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A COMPARATIVE STUDY ON INHERITANCE LAW IN FINLAND AND ENGLAND

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I declare that I have compiled the paper independently

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ABSTRACT

This paper is a comparative study on inheritance law in Finland and England. The concept of inheritance is familiar to people for a long period of time. The passing of a spouse or a family member is never easy and this paper's one aim is to provide sufficient knowledge about inheritance issues to citizens living in Finland and England. The method used is comparative research and luckily there was a lot of different literature and legislation available. One purpose of this thesis is to awaken the reader to make sure that they know that there are very large differences in the provisions on the inheritance of different legal systems. Judicial review of the English property law creates special challenges because of the systemic nature of the legal system. Understanding English law requires the perception of the context of individual provisions.

There is two main research questions that this paper deals with, one is about the protection of widows after international marriages and the other one deals with the division of property in real estate and whether England's way of protecting surviving spouse should serve as a model to Finland. The results vary in part. One of the biggest difference between England and Finland because in English inheritance law there is no such thing called reserved portion. Also in Finland the surviving spouse inherits only if there is no direct descendants and in England the surviving spouse is the first to inherit. Joint property between the spouses is also one major feature which was interesting to compare between these countries.

Introduction

The objective of my bachelor thesis is to examine and compare the inheritance law in Finland and England. Author will be using comparative research method. It can be said that Finland and England are same family but still different. Both of their legal cultures are a Roman revocation, but over the years they have become differentiated: Finland belongs to the Romanesque Germanic family and England is a common law country. Already at the beginning of my thesis it can be seen that the legal thinking and regulations differ between the countries considerably. With judicial comparisons the aim is to learn new things and through that develop one's systems.

The term inheritance is familiar to almost everyone and every one of us is going to be dealing with it at some point in life. Some of us think that it's just a simple procedure where you just receive the inherited property but there is so much more to it. Many of the conflicts between different individuals could be reduced if people had more knowledge about inheritance. In the first part of my thesis I will be explaining the basics of inheritance, different heirs and who is eligible to inherit.

The legal action is a measure by which an individual decides one's rights. With the help of a testament everyone has the right to decide how their property is divided and determine the heirs for themselves. In case of disputes the legislation contains provisions on how to proceed and who is entitled to reserved portion.

Heritage is the deceased's property that can be passed by law after the death of a close relative or by a testament. An heir is a person who is eligible to receive a part of the deceased's property. The jurisdiction that will be applied depends on the place where the deceased died or owned property at the time of death.

One of the countries with a totally different law and legal system than in Finland is England. Due to the diversity of these countries they will provide me the best comparability. This thesis will be dealing with two main research questions. The first one is related to the protection of the widow after international relationships and the second one deals with division of joint property and how can Finland improve their widows protection by taking a model from England.

In the second chapter the succession orders, heirs and the international inheritance law of both states are reviewed. At the end of this chapter, the estate administration between these two states is compared. The aim of this comparison is to provide a guide for citizens of these two countries who live in either Finland or England. The third chapter examines widow's legal status after international marriage. It explains how it differs in England and Finland and offers a solution for widow's protection. The last chapter discusses the main hypothesis regarding the division of joint property in real estate formed by succession and provides solutions for how the Finnish legal system can improve the surviving spouses position.

1. Heirs

1.1 Heirs in Finland

In finland the laws concerning wills and succession is set out in Finnish Code of Inheritance. The law was adjusted in 1965 and it overturned the previous code which was set out in 1734. The basic prerequisite for legal succession is that the one who is inheriting must be alive at the time of inheritance. Unborn child who is conceived before the death of the deceased and is born alive can inherit.[1] The law requires that the child and the parent have legally valid relationship. A person can be an heir if the relationship between the heir and the deceased is family relationship, marriage or adopted child relationship. If the deceased has not made a testament the heritage is divided by the statutory order of succession. In the situation where two people die at the same time and it can't be proven that the heir has died after the decedent he or she shall be considered dead before the decedent. This presumption has been used after many natural disaster such as the tsunami in 2004.

The statutory order of succession is divided into three ancestral lines based on the distance of kinship. If there is one heir in the first ancestral line, they'll get the entire property. According to the old inheritance law civil code of 1734, inheritance was unlimited and even a very distant relative was legitimate to inherit. In 1966 when the current Code of Inheritance entered into force this was changed so that relatives who were beyond the reach of the third group did not inherit anything.[2] The first group is formed by direct descendants; children, grandchildren, acknowledged children, adopted children etc.[3] Childrens can be born during the marriage or out of the marriage. Direct descendants are the primary heirs and the inheritance is equally divided between them unless there's a will that says otherwise. Direct descendants have their right to reserved portion and even the testament can not change it. This is one of the biggest difference

[1] Kangas U. Perhe- ja perintöoikeuden alkeet. Helsinki, Helsingin yliopisto 2012, p 349
[2] Norri M. Perintö ja testamentti. Käytännön käsikirja. Helsinki, Talentum 2010, p 81
[3] Helin M. Suomen kansainvälinen perhe- ja perintöoikeus. Helsinki, Talentum 2013, p 348

between England and Finland because in English inheritance law there is no such thing called reserved portion. So basically in Finland you can't leave your children without inheritance and give everything for example to your neighbour. Each child receives an equal share of the inheritance and if the deceased has only one child, they'll get the whole inheritance. If one of the children is dead and there are descendants the share will be divided among them. For example if the deceased has three children each of them will get ⅓ of the inheritance. If there is only one child alive he or she gets ⅓. One of the deceased child has two children who will take the deceased's place and each branch will receive an equal share ⅙.[4] The second deceased has three children so they will each get 1/9. If the deceased was married and doesn't have any direct descendants the whole inheritance will go to the widow.

The children born outside of marriage have the same right to inherit their mother and maternal relatives than children born during marriage. During the old law about children born outside marriage (before 1.10.1976) there was a system where first there had to be recognition of paternity and then affirmation of paternity.[5] If the child had been recognized the child could inherit his or her father and paternal relatives just like children born during marriage. Afterwards an addition was put into the law which under the old law unrecognized children could apply for paternity confirmation by 1.10.1981.[6]

According to the current inheritance law adopted children have a right to inherit their adopted parents. However they don't inherit their biological parents because an adoption breaks up the legal relationships.[7]

If there is no direct descendants or a surviving spouse the inheritance goes to the second ancestral line which is formed by the deceased's mother, father, siblings and the children of the siblings. The inheritance is divided equally between the parents if they are still alive. So each of them will get ½. If one of the parents or both are deceased will the brothers and sisters share the deceased parent's part. If there is no brother or sister alive the share will go to their children. The

[4] Perintökaari 1965/40, 2 §1
[5] Isyyslaki 700/1975
[6] Norri (2010), *supra nota* 2, p 86
[7] Kangas (2012), *supra nota* 1, p 351

substitution is unlimited.[8] The right of the stepsiblings is limited so that they inherit together with their full siblings.[9]

If the second ancestral line is empty the third one should be examined. This includes grandparents and their children. If the deceased's maternal and paternal grandparents are dead, the aunts and uncles will inherit. However their children, cousins, will not inherit. If this ancestral line is empty the estate will go to the government. Usually when this happens the government passes the inheritance to the municipality where the deceased lived or in some cased to people close to the deceased during their lifetime.[10]

1.1.1 Widows protection in Finland

The inheritance protection of the widow consists essentially of two alternative forms of protection. In the Finnish legal system the spouse of the deceased may legally inherit only when there is no direct descendants. In the case where there are direct descendants the estate distribution is done only after the widow dies. However the widow has the right to control the estate as indivisible.[11] If the couple was not married or there was a divorce in hold the surviving spouse has no right to inherit.

Widow's right to inherit and the right to manage the estate are laid down in the third chapter of the Inheritance Code. In spite of the direct descendants sharing requirements the widow is entitled to maintain the undivided control of the spouses common home or any other housing that is part of decedent's estate. The maintaining of the customary household effects also belong to the surviving spouse. The only exception when this does not apply is if the surviving spouse has a home in his or her own property.[12] Author thinks this is the biggest thing which protects the widow from the direct descendants but also is one of the most significant differences between

[8] Surakka A. Access to Finnish law. Suomi, Sanoma Pro 2012, p 217
[9] Aarnio A., Kangas U. Suomen jäämistöoikeus 1: Perintöoikeus. Suomi: Talentum 2009, p 130
[10] Davis J. A., Swartz J., Blakely E. B., Chang C., Eyzaguirre J. M., Mattson R., Pettker J. D. (1996). A Comparison of Four Countries' Estate Laws and Their Influence on Family Companies. - *Family Business Review,* Vol. 9, No. 3, 290
[11] Puronen P. Perintö- ja lahjaverotus. Suomi, Lakimiesliiton kustannus 2008, p 77
[12] Kolehmainen A., Räbinä T. Jäämistösuunnittelu. Suomi, Talentum 2012, p 38-39

English inheritance law. This change came into force in 1983. When the surviving spouse dies the inheritance is shared between the secondary heirs which are siblings and parents.
If there is no secondary heirs alive after the death of the widow the property goes entirely to the widow's family.[13] Widow also enjoys protection against the will the deceased spouse has made.

1.1.2 Finland's current legislation on international inheritance law

Law on international succession in Finland was adjusted in 2002. Prior to that, the law of the nationality of the deceased was applied and there were no general provisions. There were exceptions in the situations where the heritable was citizen of the Nordic countries. In 2001 a new part, chapter 26, was added which entered into force on 1 March 2002. The chapter includes a comprehensive information package on the estate administration, the applicable law to inheritance issues and the international jurisdiction of the Finnish court in succession cases. Chapter 26 applies only to persons who have died after its entry into force.[14]

Universal principle and territorial principle are both principles applicable to the division of property of the deceased. Universal principle refers to the principle that all property belonging to the deceased must be subdivided, irrespective of the location of the property, in accordance with one and the same law. Territorial principle is the opposite of universal principle and according to that the immovable property is governed by the law of the country where the property is located. [15] Universal principle is applied for example in the countries of continental Europe and Nordic countries. Territorial principle is popular in common law countries as well as in some states that have been influenced by French law. Finland's international inheritance law is based on universal principle. Territorial principle could not even be implemented with the choice of law. However in the chapter 26 section 8 (1) of the inheritance code an exception has been added which states: "If the foreign state where real property is located has special legislation governing real property with a view of protecting the pursuit of a business or a profession, or of maintaining the property in the family undivided, or other similar special legislation, that legislation applies even if the law of some other state is otherwise applicable to the inheritance." It can be seen that the immovable property exception has made it possible to comply with the law on the

[13] Suojanen K., Korte A., Savolainen H., Vanhanen P. Lakiopas: juridiikan perusteet. Suomi, KS-kustannus 2015, p 720
[14] Helin (2013), *supra nota* 3, p 602
[15] Helin (2013), *supra nota* 3, p 609

immovable property of the state in which the real estate is located in respect of the protection of a profession or business or the possession of retaining inherited family property even though the law of another state is otherwise to be respected.[16] Other things that are covered in the Chapter 26 are provisions to be applied notwithstanding the law of a foreign state (§ 12-14), settlement and distribution of the estate (§ 15-18) and miscellaneous provisions (§ 19-20).

1.2 Heirs in England

The inheritance law in England is divided into testament succession and intestate succession like most of the inheritance laws in Europe. The most important aspect of the succession law is Wills Act 1837. The point is that by making a testament the deceased has right to decide who has the right to inherit the property and how much. Unlike in Finland the lawful inheritance portion is not known in England. Primarily the testament says who will inherit what and that's the factor to which other provisions of the succession law has been built.[17] If the deceased has not made a testament, Administration of Estates Act 1925 will be applied. Administration of Estate Act 1925 entered into force in 1925 in England and Wales. It consists of 5 different parts. English family and estate law is divided into testamentary succession and intestate succession like many other inheritance systems.

Direct descendants or widow have no absolute right to administer or use a particular property of the estate or obtain a certain proportion of the estate if the deceased has made a will that says otherwise. If the deceased has not made a will or the will is inadequate the provisions of statutory succession which are regulated in the Administration of Estates Act 1925 will be applied.[18] The act has had some changes after it has been adopted and the newest is the 2014 Inheritance and Trustees' Powers Act. In the English statutory order of succession the widow has priority over the other heirs. Due to the Inheritance and Trustees' Powers Act widow's status as a heir was

[16] Mikkola T. (2014). Dynaaminen testamentti osana kansainvälisen perittävän jäämistösuunnittelua. - *Defensor Legis,* No. 6, 872
[17] Castelein C, Foqué R, Verbeke A. Imperative Inheritance Law in a Late-Modern Society: Five Perspectives. Intersentia 2009, p 210–211
[18] Garb L., Wood J. International succession. Oxford, Oxford University Press 2004, p 193

strengthened. If the deceased was married and had no kids, the spouse inherits everything.[19] If the deceased had children the surviving spouse reserves the right to a statutory share of £ 250,000 and the deceased's children were entitled to half of the excessive assets. If the children were under 18 the share was put into a trust until they turn 18. Also the ownership of the second half of the property went to the children but the spouse is free to spend without restriction his or her share of the split of assets above the £250,000 level. If the deceased was not married and left behind no children the deceased's parents inherit in equal share. If the parents are no longer alive the inheritance goes to the brothers and sisters which also inherit in equal share. If the deceased had no surviving brothers and sisters the inheritance will go to half-brothers and- sisters. They also inherit in equal share. If there is no-one to inherit from this group either the grandparents inherit in equal shares. The last relatives that can inherit are uncles and aunts if none of the previous relatives are alive. In the situation where none of the previous relatives are alive the estate passes to the Crown.[20] The term "personal chattel" is something one would hear when talking about inheritance. This term is defined in the Administration of Estates Act 1925 chapter 55(1)(x) as follows: "Personal chattel means tangible movable property, other than any such property which consists of money or securities for money, or was used at the death of the intestate solely or mainly for business purposes, or was held at the death of the intestate solely as an investment."

1.2.1 Inheritance (Provision for Family and Dependants) Act 1975 and the restriction of testamentary freedom

Since English inheritance law is not familiar with the term lawful inheritance portion, they do have regulations that restrict the testamentary freedom. The most important act regarding this is the Inheritance (Provision for Family and Dependants) Act 1975. It supplement wills and provisions on statutory inheritance. If the deceased person's will fail to make reasonable financial provisions this act enables for a court to vary the distribution of the estate of a deceased person for example to any spouse, former spouse or child.[21] If you feel yourself as unfairly treated either under a will or through the operation of the intestacy it is possible to make a claim under the 1975 act. However this act was never made to weaken one's testamentary freedom or

[19] Kerridge R. Parry&Clark: The law of succession. London, Sweeet&Maxwell 2002, p 9
[20] *Ibid.*
[21] Anderson M., Amayuelas E. A. Law of succession, testamentary freedom : European perspectives. Groningen, Europa Law Publishing 2011, p 146

create a system through which the court could automatically prescribe the estates to certain persons. The judgement proceeds progressively when the claim is made. First it is determined if the applicant is eligible to make the claim. The person making the claim can be a spouse or civil partner of the deceased, a former spouse or civil partner who has not remarried, of the deceased, child of the deceased, any person treated by the deceased as a child (step-children) or a dependant of the deceased.[22] If the application is admissible the court will determine if there has actually been any unfair treatment and is it actually true that the applicant will not receive a reasonable financial benefit from the assets of the estate.

If the case is about the children of the deceased or someone who was a dependant of the deceased, the wording of the law would allow a court to consider only the deceased's one-way investment in the applicant's economy. The author noticed when looking at different precedents that this may not always be the case. For example in the case of Garland v Morris[23] the applicant was a daughter that was left out of her father's will and did not get inheritance under statutory inheritance provisions either. Her application did not go through due to the fact that she had alienated from her father. It can be concluded from this that one big point seems to be the relationship between the applicant and the deceased. If the applicant is the deceased's spouse the question that the court has to evaluate is what the spouse would most likely have received if the marriage had ended with divorce. Also the age, state and the duration of the marriage are things to be considered by the court.

1.2.2 England's current legislation on international inheritance law

England is one of the three countries which have opted out of the new EU regulation on international succession.[24] England has justified their exclusion from the inheritance regulation by differences in the substantive legislation of the EU member states regarding both inheritance law and property rights. As it has been noticed, in England, inheritance law is largely seen as a question of the transfer of property rights. The main concern of the English people has always been that unified choice of law rules could have unforeseen and uncontrolled effects on trust

[22] *Ibid.,* p 146-147
[23] [2007] EWHC 2 (Ch) *Garland v Morris*
[24] Regulation (EU) No 650/2012 of the European Parliament and of the council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

institution and the legal position of the parties involved. Another concern on the succession regulation is related to determination of succession property since the English law doesn't make a difference between real and calculative estate.[25] The estate consists of the wealth the deceased had when he or she lived.

Even though England hasn't opted in to the succession regulation there may be a situation where the English inheritance law must be applied. A typical incident is that heritable nationality is some other than the nations that they are currently habitual residence. The general misconception is that in the inheritance distribution the laws of whose national is the deceased will be applied, but that is not the case. As was mentioned in the subchapter regarding Finnish international law, territorial principle is applied in England. Territorial principle means that the immovable property is governed by the law of the country where the property is located. If the deceased had property also in a state other than the state of residence the estate will not be distributed only under one legal system. The distribution of immovable property takes place in accordance with the inheritance provisions of the State in which it is located and the distribution of other property according to the law of deceased's domicile.[26] Here, it should be noted that the concept of domicile in English law should be distinguished from the concept of habitual residence in the inheritance law. Differences play an important role in determining the competent court, the applicable law and whether the decision taken abroad is recognized and enforceable there. Domicile is defined in English private international law in three different levels. Domicile of origin, where a person is born and in other words the place his or her parents live at the time of birth. The second level is domicile of dependence, which is the next home where parents move with their children. Dependence comes from the fact that the children are dependant on their parents. The last level is domicile of choice. This is used if and when the person's domicile changes after the age of sixteen.[27]

[25] the House of Lords, *European Union Committee. (2010). The EU's regulation on succession*. Accessible: https://publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf, 24 october 2017
[26] Helin (2013), *supra nota* 3, p 609
[27] Mikkola T. Kansainvälinen avioliitto- ja jäämistöoikeus. Suomi, WSOY 2004, p 64

1.3 Estate administration in Finland and England

The estate administration in Finland and England differ from each other widely. Unlike in Finland, a testament has a key role in the settlement of the estate and inheritance in England. If the deceased did not make a testament there is also the possibility to use the statutory order of succession. In the English estate administrating and in the inheritance division system, the estate is dominated by personal representatives. Personal representative is the individual placed in charge of settling deceased's estate after death.[28] In Finland, the estate administration can be done either as a joint management of the shareholders or as the estate executor's administration. According to Finnish Inheritance Act chapter 18 section 2(1) says that: "When the administration of a decedent's estate has not been specifically arranged in accordance with this Act, the shareholders shall administer the property of the estate jointly in order to settle the estate." Estate administration is seen to include three different categories: the administration of the estate, the transfer of succession property to distribution and the transfer of property to the shareholders. In Finland, the estate executor is a law enforcement officer appointed by the court, responsible for payment of debts and other necessary measures to bring the estate into a state in which the division of property may begin.[29] All this can be done without a will, which is one major difference between the Finnish and English system. The English estate administration system differs from the Finnish system in many different areas. In Finland, the system is based on settlement of an estate and the distribution of inheritance, while in England the two terms are not separated from each other. In other words estate executor and estate distributor are the same person. As in Finland, the English court is the last one to give the estate administrator authorization to do their duties.[30]

If the deceased has not made a testament and named a personal representative the court will appoint one. The duties of the personal representative appointed by testament begin immediately after the death and the one appointed can start after the decision of the court. The naming of the personal representatives is a subject to a court proceeding called probate. Also in probate the will is verified and accepted a valid document. Probate can be done in two different ways. If there is

[28] Matikainen P. Oikeuskirja. Kitee, Lapin yliopiston oikeustieteellinen tiedekunta 1995 p 412
[29] *Ibid.,* p 414
[30] Sawyer C. Principles of succession, wills and probate. Lontoo, Cavendish 1998 p 269-270

no doubt about the origin of the testament the naming of the personal representative is done in "common form". If there is a doubt about whether the testament is valid the naming occurs is "solemn form". Solemn form, the form of probate of a will, is a bit more complicated than common form. In this procedure the main point is to validate the will and hear the testimony of the relatives who think that they are treated unfairly in the testament.[31]

One different thing in estate administration between Finland and England is trust institutions. There is no equivalent institution in Finnish law. Finnish professor Tuulikki Mikkola has summarized the meaning and purpose of trust institutions quite well in her article. Briefly the trust is a legal arrangement and the structure consists of three legal positions. These parties are settlor, trustee and beneficiary. In English law, the structure of the trust is explained so that the settlor's assignment is dual ownership leaving the trustee a formal ownership right and the beneficial actual ownership. Each of the three trust parties have their own tasks. The settlor is the person who moves his or her property to the trust with trust-order. Once the property has been transferred to trustee's name, it will no longer belong to the settlor's assets unless the settlor is also a trustee or one of the beneficiaries. A trustee is a person who has the formal ownership which includes both management and limited transfer and credit competency.[32]

[31] Mellows A. R. The law of succession. United Kingdom, Butterworth & Co Publishers Ltd 1977, p 268-270
[32] Mikkola T. (2002). Trust-instituutio: Lainvalintaan ja tunnustamiseen liittyviä näkökohtia. - *Edilex.* Edita publishing Oy, 5-7

2. Widow’s legal status after international marriage

The widows status in the death of the other spouse is always painful. In a large part of the world's legal system there have been many attempts to protect the widow for a long time. The widow's protection is also set in the legislator's target list by a number of international conventions.[33] Problems arising from the international nature of marriage can at worst result in the defective effect of the norms laid down for widows, either to deteriorate or to disproportionate the legal status of the widow when two or more legal systems are involved. The legal status of the widow has significant differences between Finland and England. In this chapter, the first research problem is studied and analyzed. This chapter also looks at situations where international marriage ends with the death of another spouse. Author investigates how is the law on choice of laws in Finland in the area of family law and property law especially for the widow's point of view, as compared with the jurisprudence recommendations, English legislation especially considering the compatibility of matrimonial property and inheritance statutes.

The means of protecting the widows vary widely. In other legal systems, widows are only protected by marital law, while in some jurisdictions protection is provided only through inheritance law. The main objective of Finnish legislation is also to protect the widow when the spouse dies. The aim is to safeguard the financial position of the widow so that the death of the spouse wouldn’t unduly undermine the widow's wealth and that the widow could live in the common home of the spouse. In the Finnish legal system the widow is protected both by the marriage act and by inheritance law. As an example author provides a situation where there is a married couple who have a marriage settlement which was made in Finland and how it works in England. It is mentioned in the marriage settlement that Finnish law will be applied to the inheritance division. Also they both have made a testament which stated that Finnish law should be applied to the inheritance. The aim was to protect the widow's status defined by Finnish law and the spouse would have the right of property management and the ownership would go to the children. Because of the husband’s work the couple decided to move to London where

[33] Kangas U. Lesken oikeudellinen asema. Suomi, Suomalainen lakimiesyhdistys 1982, p 5

eventually the husband passed away. Because United Kingdom is not part of the new Brussels IV [34] the marriage settlement made in Finland was not applicable in England. Also the part in the testament where the choice of law was stated as Finland was not valid. The husband left behind the house in London where the spouses were living.[35] English law was applied in the inheritance distribution and since the widows right to property management is not known in England under the inheritance law the widow received all property to herself. In English law there is no legitime which is the legal share of the deceased's estate which is the portion of the estate from which deceased can't disherit, for example his or her children. Because of this the husband's children did not receive anything. In order to avoid such surprises, it is best to start looking at succession issues in time, especially if the will contains a reference to a country other than your country of residence.

According to Gareth Miller in his book International Aspects of Succession widow's problems at the end of international marriage are two different kinds. Firstly, problems can arise from co-ordinating matrimonial property and inheritance status. Secondly, problems may arise if a deceased spouse possesses property in more than one country and the laws of several different states apply to inheritance.[36] In England and Finland there is a principle of separation of property between spouses. The ownership of the property owned by the spouses does not change even when they get married.[37] The property that the spouse had when getting married still belongs to them. But since these two states have different legal systems conflict between Finnish and English law may be very difficult for widows, even though the legal systems of both states recognize the property separation.

One factor affecting the formation of a widow's legal status is whether marriage concluded abroad is recognized and under what conditions. If the marriage is not recognized as existing or valid in the state whose legislation governs the law applicable to matrimonial property and inheritance, the surviving spouse may be excluded from beneficiaries. According to North and

[34] Regulation (EU) 650/2012. The new EU succession law contains provisions on the law of the country to which international law is applicable and the jurisdiction of the court in which the court has jurisdiction. The Regulation also contains provisions on the recognition and enforcement of succession decisions in EU countries.
[35] Mikkola T. (2016) Hoida perintöasiat kuntoon. -*Taloustaito,* No. 9, 24
[36] Miller G. International aspects of succession. England, Ashgate Publishing Limited 2000, p 94
[37] Collins L. Dicey And Morris on The Conflict of Laws, 13th edition, London 2000, p 1068

Fawcett, marriage is a status sui generis the existence of which affects many different legal relations. According to the researchers, remarkable principle of determining the existence and validity of a marriage is in compliance with the law of the state where the marriage is concluded. [38] This principle is widely accepted in different states. The potentially problematic cases from the widows point of view apply mainly in some way exceptional marriages of which's recognition for example in Finland could be countered by ordre public principle. The most typical example of such marriages are polygamous marriages. North and Fawcett consider the case law of England to provide support for the widow's claim to the succession of her right to inheritance after her husband at the end of polygamous marriage. Researches distinguish the so-called potentially and actual polygamous marriages. Potentially polygamous marriage means marriage in a state of which's legislation confers on a man more than one simultaneous marriage, but the man has not been actually married to more than one woman. By actual polygamous marriage the researches mean a situation where the man has actually been married to more than one women due to the acception of the law of the state where the marriage was concluded.[39] In both of these cases the researchers consider it possible in the light of English case law the recognition of marriage or marriages when the widow demands to herself a part of the inheritance of her deceased husband under the statutory inheritance.[40] The author thinks that in Finnish law it should also be in principle consider welcoming these kind of exceptional marriages especially with regard to the position of the widow.

As it can be seen, the issues that may arise to the surviving spouse after international marriage are different. Next author will provide two examples related to this. Solutions are based on the current legislation of each country. A Finnish woman and British man get married in Finland, where they live for 17 years until the man dies as a Finnish citizen. No agreement about the choice of law has been made. According to current legislation, the law on matrimonial property will be subject to the law of the home of the spouses according to Finnish Marriage Act[41] chapter 4 §129. The Finnish Inheritance Act[42] chapter 29 section 5(1) states that: "Unless the decedent has otherwise stipulated and unless otherwise follows from paragraph (2), inheritance shall be

[38] North P.M., Fawcett J.J. Cheshire and North's Private International Law, twelfth edition, London 1992, p 570
[39] *Ibid*., p 608-617
[40] *Ibid*., p 620-623
[41] Avioliittolaki 13.6.1929/234
[42] Perintökaari 40/1965

governed by the law of the state where the decedent was domiciled at the time of the death." Since the place of death was in Finland, Finnish law was applied. The nationality of the deceased during death is not relevant in this case. Both issues are therefore solved according to Finnish law and there is no conflict of laws. This situation is the most common among international marriages and the solution is simple and easy to remember.

The second situation is a little more complicated since there may arise interpretation issues. A Finnish woman marries a British man. The spouses live in England for a few years and then decide to move to Finland. The man dies in Finland but has received Finnish citizenship before that. Spouses have not made agreement about the choice of law. If the spouses already had the intention to move to Finland at the time of the marriage, they might be considered as having their first domicile in Finland and this makes the case unproblematic for the matrimonial property. However if assumed that the spouse's domicile was first in England and then moved to Finland, Finnish law under section 129.2 of the Marriage Act is applied. However this comes with an interpretation issue regarding the wording. Section 129.2 states that: "If the spouses have later moved their domicile to another state, the law of that state applies if the spouses have resided there for at least five years. However, the law of that state applies immediately upon the spouses becoming domiciled there, if they have earlier during the marriage been domiciled there or if both are citizens of that state." If the section is interpreted word by word one can get the impression that if the gets Finnish citizenship after the spouse's domicile has moved to Finland, the law of Finland will apply to their matrimonial relationship since then. The five year rule can be interpreted in a different way when investigating the Finnish government proposal 44/2001.[43] It is explained in the government proposal that the five-year rule does not apply if during marriage both spouses have been domiciled in the past in the new domicile or have the nationality of that state. It is further emphasized that in such cases the spouses have a strong connection to their new state of home through their previous history of life. The interpretation of the wording and the assumed ratio are now against each other. With available facts the author is inclined to settle with the assumed ratio, where when a foreign nationals Finnish citizenship received before the five-year period would not change the statute, and housing deadline should continue to prevail. If this interpretation is used, the applicable law depends on how long the

[43] HE 44/2001 Hallituksen esitys Eduskunnalle eräiden avioliittoa ja perimystä koskevien kansainvälisen yksityisoikeuden alaan kuuluvien säännösten uudistamisesta. Accessible: https://www.finlex.fi/fi/esitykset/he/2001/20010044.pdf, 20.11.2017, p 72

spouses have lived in Finland before the death of the husband. If the time period is less than five years according to the general law, the applicable law is the one where the spouses domiciled previously which is England. Despite all this the husbands inheritance must be subject to Finnish law under the Inheritance Act Chapter 26 section 5.2 because he had received Finnish citizenship prior to his death. Living duration is therefore not a relevant factor here.[44] If the spouses did not live for five years in Finland before the death, according to the interpretation above, the matrimonial property status must be applied by the English law. In any case the law applied to the inheritance is the Finnish law.

Interpretation problems appear to some extent as seen in one example. The problem areas seem to be related to two things: the status of citizenship as the secondary basis of assessment to inheritance and the five-year residence period as the basis for the change of statutes. Although the five-year rule may be problematic in the government proposal it is justified by the fact that it reduces the surprise of the change of status and gives the spouses an opportunity to get acquainted with the content of the new legislation.[45] The reasons for setting a deadline are, in author's point of view, acceptable and the status change without a deadline would certainly be an unreasonable solution.

[44] *Ibid.,* p 73
[45] *Ibid.,* p 58-59

3. Testament

3.1 Finland

The testament is the most common way to plan your heritage division. After death, the inheritance is divided according to the statutory order of succession. The testament can affect how the estates are shared. If the formality rules are not respected, it is possible that the testament will be declared void. Testament must be in a written form and be witnessed by two unchallengeable witnesses and they should know that the document is a testament. The only exception when testament can be expressed orally is emergency will.[46] An heir can be left without an inheritance with a testament. The only restriction are direct descendants since they'll receive always their lawful inheritance portion.[47] Only by a will can an heir left without inheritance and the grounds must be mentioned in the testament.

Anyone who has reached the age of majority[48] has the right to make a testament. Someone who is or has been married but has not reached the age of majority can also make a testament. If a person has reached the age of 15, he or she may make a testament to the property he or she has acquired on his or her own employment. Person who makes a testament must have testamentary capacity. This means that they must be of sound mind, memory and understanding at the time of making the testament.[49] The beneficiary of the testament must be alive at the time of the death of the testator. If the testator and the beneficiary have died simultaneously, it is considered that the beneficiary has died before the testator.[50] A testament made for a spouse or a fiancé will lapse if the engagement or marriage has been discharged for any other reason than the death of the testator. The beneficiary has to enforce his or her right and it must be done 10 years after the

[46] Surakka (2012), *supra nota* 8, p 218
[47] Code of Inheritance 40/1965, Chapter 7
[48] In Finland the age of majority is 18
[49] Code of Inheritance 40/1965, Chapter 9 §1
[50] *Ibid.*, Chapter 1 §2

death of the testator or from the moment when the right under a testament begins. The enforcement is done by giving the heir a certified copy of the will.[51]

The requirements of the testament are extremely strict. Minimum requirement is a signed and certified document, in which all actual wills must be given. The testament must be written and its text can be written by hand or by computer. The date does not belong to the mandatory testament form but nevertheless the date should always be included in the testamentary document. With a signature the testator confirms the will. An unsigned testamentary document is invalid as a will. Someone else may only sign the will on behalf of someone who is unable to write.[52] A person under the age of 15 can't act as a witness and neither can a person who is mentally ill or for example drunk at that time. Also the spouse of the testator and direct descendants can't act as a witness. The obligation to comply with actual will is so severe that it would lead to unreasonable actions in a situation where it would clearly be desirable to make a will but not be able to comply with the formal obligations. These include situations where, for example, the illness is sudden and life threatening. Only then can the will be made orally.[53] Another exceptional form of testament is holographic will which is a will that has been entirely handwritten and signed by the testator. A typical situation where the holographic will comes into question is suicide.[54] The holographic will is only valid for a certain period. It expires three months after the compelling conditions have ended.[55] Then a written testament that meets the legal requirements has to be made.

The testament can give the heir right of ownership, right of access or right of use. Each of these is its own testament type. When the testator determines full or even a fraction of his or her property it's called a universal will. The opposite of universal will is a bequest will. In a bequest will, the testament order applies to a particular object or to a certain amount of money.[56] The distinction between universal will and bequest will is directly governed by law. The question is how the will holder's associated status is arranged. A will can be done alone or together, for example with a cohabitation partner or spouse. Testament made together is called reciprocal

[51] *Ibid.,* Chapter 16 §1, Chapter 14 §4
[52] Aarnio A., Kangas U. Suomen jäämistöoikeus 2: Testamenttioikeus. Suomi, Talentum 2015 p 162
[53] Code of Inheritance 40/1965, Chapter 10 §3:1
[54] Suojanen, Korte, Savolainen, Vanhanen (2015), *.supra nota* 13, p 762
[55] Code of Inheritance 40/1965, Chapter 10 §3:2
[56] Surakka (2012), *supra nota* 8, p 218-219

testament. Although reciprocal testaments are the most common among married couples, there is no limitation of reciprocal testament between siblings.[57]

As said above, testament can give the heir different kind of rights. The term called will conveying proprietary rights will be useful when heritable wants to give the beneficiary a testament to the widest possible control of his property. Ownership means that the owner of a property has the right to prescribe the actual use and control of the item in the manner he or she likes. There are two different types of ownership: full and limited. A full property right entitles the holder to unlimited ownership, as he or she becomes the owner of the testamentary property both for life and for death. Beneficiary can make a testament of the property received and it is then inherited to his rightful owners after death.[58] In a restricted will conveying proprietary rights, the property is first determined by full ownership of the so-called first-time owner and after his or her death to the secondary beneficiary. This type of testament also gives the first-time owner in his basic form full rights to property during his lifetime. However, the first beneficiary may only possess the property only for a lifetime, and thus can not influence who will receive the property after his or her death. The difference between the full and the restricted will conveying proprietary rights is concretised in the spouses reciprocal testament. By virtue of full ownership the widow can freely order the property for example by selling, donating, hiring or plundering it. However, the ownership of the widow can be limited by the secondary beneficiary of the will conveying proprietary rights. In that case, the order that the deceased has imposed in the will in favor of the secondary beneficiary must be maintained. The widow can't therefore testament the property or donate the property so that it passes to the recipient of the gift after the widow dies.[59]

The testament can also be drawn up as a will conveying right of usufruct. In that case the ownership will go to beneficiary stated in the testament or the one in statutory order of succession but the lifelong access to the same property will be bequeathed to a different person. The one granted the conveying right of usufruct can use the property as they wish during their lifetime but won't get the ownership. The right to use entitles one to receive interest and proceeds on the property.[60] The income that is accumulated from the property may for example be interest,

[57] Norri M. Johdatus Siviilioikeuteen. Suomi, Kauppakamari 2009, p 197
[58] Aarnio, Kangas (2015) *supra nota* 52, p 619-621
[59] *Ibid.,* p 623-627
[60] *Ibid.,* p 655-657

lease or business income. Instead, capital gains from property such as forestry, belong and are owned by the owner. If the holder of the license is bankrupt, the property he or she has access to doesn't belong to his bankruptcy estate and can not therefore be tied to his debt. An asset that can't be handed over can't be the object of distress. Furthermore, the owner of the property doesn't have the right to hand over the licensed property without the licensee's permission. Due to this it can not even be distraint from the owner's' debts.[61]

The heirs have the right to contest the will if it is subject to a so-called plea. The heirs can bring an action to the district court within the time-limit and demand a ground of appeal on the grounds that the testament is declared null and void. The contesting of will shall be done within six months of the willful testimony of the will.[62] If the validity of the will is challenged in court, the beneficiary has the burden of proof. The opinion of law and legal literature on who has the right to criticize the will, is different from each other. Inheritance law recognizes that the right is only for heirs, but legal literature seems to allow a right of appeal to those persons who have a legitimate interest in disputing. The criterias are divided in four section in the Code of Inheritance chapter 13.[63] An interesting feature of the inheritance law is the repair of a formal error, which is the result of the fact that the lawsuit has not been brought within the prescribed period of six months. A formal error can also be remedied because of the fact that the heir has accepted the testament and decided not to challenge the will or has waived its right to appeal in any other verifiable manner. So in principle, a will with a formal error may become valid. On the other hand, strict compliance with the testamentary design rules may lead to the opposite which is the invalidity of the will, even if the testament was a matter of fact formulated correctly. An example is the situation where two people are acting as witnesses, but later it is found that the other witness is a close relative.[64]

[61] Tuunainen P. Perintö, testamentti ja velka. Suomi, Talentum 2015, p 298
[62] Code of Inheritance 40/1965, Chapter 14 §5
[63] *Ibid.*, Chapter 13 §1
[64] Aarnio, Kangas (2015), *supra nota* 52, p 1027

3.2 England

It is generally known that the English law applies the principle of freedom of testation, when someone dies he or she is free to do whatever they like with their property. It was not until the early twentieth century until English law started to apply same rules to real and personal property. Real property was property which could be recovered by real action for example freehold land. Personal property included moveables and land held by lease.[65]

When making a will in England you should have to sign it in front of two independent witnesses in order for the will to be valid. The independent witnesses can't be anyone and there are specific rules regarding it. The purpose of having two witnesses is to prove, if required, the circumstances around the actual execution of it. Anyone who is mentally ill and does not have sufficient mental capacity to understand what they are witnessing, someone who is a minor, blind person, your spouse or civil partner or any of your beneficiaries, meaning people you intend to inherit from your estate should not be a witness. If you name someone from above as your witness it could cause some problems after you die. In English law it is stated that if a witness of the will or their spouse is named as a beneficiary of the will, the witnessing remains valid but the beneficiary is not accurate anymore and it fails.

When making a will the context should be carefully drawn. The most common mistakes when making a will without the help of a solicitor are for example not taking into account that the beneficiary can die before the person making the will, not knowing all the formal requirements needed for the will to be legally valid, failing to take account of all the money and property available and not being aware of the effect that marriage, registered civil partnership or divorce has on making a will. It is advised that using a solicitor is useful if you own property with someone who is not your spouse or civil partner, or if you live in England but have property overseas. It is also important to note that in England the testament made earlier will be annulled

[65] Anderson, Amayuelas (2011), *supra nota* 21, p 131

if the testator is married after making the testament and has not taken into account his or her new spouse in the testament.

4. Division of joint property in real estate formed by succession - balancing interests of surviving spouses and descendants

Securing surviving spouses position is perhaps the most common motive for legal action aimed at affecting the distribution of wealth after the death. In this chapter, author studies the best situations for surviving spouses and the main focus is in Finland. As mentioned before, if the heritable does not determine the transfer of his assets, it will go very schematically in accordance with the provisions of the Inheritance Act without further consideration to the needs of the various stakeholders. The surviving spouses legal protection does not necessarily correspond to spouses needs or its implementation and the content may be unclear. In this section, author comes to the main research question of the thesis in which author analyses if UK practice is better for Finland and whether it should act as a model for Finland in view of the rights of the surviving spouse. The main focus will be in joint property.

In Finland, surviving spouse has had the right to inherit since 1965 when the Code of Inheritance came into force. As previously mentioned in the thesis England's inheritance law is divided into inheritance by will and statutory inheritance and there are no reserved portions. If the deceased has not made a will or the will does not cover all the property, the provisions of statutory inheritance apply. In England, the surviving spouse is the primary heir and then comes the children. In Finland surviving spouse inherits their spouse only if the deceased has no children. One of the biggest things that is being considered when a spouse dies is what happens to the common home if one exists. In Finland the surviving spouse is entitled to continue living and have the administration right to their common home or other housing suitable to be surviving spouse's home if there is not a suitable home included in the surviving spouses own property.[66]

The most problematic situation for the protection of the surviving spouse is the situation where there is an apartment included in the surviving spouses own property. In this situation, the spouse

[66] Perintökaari 1965/40 3:1a.2

has no right to stay in a common home. Many spouses have been living up to dozens of years in their common home, and it may be very disappointing for the surviving spouse to abandon this. If the surviving spouse has sold or donated his/her housing away before the spouse dies the right to live in the common home will remain. But if the surviving spouse receives a suitable home after the death of the spouse it may be considered to have waived their right to minimum protection and the heirs can claim that the surviving spouse has a suitable home for living.[67] In this respect, England has taken a leap in the present and made additions to its inheritance law in the Inheritance and Trustees' Powers Act which came into force in 2014. The purpose of this reform is to improve the position of the surviving spouse and to clarify the distribution of the inheritance, especially if the deceased has left children. As already stated before in the safeguarding of the surviving spouse's position in Finland needs improving and this more balanced model could also work in Finland. The surviving spouse's housing protection is a key factor, since it is almost always a matter of considerable wealth. According to Statistics Finland's latest study, almost 70% of the wealth of households consisted of dwellings.[68] Typically couples own their home as joint tenants which means that they both own the whole home. This means that in England if one of the owners in deceased the surviving spouse becomes the sole owner and by that can continue living there.[69]

In Finland, the surviving spouse has the right to manage the entire estate undivided only if no one of the heirs demand of the distribution requirement. This weakens the position of the surviving spouse compared to England. According to the Inheritance and Trustees' Powers Act if the deceased leaves children behind the surviving spouse gets the first £250,000 of the value of the estate and half of anything left over after that. The remaining half is equally divided among the children. If the value is less than £250,000 the surviving spouse gets the whole amount. For example Alex and Katy have been married for 15 years and own their home jointly. The couple have 2 children. Alex dies at the age of 60 leaving behind the jointly owned house worth £450,000 and £150,000 in shares in his own name. Since the house is jointly owned by both of them it goes automatically to Katy. The remaining £150,000 also goes wholly to Katy since it is worth less than £250,000. In this intestate case the children get nothing. If Alex and Katy were

[67] Aarnio, Kangas (2009), *supra nota* 9, p. 1028
[68] Kotitalouksien varallisuus, tilastokeskus. Accessible: https://tilastokeskus.fi/til/vtutk/2013/vtutk_2013_2015-04-01_kat_002_fi.html, 29 March 2018.
[69] Law of Property Act 1925 Chapter 36.2

Finnish the case would be different. The children are direct descendants and have a right to inherit. In this case, the asset allocation is provided so that Katy receives half of the summed up assets. Since the home was 50/50 owned by both of them the remaining worth of £225,000 belong to the children.[70] Alex's shares are worth of £375,000 and Katy's £225,000 which is £600,000 summed up together. Katy gets 50% and the remaining 50% is shared equally between the two children.[71] In addition to this Katy has the right to administrate the common home and the housing estate belonging to it. The surviving spouse must also take care of the maintenance costs alone. The right to administer only entitles one to manage an apartment. The ownership of the apartment is therefore not transferred to the surviving spouse. For this reason, the surviving spouse has no right to sell, pledge, donate or bequeath the apartment even though the apartment was jointly owned by the spouses. It is certainly possible to sell the apartment if all parties agree, but the surviving spouse only receives half of the apartment's sale price, which may not be enough to get a new home. Another problem with the right of occupancy is also the question of how to determine the appropriate housing and whether there is one (suitable for housing) in the surviving spouse's property. Another problem is whether the house should exist at the time of the deceased's death or sometimes later. For example, surviving spouse may be a shareholder in an indivisible estate, which includes a residence suitable for the surviving spouse to live in. There may be other partners in the estate and the ownership of the apartment in it would never go to the surviving spouse. Should this be taken into consideration when determining whether or not a resident is eligible for a surviving spouse's own property? Inheritance Act does not define the time, which makes the issue even more challenging. As it can be seen this model is a bit more complicated and gives the surviving spouse weaker rights than in England. By adopting the same model than England the surviving spouse would get the jointly owned apartment completely for themselves and would not have to get the heirs agreement to sell the apartment and buy a new one. The English model would also allow surviving spouse to rent and get the income from the another apartment, if there is one in the surviving spouse's estate.

It is worth doing a will if you want to make sure that the surviving spouse's position is secured as well as possible. As previously mentioned there are great differences between Finland and England when it comes to testament terms and methods. In Finland direct descendants right to

[70] Code of inheritance 40/1965 Chapter 3
[71] Avioliittolaki 234/1929 Chapter 2 §35

reserved portion restricts surviving spouses control.[72] Despite the will, the direct descendants have the right to inherit the property of the value equivalent to their reserved portion. The reserved portion is half of the value of the calculated inheritance. Only then the surviving spouse may keep the deceased spouse's property undividedly in their control if the direct descendants do not make a claim for division.[73] In this case the surviving spouse has the right to manage the estate and to receive its income.[74] Access will cease when even one of the shareholder of the estate require division. The English law applies the principle of freedom of testation so you can leave your estate wholly to your surviving spouse if you want. If everything is left by testament to the surviving spouse position is secured in the best possible way. By this inheritance disputes are also avoided since the testamentary freedom is not restricted. In order to achieve the same goal in Finland, the right to legal share of direct descendants should be removed completely. This would require a radical revival of the Inheritance Act, which is unlikely to happen. This would require a government proposal or citizens initiative of at least 50,000 registered voters, so that it would even be processed. Updating the surviving spouses status and the inheritance law was under consideration most recently in 2004[75] when the working group in Ministry of Justice submitted its proposal regarding these changes. The proposal mentioned that the surviving spouse's right to reside after the death of the spouse in their common home would be strengthened. According to the proposal, the surviving spouse would be free to do whatever they prefered to the common house during their lifetime, for example to sell it. This would reinforce the surviving spouse's right to a common home without weakening the status of the heirs. The status of the deceased's spouse's heirs would be safeguarded by the fact that the surviving spouse still could not make a testament to the apartment and they would have the right to a legacy after the surviving spouse died. Another aspect which would also improve the right of the surviving spouse to live in the common home would be to give the surviving spouse a right to sell the home with court permission, even if the heirs do oppose it. It would be a prerequisite if it is necessary to change the apartment for a justified reason. The most typical example of a justified reason would be that when the surviving spouse ages and the common home is just too big for

[72] Perintökaari 1965/40 2.1
[73] *Ibid.,* 3:1a.1
[74] *Ibid.,* 12:3
[75] Astola T., Helin M. (2004). *Perintökaaren uudistamistarpeet*. Accessible: https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75706/omtr_6_2004_perintokaaren_uudis_106_s.pdf?sequence=1&isAllowed=y, 23 April 2018

the surviving spouse to take care of it or it would be difficult to move around there with rolling walkers. Unfortunately this proposal has not led to any actions by 2018.

The legal systems of common law countries are usually constructed by the principle of complete testamentary freedom. However, this freedom of can be limited by the right of the nearest heirs or a spouse to obtain funds for their maintenance. According to Inheritance (Provision for Family and Dependants) Act[76] 1975 dependants are able to make a legal claim against the estate if they are excluded from the will. A dependant is considered to be anyone who was financially dependant on the deceased at the time of the death. In the case where the deceased has made a will and left nothing to the surviving spouse the spouse is entitled to make a claim against the estate. There is a strict time limit and the claim should be made within 6 months from the date when the probate is issued. If the claimant is successful with their claim the court will consider several facts when deciding what is a reasonable sum for the claimant. These are for example the duration of the marriage, the age of the parties, size of the estate and financial need of the claimant.[77] If for example a husband is financially dependant of his wife and one day his wife changes her will in the heat of an argument and decides to disinherit her husband, husband is entitled to make a claim against the will after the spouse dies. It is very likely that he will get a reasonable provision of the estate. This kind of protection of the surviving spouses position is not possible in Finland, because the rights of the direct descendants have overthrown the surviving spouse's right to the estate. There is no legal share of the surviving spouse in the law so surviving spouse has no right to claim a share of the property. With a marriage settlement that has excluded the spouses' right to each other's possessions and by a will which states that the transfer of property is to someone else than the surviving spouse, it is possible to disinherit the surviving spouse. Only the right guaranteed by the law to live in the spouses common home and to administrate the residential movable property will survive.

In 2012 one major change happened concerning the position of the surviving spouse and direct descendants when Supreme Court made its ruling.[78]. In the past if the spouses have made an ownership testament and the estate is mainly formed of their common home the surviving spouse

[76] Inheritance (Provision for Family and Dependants) Act, Chapter 1
[77] Mikkola T. (2016). Rajat ylittävän perimyksen haasteista: esimerkkinä Englannin jäämistöoikeus. - *Lakimies,* No. 3-4, 410-411
[78] KKO:2012:90

has had to decide whether to apply the testament or to the minimum protection provided by law to the surviving spouse which is the right to reside in the common home. If the deceased left behind descendants and the surviving spouse had chosen to apply the testament, the descendants had the right to get the lawful share either as money or as a burden-free property. If the surviving spouse chose to apply to the right to live in the common home, it was not mandatory to make any statutory payments while the housing protection was in force. Despite the freedom to choose which one to apply, before this ruling the surviving spouse had been in a worse position than what was intended by the testator since the surviving spouse may have to settle for lesser protection in the form of a right of residence.

The question the Supreme Court was dealing here was whether the surviving spouse can choose to invoke both to the testament and the right to reside in the common home and at the same time pay the reserved portion by giving ownership of part of the housing shares. In this case spouses made an ownership testament according to which if one of them dies the surviving spouse acquires full and unrestricted ownership to the deceased's property. It was also mentioned in the will that if the deceased's children require their reserved portion the surviving spouse may pay it by cash but this was not mandatory. The estate was mainly formed of half of the housing share and the remaining half was owned by the surviving spouse. The surviving spouse was given the right to apply to the ownership testament and also to the right to keep the common home in an undivided control.[79] Due to this the surviving spouse did not have to pay the reserved portion to the deceased's by cash but gave ownership to part of the housing share. The ownership of the housing shares are still burdened by the surviving spouse's right to reside in the common home. Because of this burden this right is free from restrictions after the surviving spouse no longer have the right reside in the common home.

When analysing this ruling it can be seen that it was mainly formed around the Inheritance Acts third chapter which deals with the right of a spouse to inherit and to administer the estate. The surviving spouse's right to reside in the common home is set before the right to reserved portion in the benefits that are given from the estate. It should be also noted that according to the testament the surviving spouse had also the right to pay the reserved portion by cash but the surviving spouse chose not to use this right. After the payment of the debts the estate did not

[79] Perintökaari 1965/40 3:1a.2

have much property in addition to the common home. Because the surviving spouse was not obligated to pay the reserved portion with funds outside the estate (for example a loan) it was possible to give the children part of the housing share. Thus, in the estate where there is no property other than an apartment, the surviving spouse's right to remain in the common home burdens the reserved portion. In practice, such right does not have any value for the deceased's children as long as the surviving spouse is alive.

Therefore it can be said that this precedent greatly strengthens the position of the surviving spouse, but similarly reduces the rights of the direct descendants in the situations mentioned above. In accordance with the aforementioned decision, the surviving spouse may appeal to both the will and the right to reside in the common home and to avoid paying the lawful share with external funds. The condition is that the testament does not oblige the surviving spouse to carry out lawful shares, the surviving spouse does not own any other housing eligible for a home and the deceased's property is mainly formed of a dwelling used as a common home.

Author thinks that controversial situations can be avoided by carefully drafting the will. It is obvious that by testament one can't undermine the surviving spouses statutory right of residence. The testament may impose different conditions, for example an order that the surviving spouse acquires the ownership right of a certain property if the surviving spouse pays the lawful share as money. Also another way is to testament that the surviving spouse gets the ownership right only if the spouse gives up the right to reside in the common home. Either way it does not make any difference which one is chosen to apply because the surviving spouse’s position is still secured. The only difference is that above mentioned disputable situations can be avoided.

While the Supreme Court's decision slightly improves the surviving spouse’s position, it still remains to be improved when compared to England and the joint property transfer. The owners there share equal ownership and by the right of survivorship upon death of one owner the house passes to the surviving owner who receives sole ownership. Also in joint tenancy, ownership of the property can't be bequeathed to someone who is not a joint owner which also secures the surviving spouses ability to continue living in the apartment. In conclusion this Supreme Court's decision only strengthens the position of the surviving spouse in the event that the assets consists mainly of a common apartment. Thus, the balance between surviving spouse and descendants

disappears. In the author's view, however, there are still many uncertainties about this issue. As previously mentioned, surviving spouse should be granted the right to change housing without losing the right granted in the Inheritance Act chapter 3:1a.2.[80] If this right would be granted the legal relation between the surviving spouse and the descendants would be more predictable and there would still be a balance between them.

Since Finland and England are from different legal families the author introduces shortly a reform in the Swedish Inheritance Code and discuss if it would work in Finland. In the beginning of 1988 a reform in Swedish Inheritance Code was carried out in which the surviving spouse was placed before the joint children or other successors in the order of succession. According to chapter 3.1[81] in the Swedish Inheritance Code if the deceased was married, the inheritance goes to the surviving spouse. However the inheritance of the surviving spouse doesn't cover the portion of the inheritance which belongs to the deceased's direct descendants who are not related to the surviving spouse. These are for example deceased's children from previous relationship. They can claim their inheritance immediately.[82] According to the author, the situation where the surviving spouse is placed before the joint children is best justified in situation where the spouse dies while the children are small. If such a reform were to be introduced in Finland it would also require the survival of the spouses right to keep the apartment indivisible in its control. Otherwise, there may be a situation in which the position of the surviving spouse would be further deteriorated because if the deceased has children from previous relationship and they immediately claim their share of the estate. This could lead to the loss of surviving spouses home.

[80] "Notwithstanding a demand of a direct descendant for the distribution of the estate, or the rights of a beneficiary under a testament, the surviving spouse may retain possession of the undivided common home of the spouses or of other housing that is part of the decedent's estate and suitable as a home for the surviving spouse, unless there is housing suitable as a home for the surviving spouse in his or her own property. The customary household effects in the common home shall always remain undivided in the possession of the surviving spouse."
[81] Ärvdabalk (1958:637) 3 §1
[82] Willenbacher B. (2003). Individualism and traditionalism in inheritance law in Germany, France, England, and the United States. - *Journal of Family History,* Vol. 28, No. 1, 222

CONCLUSION

The aim of this thesis was to study and compare the Finnish and English inheritance laws. Author compared general inheritance issues, focusing particularly on the rights of the surviving spouse. The purpose was to find out the differences and to demonstrate their impact on the inheritance. Firstly the statutory order of succession and the persons who can inherit differ greatly. According to Finnish law, there are three groups in statutory order of succession. The first group include children and their descendants, the second group consists of the deceased's parents and their descendants and the third one includes grandparents and their children. The surviving spouses position in the order of succession is between the first and the second second group. If the deceased has left no direct descendants the estate goes entirely to the surviving spouse. In England, the spouse and children are the primary heirs. If the deceased was married and had no children, the surviving spouse inherits everything. If the deceased had children the surviving spouse reserves the right to a statutory share of £250,000 and the deceased's children were entitled to half of the excessive assets.

In conclusion to this thesis and the main hypothesis it can be said that the position of the surviving spouse is not as unambiguous as one could think. The position of the surviving spouse in Finland has improved considerably after the inheritance act has been adjusted. In Finland, the spouses position is substantially influenced by the fact that if the deceased does not have any heirs belonging to parental, then the surviving spouse inherits the deceased entirely. The advanced legislation makes it easier for the surviving spouse to continue living after the death of a spouse, and will not be forced to abandon the jointly owned property. Based on this thesis it is clear that the biggest problem lies in the protection of Inheritance Act chapter 3:1a.2, especially when the surviving spouse needs flexibility. If the spouse needs to change the jointly owned apartment it will lead to the fact that the right granted in 3:1a.2 will end. However, the testamentary freedoms that is in England will most likely not be achieved in Finnish legislation. The proposals and improvements presented here can be executed through minor legislative

changes. One of the biggest issue that weakens the surviving spouses position is that the surviving spouse can be completely displaced by will from a heirs position and there is no need for any special reasons. The position of the spouse may, therefore, be surprisingly bad if the deceased has bequeathed the whole property to someone else than the surviving spouse without spouses knowledge. In England this can be avoided by the fact that if the surviving spouse is disinherited, the will can be challenged. Only the fact that the spouse has been financially dependent on the deceased is to be proved.

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