

WEDNESDAY 2 DECEMBER 2009

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Present

Blackwell, L  
Bowness, L (Chairman)  
Kerr of Kinlochard, L  
O’Cathain, B  
Renton of Mount Harry, L  
Rosser, L  
Sandwich, E of  
Wright of Richmond, L

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Witness: **Mr Richard Frimston**, Law Society and Society of Trust and Estate Practitioners (STEP), Russell-Cooke Solicitors, examined.

**Q46 Chairman:** Mr Frimston, welcome. Thank you very much for coming to give evidence to the Sub-Committee on the draft Regulation on Succession. If I may, for the record, point out that you have before you a list of the interests that have been declared by Members. They may not all be relevant particularly to this inquiry, although in dealing with that I will declare my relevant interest as a practising solicitor and notary public. This session is on the record, as you know. It is being webcast live. It will be accessible on the website. You will have a transcript after the session to enable you to go through and correct anything which you think is not correct and that will go into the public domain in printed form on the website. Mr Frimston, could I ask you first of all if you could begin, for the record, by stating your name and the capacity in which you are here and also ask you whether you want to make any statement to begin with in general terms on the matter or whether you want to go straight to questions?

**Mr Frimston:** Thank you, my Lord. Perhaps it would be helpful if I just describe myself a little. I am Richard Frimston. I am a solicitor and a notary public and I have practised in London all my life. I have been dealing with private client matters since the mid-1980s. I sit

on the Law Society's International Committee. I represent the Law Society to the European Committee of the Union of International Latin Notaries. I am also involved in an organisation called the Society of Trust and Estate Practitioners (known as STEP) and I chair the Cross-Border Estates Committee for STEP. , Professor Matthews and I have been experts on the Commission's group of experts in relation to this topic of succession for two years and he and I are still on the Commission's group of experts looking at the question of matrimonial property regimes. So, with that background, I have been involved in putting together responses on behalf of the Law Society and STEP and the Notary Society to this draft Regulation, and that paper has gone in to the Ministry of Justice, but I suspect that it only went in yesterday and nobody has had the time to read it. So I am happy to wear all of those hats and put the views which are consolidated from all of those places. My personal views are fairly similar, but I might from time to time just say that I have a view which perhaps many of my colleagues may not share quite so enthusiastically.

**Chairman:** Thank you very much indeed.

**Q47 Chairman:** Can I perhaps begin then and say that you know in its explanatory paper the Commission has attempted to assess the scale of the problem created by cross-border successions. A previous witness suggested that there was not much evidence for the figures either of the total or those that actually gave rise to any particular problems. I think 450,000 was the total figure. What is your assessment of the nature and scale of the problem and whether this proposal would have an impact upon it, good or bad?

**Mr Frimston:** I think it does depend where you are, my Lord. In London, I think the current statistics are that something like a third of London was born outside the United Kingdom, so certainly in my practice in London it is a huge issue. I think probably 80 per cent of my work involves some sort of cross-border element. I think in the country as a whole probably the position is less extreme, but I think even that there is something like 11 per cent of the

population is born outside the United Kingdom, and of course that is not the only issue. There are very English people, or very Welsh people, or very Scottish people who own property in other parts of the European Union, or who have children who go and live and work in other parts of the European Union. So certainly my experience is that this is an issue which is a growing one and the position is so complex that ordinary folk find it very difficult to deal with.

**Q48 Chairman:** Have you any view about the 450,000 estimate which was given in the Impact Assessment? I know they talk about nine to ten per cent involving an international dimension.

**Mr Frimston:** I think it is very difficult to get any statistics, my Lord. I think those statistics are probably quite old now and I think all the information there is out there from the ONS and others is that migration is increasing and that people are moving around more and own property and assets in more than one jurisdiction.

**Q49 Chairman:** Let us take that as read then. In general terms, although we will be asking you about specifics, do you feel that this proposal would make a significant impact on solving some of these problems?

**Mr Frimston:** Cautiously, yes, my Lord.

**Q50 Baroness O’Cathain:** Which way?

**Mr Frimston:** The applicable law issues are particularly difficult. The fact that at the moment within the European Union we have three different ways of doing it, whether it is domicile, whether it is habitual residence or whether it is nationality, means that for many people either assets are governed by two sets of laws or by none and it can cause severe problems.

**Q51 Lord Wright of Richmond:** When you started your advisory role two years ago did the Commission have a fairly clear idea of what it wanted, or does the draft legislation reflect your advice and the advice of your colleagues?

**Mr Frimston:** My Lord, I think that is quite a difficult question to answer. The process has been going on for more than seven years. The original report from Professor Dörner and Lagarde came out in 2002 and made various suggestions. A lot of those suggestions have been followed. The two big areas where I still regard the Regulation – well, there are probably three areas where I regard the Regulation as being defective. One is that reference to the validity of wills has been completely removed, which I do not understand, the formal validity of a will document. Is a will validly executed as a document and recognised in another jurisdiction? A lot of European Union Member States have ratified the Hague Convention on the validity of wills, which means that broadly if you sign a will in England in English form that will be recognised in other countries, but there are a number of Member States which have not, such as Malta, so that unless the fundamental question of what is a valid document, is it a valid will or not, is addressed it is very difficult to move on to the question of what law should apply. I think that is one thing which is peculiar but has not been taken up. The other was the question of choice of law. I think most people who have been involved in the subject thought that the choice of law of your habitual residence at the time of choice ought to be a valid choice and that has been discarded. The other big contentious question, I think, is that of jurisdiction in that in the Rome regulations if a party chooses a particular law for a contract there is no reason why they cannot choose the jurisdiction and many of us thought that if there was a valid choice of law it would be much more sensible that jurisdiction should follow that choice.

**Lord Wright of Richmond:** Thank you very much.

**Q52 Lord Renton of Mount Harry:** I do not have the advantage of being a lawyer and I listened with very great interest to Professor Matthews last week and I think we were all very impressed by him. He put over his case very well. But as a non-lawyer I did come to wonder, at the end of an hour and a half or so, whether the whole matter was too complex to attempt EU legislation. As you said, we have been trying for seven years. Do you think it could succeed, or do you think it is too complex?

**Mr Frimston:** My Lord, I do think it can succeed, indeed I think because of the complex nature it is crying out for regulation to make it simpler. So many of my clients say to me, “Why hasn’t the EU done something about this? Why haven’t they sorted it out?” I do think that the current position is completely unsatisfactory and any regulation, almost, is better than the place we are at at the moment. Not quite, but a regulation could do a great deal in this area.

**Q53 Lord Renton of Mount Harry:** If I may, just for a moment, be difficult – I am not necessarily disagreeing with you – if you do get down to it on an EU law basis, and as you say that is without taking down either domicile or residence, or jurisdiction, you would also, for a very ignorant person like myself, come to the difference between common law and civil law. Is that not likely, however much it is needed, to lead to a lot of arguing which is likely for the client, the heirs, and so forth, to actually mean a good deal of expense, on legal matters?

**Mr Frimston:** My Lord, I do not think I would agree. The majority of the population do not make a will. Two-thirds of the population die intestate and the intestacy law is there to make a rough and ready decision as to what happens to people’s estates if they do not, or do not bother, or cannot afford to, and I think the Regulation is a bit like that in trying to provide a rough and ready solution for the ordinary folk who cannot afford to come to me and spend £2,000 for me to help them sort it out but want to go to their local probate registry and deal

with the money that is sitting in Germany, or anything else. I was very struck last week, when I had a new piece of work from a lady in the south-west of England, who is English, her brother is English but died living in Germany and because he was in Germany and had German assets he had a German grant of probate. Germany law says that because he was a UK citizen it was UK law that applied. English law says that because he died domiciled in Germany, German law should apply. Germany accepted that, so on the German certificate it said, “Thomas,” whatever his name was, “died a British citizen under British law,” that German law applied and the heirs are his sisters. One of his sisters took this along to the local probate registry and tried to get access to the £50,000 in the building society and cannot do so. She has to come to somebody like me to help her draft an application to the registrar and a certificate of German law when actually the German certificate says everything that it needs to say. It is one of the few cases when we all agree the same applicable law, but even then she cannot do it. I think the Regulation ought to be making provision for ordinary folk like that. If you have complex lives and have lots of money and assets in different jurisdictions you can afford to come to people like me and Professor Matthews and spend lots of money for us to worry about it, but I think the Regulation should be helping the ordinary folk move around Europe and deal with these things.

**Q54 Lord Renton of Mount Harry:** Do you think it really could do that?

*Mr Frimston:* Yes, I do.

**Q55 Chairman:** Following on from that, it seems to me that the answer to Lord Renton’s question which you gave is an argument for an acceptable and recognised European Certificate of Succession, but could the proposal be limited to practical measures of that kind without getting into some of the more complex areas, or at least as we perceive them to be?

**Mr Frimston:** My Lord, I gave the example I gave because in that particular case both Germany and England agreed the same applicable law. That is very, very rare and usually one has got mismatches that there is never an answer to. There is no answer and the only solutions are practical ones about saying, “What do we do in this jurisdiction, and what do we do in that jurisdiction?” So I think for this to work it has to deal with applicable law. I think jurisdiction and enforcement is more difficult and certainly the Law Society’s and STEP’s response to the Green Paper was that it would have been much better if the Regulations dealt with applicable law first and we got that working and then we tried to deal with other things later, but the Commission has not taken that view.

**Chairman:** Thank you.

**Q56 Lord Blackwell:** Can I ask Mr Frimston about the impact on national laws and the question of subsidiarity? The Commission says that the Regulation will not replace national laws on succession and property, but as we have just been discussing there are many situations where different national laws conflict, different legal traditions. How likely is it that over time actually a new body of law will develop which will inevitably impact on national law, and in the light of that how do you view this proposal against the criteria for subsidiarity? Finally, although I can guess the answer to this, whether you think the UK should opt in?

**Mr Frimston:** My Lord, I think the difficulty with this area is that however hard anybody tries to make the Regulation not affect national law and although the Regulation is only dealing with private international law, inevitably it will have an effect on national law. So it will not necessarily change national law, but I think national law will have to change. So, for example, in the United Kingdom and in particular in England and Wales, which is my jurisdiction, personal representatives are not obliged to administer any assets outside England and Wales. Under the Regulation, if we opted in, then unless we change our law so that

English personal representatives are under an obligation to administer the EU-wide assets, then there will be a hole. So we will have to put an obligation on personal representatives to administer the assets throughout the EU if it is to work. That does not mean that we necessarily have to, but if we want the Regulation to work effectively then we will have to think about the changes to our national law. Similarly, we protect personal representatives in that under the Trustee Act if they put an advert in the London Gazette then anybody coming along afterwards cannot sue them personally for distributions. I do not know that people in Estonia read the London Gazette a lot, but that may be something we have to think about! Similarly, our 1975 Act provision to protect dependants currently only applies if the deceased died domiciled in England and Wales. It does not matter where he was habitually resident. So again we really ought to be changing the 1975 Act. These are things we do not have to do, but if we want the thing to work then we are going to have to look at our national legislation.

**Q57 Lord Blackwell:** If this directive comes into effect we would have to pass a law, or it would be advisable, you think, to pass a law to conform our UK law to the requirements of this directive. I guess the question then is, are any of those things we might do to conform our law things which would also impact on somebody whose estate was entirely in the UK who would otherwise have been unaffected by this?

**Mr Frimston:** My Lord, I do not think so. The question of claw back I am sure we will come back to, so we can talk about claw back perhaps slightly separately, but I think the Regulation is designed to effect private international law and I think it has been designed as well as it can be to have as little effect locally – there are debates as to whether it has any effect on land rights and I think Professor Matthews thinks that it might do. I think that is quite an academic position. I think the intention is that it should not and therefore if it does it needs changing to make sure that it does not. But I do think that the changes that are necessary, some of them we need to do anyway. We ought to change the 1975 Act anyway. The Law Commission is

currently looking at it and thinking that it is going to recommend that it ought to be changed anyway. It affects people outside the European Union. My English client who is married to a Lebanese gentleman, although she lives in the London house she has got no protection if he dies, and that is not right. So I think the 1975 Act should be changed anyway. So I do not think that the Regulation itself means that we would have to have changes to our law which would affect internal issues.

**Q58 Lord Blackwell:** What is your view on subsidiarity?

**Mr Frimston:** I think one of the things that I find interesting is the changes between England and Scotland since devolution. Scotland has changed the definition of “domicile” but we have not changed it in England and we have got no particular mechanism yet for thinking about how we deal with that clash between Scottish law and English law. Personally, I think it is unlikely that we would be able to have a sensible debate within the United Kingdom trying to reconcile those things. Certainly the only way of harmonising private international law through Europe is by regulation. There is no other way of doing it.

**Q59 Chairman:** So whatever one’s views about the proposal, you are saying really it does not offend against subsidiarity because you could not achieve it in any other way. Can I ask about opt-in then and just follow up that point as to what your opinion is, whether we should opt in? Should we opt in now or should we wait and see?

**Mr Frimston:** That, I think, is a political question in that all the constituencies that I talk to would say that the idea of the Regulation is right. The question is, how do you end up with a regulation which is workable and the best that is achievable? The question there is the political one of, do you achieve a better result by opting in and forming alliances, or do you achieve a better result by not opting in and hoping that people want you to? So I think that is a political question. My personal view is that I am an alliance man, so I am into talking to the

Austrians and the Dutch and seeing what we can do to find alliances to smooth down some of the rough edges. I know that others are perhaps not alliance men and think that we should stand clear and hope that by doing so we can have another look at the end result and see whether we like it or not.

**Q60 Lord Blackwell:** Are there any proposals that might be included in this that if they were concluded might lead you to believe that we should not opt in, or that we should opt out?

**Mr Frimston:** My Lord, I think if there was any question that there was not any choice of law then I think we should not opt in. I think if there was not an element of party autonomy, if it was just habitual residence without any choice, then I think we should not opt in, and if civilians got to the position where they thought that protection of their reserve was a matter of public policy, then again I think that would be difficult. If you got to the situation where the French law said that English succession law was in breach of French public policy, then I think that would be a regulation which would not work within the European Union.

**Q61 Baroness O’Cathain:** Can I just ask, following on from what you actually said, about alliances? Do you think the likelihood of alliances is stronger than the likelihood of not having alliances, and also the timescale?

**Mr Frimston:** My information on this is probably no better than yours. In terms of timescale, I presume that it is going to take two years to negotiate. I think it is going to be a very long and tedious process. There are an awful lot of difficulties. I think the differences between this side of the Channel and the other side of the Channel do look different once you cross the Channel. I think the difference between the Netherlands and France is as significant for them as it is between us and France. If Austria has a two year limit on claw back, they are going to be as worried as we are about the idea of French law having no time limits on claw

back. So I think personally we would do better by opting in and finding friends to find solutions to some of the problems.

**Q62 Lord Kerr of Kinlochard:** That is a sort of irrevocable choice, is it not? You are gambling at that point and you can be outvoted. The argument the other way is that if you make it clear that you are interested in the principle of the legislation, not opposed in principle to it but you do not know if it is going to come out in a way that will be appropriate to our national circumstances and laws, is it not the case that you are more likely to extract concessions than if you are in a minority which can be voted down?

**Mr Frimston:** My Lord, these are political questions and it is a political answer. My personal view is that if we are not in there, having opted in, then although the Rome I experience was satisfactory for the United Kingdom, I am not sure that playing the same card again may necessarily produce the same result. This is a very complex subject and if there are solutions which can be found between Member States that have opted in we may be excluded from that. They may not be so bothered about whether we opt in or not. It is such a difficult subject that finding a solution between France and Germany and others may mean that it does become a very mainland Europe document. The whole position, perhaps, in relation to personal representatives is one that personally I think is pretty satisfactory at the moment under the draft Regulation. If we do not opt in, there will be less need to have that in the Regulation. But as I say, these are political questions and I am glad I am sitting this side of the table.

**Q63 Chairman:** I think we ought to move on to the question of applicable law, but can I just ask you this: the Committee, I think, is very grateful for examples that are given. You mentioned the English lady married to a Lebanese gentleman and he died and she had no protection for the house. Can you just expand upon that example? What is the protection

anybody in those circumstances is going to get out of this? It may be obvious, but I think it would be quite helpful if you could expand on that for us as an example.

**Mr Frimston:** The example I gave was of the 1975 Act not giving protection at the moment. The situation there is that if you have got an English domiciled UK national resident in a house in London but married to somebody not domiciled in England, then the 1975 Act does not apply to his estate when he dies. English immovable property is subject to English law but with no protection. The difficulty with this Regulation is that it has to have a rough and ready solution. The rough and ready solution it has is to use the law of habitual residence. If he dies habitually resident in England and we change the 1975 Act, then the 1975 Act will give her protection. If he dies not habitually resident in England, then it would not. So the question will be whether he dies habitually resident in England or not, as to whether English law will give her some protection.

**Q64 Lord Kerr of Kinlochard:** I understand the answer on subsidiarity and personally I agree with it. I am more concerned about whether this proposed Regulation passes the proportionality test. On subsidiarity, if you want to do this you need some sort of EU-wide instrument, but do you need as heavy an instrument as this and does it all have to be normative? Could some of it be *facultatif*? Could it set out options, provide for choosing? You mentioned the choice of jurisdiction as well as a choice of law. Why not? The Certificate of Succession, as I understand it, is an optional add-on. Could not the whole thing be options, a menu which would simplify people's choices but not predetermine their choices, simply make their choices easier for them to take and for their executors to fulfil?

**Mr Frimston:** My Lord, the question of choice is always a question of whose choice is it? I started by saying that many of us would have preferred the Regulation just to deal with applicable law only and certainly there are many questions of how one puts into force or how one interprets the Regulation locally that might have been better dealt with by a directive

rather than a regulation. So I would entirely agree if the process could be persuaded that the Regulation should only deal with applicable law, but that does seem a bit tricky. Questions as to choice, as I understand the European Certificate of Succession it is going to be really a choice for a Member State as to how to operate it, it is not going to be a choice for an individual as to how to operate it. So the question will be, France will say, “Yes, we will operate European Certificates of Succession and will recognise an Italian Certificate of Succession,” and England may say, “No, we need a grant of probate.” It will not be up to an individual to say, “This is what I want to do.” So I think there will be questions as to who makes the choice. If once could have options where individuals had more choice, then I would generally be in favour of them, but I cannot see that working. I think the whole question of jurisdiction and enforcement is what makes the Regulation in practice quite difficult because it is so novel. We have never ever enforced or recognised succession issues between Member States before and the effect of that change is what is so dramatic.

**Q65 Chairman:** Thank you. We have started to go into applicable law and the Commission has chosen the habitual residence test to determine the law that should apply. Do you think that is the correct approach? We had some questions raised about the whole definition or the lack of definition of “habitual residence”. Could you expand on all that, please?

**Mr Frimston:** Yes, my Lord. In the experts’ group the starting point was the Hague Succession Convention, which has been remarkably unsuccessful in that it is only the Netherlands that have ever signed up to it and that has got a very long, detailed and complex definition of the connecting factor. You have got to be resident for five years, but if you move then it is two years, and there are all sorts of different things, and we discussed that at great length. I think one of the difficulties is finding a connecting factor which is straightforward. What I find difficult is that habitual residence seems to be the test for virtually everything else these days, whether it is the mental incapacity of adults, which uses

habitual residence, Brussels I and Brussels II uses habitual residence. I am not saying that I know what it means, but at least it seems to be a fairly universal connecting factor and in practice amongst the majority of my clients I usually know where they are habitually resident. I often do not know where they are domiciled. So personally I do not find it a difficult connecting factor. I think where the trickiness is is that there are a number of people, especially on the borders of Member States, who live in one Member State, work in another Member State and have a weekend home in a different Member State. A number of my clients work in London but their families live in France, and those are the difficult questions as to quite where they are habitually resident. It would have been better if the connecting factor could have had a bit more definition and could have had a tie-breaker clause, or something like that, but I can see why that is quite tricky. So personally I think “habitual residence” is better than “domicile”. I do not know what “domicile” means usually.

**Q66 Lord Renton of Mount Harry:** You say you do not know what “domicile” means usually?

**Mr Frimston:** Well, “domicile” is usually a question of choice. If you say to your clients, “Where are you domiciled?” they immediately tell you where they are habitually resident. Large numbers of my clients are actually domiciled in India but they do not know it because when they were born their parents were in Kenya or Uganda and they were certainly still domiciled, their father was still domiciled, in India at that time. So their domicile of origin is India and they are still thinking about going back to India. As I say, the definition of “domicile” under Scottish law changed in 2006 and their definition is different from ours. So whether somebody is domiciled in England under Scottish law or under English law will have a different answer.

**Q67 Lord Wright of Richmond:** My Lord Chairman, could I just remind the Committee that Professor Matthews told us the one thing “domicile” did not mean was “*domicile*”.

**Mr Frimston:** My Lord, the French and the English systems are surprisingly the same. The French “*domicile*” is probably closer to “domicile” than anything else there is in the civil law, and Professor Matthews is, of course, right that they are different. It is much more like “habitual residence”. But similarly, “domicile” in America, “domicile” in Australia, “domicile” in South Africa, “domicile” in India all mean slightly different things, so it is a complex connecting factor which nobody really understands very well.

**Q68 Lord Renton of Mount Harry:** Declaring an interest, what is the difference in “domicile” between Scotland and England?

**Mr Frimston:** It is a question of the domicile of origin. There was a very good Law Commission report in 1985 which recommended we should change the definition of “domicile” but due to various lobbies at the time it did not get changed. The Scottish Parliament dusted down the report and passed a bit of it under a Family Law Act in 2006. Under English law your domicile of origin is that of your father at the time you were born. Under Scottish law it is the domicile of your parents if they had the same domicile. If they did not have the same domicile, then it is the country with which you are most closely connected. So for a lot of my clients the definition is different.

**Q69 Chairman:** Can I just ask you about the exceptions to the proposal? Having decided the applicable law, then there are the exceptions for the special succession regimes in Article 22 and the payment of taxes and public policy. Does this not upset the whole apple-cart?

**Mr Frimston:** My Lord, I could not agree more in that it is a very loosely defined provision, but equally I presume that on any regulation there does need to be a bit of wriggle room. The question is, what are the borders of that wriggle room? I think in relation to tax it is

inevitable. I think public policy is much more difficult. So there may be bits in the negotiation in relation to the special succession regimes which might be helpful to us. I think in due course, as and when this Regulation comes in, the European Court will get round to putting some limits on this. Whether the provision of the house in the Tyrol should be allowed a special succession regime or not, or whether the farmhouse in Ireland should be allowed that, I do not know, but I can see that nationally each state will have particular things they say are important for particular reasons.

**Q70 Chairman:** Can I ask you perhaps an obvious question? If this is drafted in such a way that it is all going to depend on how the court interpret it, whether it is the ECJ or any other court, does that not of itself make it somewhat unsatisfactory? We spend hours debating in other parts of this building whether something is certain and we know what it means, and trying to amend it so that it is specific.

**Mr Frimston:** Yes, my Lord, I entirely agree that the Regulation will be much better if Article 22 was not there, but again it is a political question, I think, as to the extent to which one will be able to negotiate a regulation without something in there.

**Q71 Baroness O’Cathain:** We are talking about all these laws and all these people getting their sticky hands on the farmhouse in Ireland and the ranch wherever. How much choice should a testator have as to the law to be applied to his or her succession?

**Mr Frimston:** I think that is something which does divide this side of the Channel from the other side of the Channel in that I think our general starting point is that testators come first, whereas I think the other side of the Channel the starting point is that perhaps the heirs come first. Certainly in our responses we have suggested that testators should be able to choose not only the law of their nationality but also the law of their habitual residence at the time of their choice so that they can have some certainty and can plan their affairs properly. One can see

that from a French perspective the idea that French nationals could come over to London, work here and put everything under English law and then go back to France is more difficult for them. I can see that. It is the balance between testamentary freedom and the reserve, but equally we have our own ways of protecting dependents. We make spouses and ex-spouses people who can always make a claim on an estate. We make dependents people who can make a claim on an estate, which is a different perspective if you go to France, where it is only the children who are forced heirs. The spouse is not a forced heir. So we all have very different perspectives about what succession law should or should not say.

**Q72 Chairman:** Can I just interrupt you? You were talking about France there. Somewhere along the line it was suggested to us that most countries have the sort of provision we have, enabling former wives or current wives or children to claim if they can prove a past dependency and need. How correct is that, that most regimes in Europe have that provision in law so far as you are aware?

**Mr Frimston:** All countries within the European Union have a law of some sort or another. The civilian perspective is to give forced heirship shares to give a reserve to particular people and each country has different rules. So generally the spouse and the children are forced heirs. Normally they are entitled to one half of what they would have received on intestacy. Some countries increase that. I think that somewhere like Finland it may be that five-sixths of the estate has to go in particular different ways. France is unusual in that the spouse is not a forced heir, it is only the children who are forced heirs. In France, if you have got one child one half of your estate must go to that child and if you have got two it is two-thirds; if you have got three or more it is three-quarters that must be divided between the children.

**Baroness O’Cathain:** It makes a nonsense of the idea that it is called a will, does it not, because no will at all is applied? The will of the testator does not seem to be worth a row of beans, does it? Why do we want to opt in? I have just finished the whole rigmarole of

updating my will and I will be jolly furious if some clerk in France or something had anything to do with it!

**Lord Renton of Mount Harry:** Long live the European Union!

**Baroness O’Cathain:** If it is as stupid as that, no. The fact is, you have said, unless I have completely misunderstood you, that each country seems to have different laws. Let them get on with it. Why does the European Union as a whole want to go and muck up with each one of us as individuals? We have perfectly well managed for all this time in our own separate ways. I think this is a nonsense.

**Q73 Chairman:** That is, of course, a point of view. The object of the exercise was not to muck up everybody’s will but to try and solve some problems. I think the question for us is, is it going to solve any problems? Is it going to solve problems or create more problems?

**Mr Frimston:** My Lord, perhaps I could just put in at this stage, for my clients who own a house in France, which is subject to French law whatever they want to do, this Regulation is ideal. They can choose English law to apply to all of their things, including their French house and take the French house out of the French reserve. The difficulty at the moment is the conflicts between the various laws. If we could find an applicable law on a choice of law which meant that your estate was dealt with under one law, life would be a lot more simple. It is true that if you are domiciled in England and Wales and you only live in England and Wales and you only have assets in England and Wales, and you make sure that your children never leave England and Wales, then you do not need this Regulation, but I do find it increasingly difficult to find people who fall into that category.

**Q74 Lord Wright of Richmond:** Can I just very briefly take you back to allowances? You have not mentioned Ireland, which is another government which will have to take the decision whether to opt in or not. How similar are Ireland’s problems to ours with this Regulation?

**Mr Frimston:** My understanding is that Ireland has its own particular concerns about the Regulation, although if you go back to the 19th century a lot of Irish law was very similar to ours. It has moved on and changed over the years and there are provision in Irish law protecting spouses in a particular way and the Irish farmhouse, and I understand the concern at the moment is that the Irish Government think that there are a number of spouses who are left in Ireland on their own and their husbands may have left Ireland and that if the Regulation came in, some of the provisions protecting those spouses might be overridden. So I think Ireland has its own particular concerns. I am not an Irish lawyer, so I do not know the extent to which those are realistic or otherwise.

**Q75 Lord Wright of Richmond:** I wondered the extent to which in your discussions with the Commission an Irish view has appeared to make it likely that they might be an ally or not?

**Mr Frimston:** My understanding is that the Irish Constitution is such that the Irish Parliament has to agree to an opt in and my understanding is that they are unlikely to do so.

**Lord Wright of Richmond:** Thank you very much.

**Q76 Lord Rosser:** Listening to what you had to say, to what extent is this really about the law and to what extent is it about a clash of culture that is causing the difficulty?

**Mr Frimston:** I am a lawyer, so I am good at giving legal answers but I do not know that I am good at giving cultural answers. I think it is true that succession law is seen as part of the inherent culture of a state and certainly a state such as Poland, which for a long time felt itself governed from Moscow, wanted to escape from that and has been busy dusting down its own law and developing its own personality and I suspect that it is nervous about the idea that some of that might be taken away from it. So I think that certainly succession law does have a very big cultural impact. The trouble is that the current position does not protect that. At the moment if a Polish person wants to escape Polish law they buy a house in London, which

is subject to English law, and they can do what they want with it, though the trouble always is that however much a particular Member State might have strong views about its culture and its law, individuals can find ways around that and ordinary folk are still left with a mess which they have got to try and sort out.

**Q77 Baroness O’Cathain:** How will the proposal affect the UK system of using personal representatives to administer a succession?

**Mr Frimston:** I think it is one part of the Regulation which I think has got it fairly well done really. It says very clearly in Article 21 that even if French is to be the applicable law, we can insist upon the use of personal representatives in relation to the administration of assets in England and Wales. So I think we have got an excellent current solution whereby we can still insist on personal representatives and, the other way round, if English law applies the personal representatives can go and administer the estate in France.

**Q78 Chairman:** Does it apply *vice versa*? Is there a sort of *quid pro quo* for that whereby heirs, where they have not got PRs, can administer the estate in England?

**Mr Frimston:** No, my Lord. Article 21 specifically says that although French law might be the law applicable to the succession, nothing stops us insisting upon the appointment of personal representatives. So I think it has got it right. I think the elephant in the room on the whole Regulation, of course, is tax and the tax effect of some of that may be quite interesting. Therefore, that may be a bit of a dampener, but that is not something which I think the Regulation can do anything about.

**Q79 Lord Renton of Mount Harry:** The point there being that the tax is very different in different countries, is that right?

**Mr Frimston:** My Lord, yes. The way it works is very different.

**Q80 Lord Renton of Mount Harry:** I meant in a percentage sense?

*Mr Frimston:* That is also true, my Lord. For example, in Italy Inheritance Tax is a maximum of eight per cent, whereas in France Inheritance Tax is a maximum of 60 per cent. So there are very different positions, but the general position is that the United Kingdom is the last place which still has an estate duty, where it is the personal representatives who have to pay a tax out of the estate. In every other country which has a tax on death it is an Inheritance Tax and it is the heirs who pay tax on what they inherit. That is the position in Ireland as well. So the difficulty for France, for example, is that if the English personal representatives go to France, because they have never really had those animals before how are they going to be taxed? If the heirs claim their inheritance intact in France they might only pay 20 per cent tax. In France if strangers inherit assets they pay 60 per cent tax. So the tax effect of what this Regulation is going to do may be interesting.

**Chairman:** Tax is probably a good time for us to go to the Earl of Sandwich to ask about claw back.

**Q81 Earl of Sandwich:** You have already touched on this through Lady O’Cathain’s questions. I am fairly new to this, but if I have understood it claw back is going to be a horrifying prospect and we are not going to go anywhere near it, but what I think would be interesting to the Committee is what is the impact of it on those who are opting in and those who are contemplating opting in? So if you could look at the Community first and then come back to what sort of impact you think it would have here, but I think we can all guess that. We want to know how others are suffering from it.

*Mr Frimston:* My Lord, claw back, I think, is a tricky topic and I think one needs to distinguish between rearrangements between heirs and rearrangements not between heirs, so that in general terms in the European Union rearrangements between heirs often have no time limit, whereas rearrangements between people who are not heirs usually have a time limit. So

if the deceased gave money to a child, then that child has got to bring that back into account when the estate is distributed, and in many ways that is similar to the existing position in England. We have that law ourselves. We have the rule against double portions. In general, of course, it is true that existing cultures know their own law and therefore behaviour is changed by the knowledge of that law. In England we make wills for clients and advise them about the 1975 Act and that affects the way they make their wills. In many European States people say, "I won't bother making a will because it is all going to get divided equally between the children anyway," or if they make gifts then they divide them between the children equally so that it is not an issue. I think the tricky question is claw back between non-heirs and certainly I know that charities in this country are very worried about it, but if one looks at European Union Member States, Austria, for example, has got a two year time limit on claw back, the Netherlands five years and Germany ten years with a sliding scale going down ten per cent every year. It is France and Italy that are the problem, where they have lifetime claw back. That is why I say I think countries like Austria and the Netherlands will regard this as as much of a problem as we do and will need to find some solutions. It is not true that we do not have claw back in this country. Under the 1975 Act if the deceased made gifts with the intention of defeating the 1975 Act the court can override those and claw those back. We are used to claw back in all sorts of ways, whether it is on insolvency, where if somebody has gone bankrupt and tried to give things away and hide them then the court can go after them and get them back. We are quite used in divorce proceedings, in the divorce courts, to make orders in relation to trusts that have been created and take the money back, so we are not completely unused to the idea of claw back. It is a question of the way it works. So I think in practice there are some examples, for example the case in Northallerton recently of Dr Gill, whose mother left everything to the RSPCA and they spent £2.5 million, or whatever it was, on legal fees. It might well have been a good case for everybody to sit down

and try and work things out whilst they were alive. I think if the Regulation came in and if we had a limitation period, that charity would ask responsible questions: “If you are giving me a million pounds, are there any heirs who might be involved? Shouldn’t we be sitting down and having a contract?” So I think it puts a little more onus on donees to say, “Where’s this money coming from?” In the days of money laundering regulations it is the sort of question we are all used to asking.

**Baroness O’Cathain:** But is it not surely the duty of the lawyers who draw up the will in the first place with the person who is going to leave this money to bring these points to their attention and to avoid £2.5 million pounds being spent on lawyers?

**Lord Renton of Mount Harry:** Yes.

**Chairman:** Nobody wants to answer that question!

**Baroness O’Cathain:** I just think we need a bit of common sense in this, do we not? We are getting all tied up like those knitting balls that cats play with!

**Q82 Earl of Sandwich:** I am just surprised at the way in which Mr Frimston has described the implications for the UK as though we are going to simply be developing good things. The avoidance legislation that we are used to, money laundering legislation. We do not want any more of that, I do not think. I do not think anyone is going to want it, but you seem really to be in favour of this as a benefit to our own economy, if you like?

**Mr Frimston:** My Lord, as I say, I think it is the ordinary folk who need this Regulation and they will not be troubled by claw back. They will not be giving a million pounds to somebody or other, and those who do want to give a million pounds can spend money with lawyers like me or Professor Matthews and we can discuss the issues and find solutions for them.

**Q83 Chairman:** Can I move on to this section which deals with jurisdiction, Mr Frimston? I have to say I find that all really rather confusing, whether these Articles on jurisdiction are a good idea and how do they fit with applicable law. It seems that Member States have got a sort of residual jurisdiction to deal with the estates of people who die in other countries. Can you expand a little on all that? Is it going to lead to all sorts of conflict, or could we go forward without any of this?

**Mr Frimston:** My Lord, as I say, I think if the Regulation just dealt with applicable law then a lot of people would be very happy. If it is to include jurisdiction and the idea is that one has one court that can think about all of these things, the question is which court should it be? As I say, a number of us have thought that it should be the court whose law is going to apply and that if somebody makes a valid will choosing the law of their nationality then it would be much more sensible if the court of the nationality that is going to apply its own law should have jurisdiction. That was not accepted in the Regulation and we are stuck with this position that it is still the jurisdiction of the habitual residence. The idea that English people dying in Spain make a will choosing English law but it is still going to be the courts of Spain that have got jurisdiction does seem rather foolish. I think the residual jurisdiction is less of an issue in that clearly if somebody dies domiciled in Florida, is resident in Florida but leaves property within the European Union, some court within the European Union must have jurisdiction to deal with it and there is a hierarchy of places, so I think it is a fairly sensible sort of position.

**Q84 Lord Blackwell:** In the situation you gave where an English person dies in Spain but chooses English law, would the Spanish Court therefore be in the position of having to interpret and make a judgment on English law?

**Mr Frimston:** Yes, my Lord. There is provision in Article 5 for the Spanish Court to say, “Since English law applies, we want to refer it to England,” but it is within the discretion of the Spanish Court as to whether to do that or not. So it says it may pass it over to England, it

does not say it has to, and the idea that, for example, if some of the children were in Spain the Spanish Court might well feel that it wanted to hang on to jurisdiction and would not have to pass over, but would still then have to be interpreting English law. So it would mean that English lawyers like me would have to be flown over to Marbella to tell them what English law might or might not mean.

**Q85 Lord Blackwell:** If it were appealed, in which court system would the appeals be heard?

**Mr Frimston:** My Lord, it would go through the Spanish Court system.

**Q86 Lord Rosser:** As a Committee and as a general statement, we do favour mutual recognition and the facilitation of cross-border enforcement, but having made that statement can I ask, do you see any policy or technical or practical problems in connection with the recognition and enforcement that we have been talking about either of decisions or of authentic instruments? Are there any red lights to flash up?

**Mr Frimston:** My Lord, I would again say that if the Regulation only dealt with applicable law I would be not unhappy. It is the fact that at the moment we do not recognise the decisions of other succession laws and that the Regulation proposes that we should that makes it all quite difficult. Issues about recognition are really quite tricky. Malta does not have divorce, so does that mean that Malta will not recognise the divorce of a spouse and therefore there will be succession issues as to whether they are married or not. Greece does not recognise civil partnerships. Will there be difficulties about recognition of a civil partner under Greek law? So there are going to be all sorts of problems in relation to recognition. Whether it is realistic to say that it might be excluded now, I would have thought it is not. If one is going to have private international law that applies across Europe, then recognition is necessary. We do need to have one court making the decision about the law and then that

being recognised across Europe. Recognition is about recognising a grant of probate. That is what the politicians in Brussels, I think, have been asking for. It is the idea that there is the European Certificate of Succession, that an ordinary citizen can carry around Europe hoovering up their bank accounts. It is more complex than that, but that is where the requirement for recognition has come from. Certainly authentic instruments is another problem and another issue and the fact that we have different systems of probate, so that in Italy or France it will be the notaire who produces a notarial certificate, whereas in the UK, Germany or Austria it will be a court document does produce its own complications.

**Q87 Chairman:** I think that leads us on to the question of the European Certificate of Succession. I think the Committee understands in practical terms how something that is acceptable everywhere would be of use to people, but do you see any difficulties with what is proposed and how it is proposed in the sense that it is actually quite a complex document?

**Mr Frimston:** My Lord, I think it is a more complex document than it looks in that if there is an English personal representative going to France, explaining to France what the powers of a personal representative are can be quite tricky. The question always one gets from a civilian is, "Who are the heirs?" Really what they are asking you is, "Who is entitled to take hold of this asset and deal with it?" and therefore for us that is the job of the personal representatives. So I think the certificate could be helpful. In my case of my lady whose brother died in Germany, the German certificate of succession would have been really useful. She could have brought that, the Probate Registry would have seen it and would have produced an English grant of probate without any difficulty. So I think it will have value. It will have more value in some cases than others.

**Q88 Chairman:** It is interesting that you say that. You say you would envisage that she would bring the certificate of succession from Germany which she would then take to the Probate Court?

**Mr Frimston:** Yes.

**Q89 Chairman:** You would not expect it to be done in such a way that the certificate was acceptable without the additional grant?

**Mr Frimston:** No, my Lord, and that would be the case in many jurisdictions because most jurisdictions do depend upon a local procedure in order to collect the tax. That is not just a UK position, that is true in France and in other jurisdictions. So there is certainly no way that France is going to be very happy about somebody turning up with an Estonian certificate, taking the money and running off with it without the tax position being checked first, and that will be the same for us. The reference to the European certificate does very clearly say, in Article 36(2), that the use of the certificate “shall not be obligatory and shall not be a substitute for internal procedures”, and my understanding of the meaning of that is that it will be a state’s decision as to whether it is obligatory, and therefore it will be for the United Kingdom to say, “Yes, do come here with the European Certificate of Succession and that will help you get a grant of probate.” It will not remove the need for the grant of probate. As I say, it may well be that between France and Italy they are very happy to accept each other’s notarial certificates without anything further, but that will be, I think, a question for each state to decide. But it would still be helpful, even though you still have the internal procedures, because you would have a document which enables an ordinary person to take it to the probate registry or the notaire with the relevant information and enable them to get the certificate locally that they need easily.

**Q90 Chairman:** You are satisfied, are you, that the Regulation makes that certificate conclusive to whomsoever it is produced?

**Mr Frimston:** I think there is some tidying up that is needed in the Regulation. The effects of the certificate in Article 42 say that anybody who pays out to the bearer is protected and anyone who acquires property from the bearer is protected.

**Q91 Chairman:** Forgive me, if in fact you are saying that somebody has one of these certificates that have been produced in Germany and trots along to the Probate Court and gets probate, people will pay after the probate, will they not? So in a sense Article 42 and the effects of it are neither here nor there, are they, because nobody here is going to pay out other than on a grant from the Court?

**Mr Frimston:** Absolutely, my Lord. That is why I am saying it is going to be an optional matter for each State. So if a State wants to use it, it can do, but it will still be useful between European Member States. I do not regard it as something of huge significance.

**Chairman:** I think at one stage we thought it was the only thing that was useful, but never mind! At the very early stages. Are there any other questions?

**Q92 Lord Rosser:** Could I just come back, because you have said on more than one occasion that these proposals would help – and I think I use your words when you say “the ordinary folk”. I am not quite sure what your definition of “ordinary folk” is in this context. You said particularly in relation to the applicable law issue it would help, and then when you were responding to questions on claw back your answer was, “Well, as far as ‘the ordinary folk’ are concerned, they wouldn’t be worried about that since they are not the ones who are making million pound gifts.” So when you put this emphasis on “the ordinary folk” and the proposals helping them, are you saying that you would regard 90, 95 per cent of the people concerned being within your definition of “ordinary folk” or is it 51 per cent?

*Mr Frimston:* My Lord, I think it is nearer towards 95 per cent.

**Chairman:** Have any other Members any questions?

**Q93 Lord Renton of Mount Harry:** I do not feel greatly encouraged. Am I wrong?

*Mr Frimston:* My Lord, I think the whole thing is very, very difficult.

**Q94 Chairman:** Thank you. Is there anything you would like to add or if you think we are not comprehending something correctly?

*Mr Frimston:* My Lord, I think you have understood the measure of the difficulty.

**Chairman:** That could be the level of our understanding, that we do not understand it!

Thank you very much indeed, Mr Frimston, for your assistance.