Issues Paper on Review of section 120 of the *Succession Act 1965* and Admissibility of criminal convictions in civil proceedings (LRC IP 7-2014)

LAW REFORM COMMISSION/COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

BACKGROUND TO THIS ISSUES PAPER AND THE QUESTIONS RAISED

This Issues Paper examines the rule in section 120 of the *Succession Act 1965* that a killer is precluded from inheriting from his or her victim's estate and forfeits any inheritance that he or she would otherwise receive under the victim's will or on intestacy.

The Issues Paper examines whether section 120 of the 1965 Act should be reformed, including where it applies to a joint tenant who kills his or her spouse who was also a joint tenant at the time of death. This issue arose in *Cawley v Lillis*[1] in which the High Court (Laffoy J) decided that, under the law, the interest of the deceased should be held by the surviving spouse - the killer - in trust for the deceased's daughter. Laffoy J considered that the law should be reviewed and this Issues Paper examines that question as well as a number of matters related to the general scope of section 120 and the costs associated with an application under its provisions.

The Issues Paper also considers the related question of whether a criminal conviction is admissible in subsequent civil proceedings under section 120 of the 1965 Act. In *Nevin v Nevin*[2] the High Court (Kearns P) allowed a criminal conviction for murder to be admitted in evidence but noted that the law in this area would benefit from being clarified. The Commission is seeking views in relation to the following issues:

1. Reform of section 120 of the *Succession Act 1965* as it applies to property held in a joint tenancy (see page 8);
2. Whether section 120 of the 1965 Act should be extended beyond murder, attempted murder and manslaughter (see page 14);
3. The possibility of granting the courts power to modify the effect of the forfeiture rule (see page 17);
4. The extension of the forfeiture rule to bar applications under section 67A(3) of the 1965 Act[3] (see page 22);
5. The possible review of section 120(4) of the 1965 Act (see page 23);
6. The necessity of a criminal conviction for the application of the forfeiture rule (see page 26);
7. Costs of civil proceedings relating to the application of the forfeiture rule and alternatives to litigation (see page 29);
8. Admissibility of criminal conviction in civil proceedings (see page 31).

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[1] [2011] IEHC 515, [2012] 1 IR 281.

[2] [2013] IEHC 80; [2013] 2 ILRM 427. The Commission understands that, at the time of writing (November 2014), this decision is under appeal.

[3] Section 117 of the 1965 Act provides for an application for "just provision" out of the estate of a parent. Section 67A(3) allows the child of a person in a civil partnership, in an intestacy, to apply for a share in the estate of their parent if they have a need. Section 120(1) specifically bars an unlawful killer from making a section 117 application. As both of these applications provides for an application for a share in the estate of a deceased parent, arguably, section 120(1) should be amended to bar an unlawful killer from making a section 67A(3) application.

General common law principle: no person should be able to benefit from his or her wrongful conduct

It is a well established legal principle based on public policy that no person should be able to benefit from his or her wrongful conduct.[4] This principle is applied for example by the rule that a contract involving illegality is in general not legally enforceable[5] and in the enactment of legislation providing for the confiscation of the proceeds of crime.[6] In the context of land law and the law of succession, the principle gives rise to a rule of unworthiness to succeed which is also known as the forfeiture rule.[7] The effect of this rule is that a killer is precluded from inheriting from his or her victim's estate and forfeits any inheritance that he or she would otherwise receive under the victim's will or on intestacy.

Section 120 of Succession Act 1965: a person convicted of murder, attempted murder or manslaughter is prohibited from taking a share of his or her victim's estate

Section 120 of the *Succession Act 1965* put the forfeiture rule on a statutory basis, drawing on comparable provisions on unworthiness to succeed and disinheritance in the French, German and Swiss Civil Codes.[8] Section 120(1) of the 1965 Act provides:

> "A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under section 117."

This precludes the unlawful killer from inheriting a share in the estate of his or her victim under a will and on intestacy. It also bars a claim by a spouse who kills his or her spouse to the "legal right share" in the estate of the victim under the 1965 Act[9] and bars a claim for "proper provision" under section 117 of the 1965 Act[10] by a child who kills his or her parent.

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[4] In English law the principle can be traced to the statement in *Coke on Littleton* (first published in 1628), § 148b: "it is a maxim of the law that no man shall take advantage of his own wrong, *nullus commodum capere potest de injuria sua propria*." In *Riggs v Palmer* 115 NY 506 (1889), the New York Court of Appeals noted that the principle could be traced to Roman law, citing the 17th century French jurist Domat's, *Les Lois Civiles Dans Leur Ordre Naturel*, Part 2, Book 1, Title 1, § 3. Domat's work influenced the content of the Napoleonic *Code Civile de Francais* (1804), Article 726 of which also sets out the principle. As noted below, section 120 of the *Succession Act 1965* was derived from comparable provisions in the French, German and Swiss Civil Codes.

[5] See Clark, *Contract Law in Ireland* 7th ed (Thomson Round Hall, 2013), Chapter 14.

[6] See the *Proceeds of Crime Act 1996*.

[7] See Wylie, *Irish Land Law* 5th ed (Bloomsbury, 2013), paragraph 16.34; and Brady, *Succession Law in Ireland* 2nd ed (Butterworths, 1995), paragraph 6.36ff and 7.80ff. In *Cawley v Lillis* [2011] IEHC 515, [2012] 1 IR 281, the following English authorities were cited in support of the rule: *Amicable Society for a Perpetual Assurance Office v Bolland* (1830) 2 Dow & Clark 630; *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; and *In re Estate of Crippen* [1911] P 108.

[8] The *Explanatory Memorandum to the Succession Bill 1965* as passed by both Houses of the Oireachtas (Department of Justice, 1965) noted, at para 76, that section 120(1) of the 1965 Act "restates the existing rule of public policy law which precludes a felon from taking advantage of his crime. The other provisions [in section 120] are new to the law and may be compared with the rules as to unworthiness to succeed and disinheritance in the French, German and Swiss Civil Codes." Section 120 of the 1965 Act is contained in Part X of the1965 Act (comprising sections 120 to 122) under the heading "Unworthiness to Succeed and Disinheritance." See also Brady, *Succession Law in Ireland* 2nd ed (Butterworths, 1995), paragraph 7.88.

[9] Part IX of the 1965 Act sets out minimum inheritance entitlements for spouses where the deceased's will provides for less.

[10] Section 117 of the 1965 Act allows a child to seek a share of his or her deceased parent's estate if it can be established that the parent did not make "proper provision" for the child in accordance with his or her means, whether by will or otherwise.

The "pre-decease rule" in the Succession Act 1965 means that children of persons convicted of murder, attempted murder or manslaughter are able to inherit from victim's estate

Section 120(5) of the 1965 Act provides:

> "Any share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased."

The effect of this "pre-decease rule" is that the inheritance forfeited by the killer will go to other beneficiaries, if any, named in the deceased's will or to the next person listed to inherit under Part VI of the *Succession Act 1965* if the deceased died intestate. This ensures that the killer's descendants, such as his or her children and grandchildren, are not disinherited by the criminal acts of the killer and are entitled to inherit from the deceased's estate. If this provision were not included the children and grandchildren would also be disinherited. A similar pre-decease rule was introduced by statute in English law in 2011.[11]

A person convicted of murder, attempted murder or manslaughter who owned property with deceased as joint tenant is entitled to full legal ownership under right of survivorship

A joint tenancy is a specific type of co-ownership, often arranged between spouses, and is a formal or informal agreement to share ownership of both real and personal property.[12] There may be more than two joint tenants. In circumstances where there are two joint tenants only, when one of them dies the entire interest in the property automatically passes to the surviving joint owner[13] who becomes full owner. The property held in a joint tenancy does not become part of the deceased joint owner's estate as ownership automatically vests in the other co-owner. This legal consequence is called the right of survivorship.[14] Section 4(c) of the 1965 Act provides that when a joint tenant dies, his or her estate in the assets held in the joint tenancy ceases whenever there is another surviving joint tenant.

Therefore the forfeiture rule under section 120 of the 1965 Act does not apply to property held in a joint tenancy as the deceased's interest in the property ceases on his or her death. If there are more than two joint owners, the surviving owners (including the killer) become full owners of the property. If there are two joint owners, the killer becomes the full owner of that property under the right of

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[11] The issue arose directly in the English Court of Appeal case *Re DWS (decd)* [2001] Ch 568 in which a son had murdered both of his parents, neither of whom had made a will. The killer's son, the victims' grandchild, claimed the inheritance that had been forfeited by his father as a result of his crime. As there was no "pre-decease rule" in English law at that time, the English Court of Appeal held that not only the killer but also his son was excluded from inheriting. The property therefore passed to the next persons entitled to succeed who were the deceased couple's other relatives. Following this the English Law Commission was asked to examine the matter and in its 2005 Report *The Forfeiture Rule and the Law of Succession* (Law Com No. 295) it referred to the relevant forfeiture provisions in the French Civil Code, although it did not refer to section 120(5) of the 1965 Act. The 2005 Report recommended introducing a "pre-decease rule" and this was implemented in the English *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011*.

[12] "Real property" is land and anything erected, attached to or growing on land such as crops and buildings. "Personal property" is anything other than land and generally comprises movable property such as bank accounts, jewellery, stocks, bonds and insurance policies.

[13] It is possible to have more than two joint tenants over land or other assets.

[14] The law of survivorship, also referred to as the *jus accrescendi*, can also be traced to *Coke on Littleton*, § 181b (see fn4, above).

survivorship.[15] The application of the right of survivorship in such a context was considered by Laffoy J in *Cawley v Lillis*[16] and her judgment modified the killer's right of survivorship.

Effect of right of survivorship modified in Cawley v Lillis by ordering that person convicted of manslaughter holds half interest of deceased on trust

In *Cawley v Lillis* the defendant had been convicted of the manslaughter of his wife. They were joint tenants of their family home and of other assets. Because of the conviction, the defendant was precluded under section 120 of the 1965 Act from taking any share in his wife's estate and, in accordance with section 120(5) of the 1965 Act, that share was to be distributed as if he had pre-deceased her. Because the property held in a joint tenancy did not form part of the estate, the deceased's personal representatives and daughter (the plaintiffs) applied to the High Court to determine how the jointly held assets were to be treated.

The defendant conceded during the hearing that he was not solely beneficially entitled to the assets held in the joint tenancy. He acknowledged that the joint assets were beneficially owned in equal shares by him and the estate of the deceased. This was a concession that the right of survivorship did not apply to the assets held under a joint tenancy. Laffoy J noted that "in making that concession, the defendant... properly, if belatedly, acknowledged that the law, as a matter of public policy, will not permit him to obtain a benefit or enforce a right resulting from the crime he committed against the deceased."

On this basis, Laffoy J proceeded to examine three options:

Option (a): killer is deprived of share of joint tenancy by application of "predecease rule"

The plaintiffs argued that, having regard to the principle that no person should be able to benefit from their wrongful conduct and by analogy with section 120(5) of the 1965 Act, the defendant should be deemed to have predeceased his wife for the purposes of the joint tenancy. This would mean that the assets that had been held in the joint tenancy by the deceased and the defendant would pass entirely to the estate of the deceased depriving the defendant of the rights he held in those assets prior to the deceased's death. The defendant objected submitting that, prior to the deceased's death he had vested rights in the joint assets subject to the law of survivorship which depended on which of the joint tenants died first. He argued that those rights were property rights which enjoyed the protection of Articles 40 and 43 of the Constitution. The defendant argued that he should not be penalised further, in addition to his sentence on conviction for manslaughter,[17] by being excluded through forfeiture from his property rights which he had enjoyed for eight to nine years prior to his wife's death.

Laffoy J held that she could not create a new rule by analogy with section 120(5) of the 1965 Act so that the defendant would be deemed to have pre-deceased the deceased. She noted that section 120 of the 1965 Act "deals with the distribution of property owned by the deceased person, not with the distribution of property in which an unworthy potential successor has rights." She stated that "in

[15] Prior to the enactment of the *Land and Conveyancing Law Reform Act 2009* one co-owner could sever a joint tenancy unilaterally without notice to the other: this was the law that applied to the circumstances in *Cawley v Lillis*. Arguably, the unlawful killing of the co-owner before he or she could effect a severance benefits the killer. Since the 2009 Act came into force, unilateral severance is no longer possible.

[16] [2011] IEHC 515, [2012] 1 IR 281.

[17] The defendant had already been sentenced to 6 years and 11 months imprisonment for the manslaughter of his wife.

the absence of legislation empowering the court to so interfere with the defendant's existing rights at the date of the deceased's death...the court has no power or jurisdiction to do so."[18]

Option (b): joint tenancy is severed and overrides right of survivorship

The second option put forward by the plaintiffs and contested by the defendant was that when the death of one joint tenant is caused by the other joint tenant the joint tenancy is severed. The effect of this would be to override the general right of survivorship, with the deceased's estate and the defendant becoming equally entitled to the joint assets as tenants in common. Both would be entitled to sell the family home and to share out the other assets. This approach appears to be applied in the United Kingdom.[19]

Laffoy J concluded that, having regard to the common law principles which applied on the date of the deceased's death, it was not possible to conclude that the legal estate in the joint tenancy was automatically severed on the death of the deceased.

Option (c): killer holds deceased's share on constructive trust

Laffoy J confirmed that the devolution of the legal title to the property held in a joint tenancy should be determined in accordance with common law principles so that on the death of the deceased the legal estate in that property accrued to the defendant solely by right of survivorship.[20]

At a late stage in the case the defendant had conceded that he, as the person who caused the death, should be treated as holding the joint assets on a constructive trust for himself and the estate of the deceased in equal shares. It was noted that this option had been adopted by the Courts in Australia, Canada, New Zealand and the United States.[21]

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[18] [2011] IEHC 515, [2012] 1 IR 281 at 301.

[19] Laffoy J cited *Re K decd* [1985] 1 Ch 85 and *Dunbar v Plant* [1998] Ch 412. She noted that the English case law was influenced in part by the statutory changes to joint tenancies made by the UK *Law of Property Act 1925*. Before the 1925 Act, a joint tenancy could be severed both at law and in equity. The 1925 Act abolished legal tenancies in common and, therefore, a tenancy in common can now only exist in equity. *Megarry and Wade's Law of Real Property* 7th ed (Sweet & Maxwell, 2008), para.13-049, list five ways in which a joint tenancy may be severed in equity, one of which is homicide. However, as quoted by Laffoy J they also state that "it has not been conclusively settled in England whether the application of the rule causes the automatic severance of the joint tenancy or whether a constructive trust is imposed to prevent the killer from obtaining any benefit from his crime." In a footnote to this statement, they note that the remarks in *Re K decd* [1985] 1 Ch 85 suggests that severance is automatic. Laffoy J also noted that the English case law cited post-dated the enactment of the UK *Forfeiture Act 1982*, discussed at paragraph 3.02, below, which empowers a court to modify the application of the forfeiture rule in cases where a person has unlawfully killed another except where he or she has been convicted of murder.

[20] "Title" is the ownership rights which a person has in property. "Legal title" is the actual ownership of the property whereas "equitable title" is the right to obtain ownership where another person holds the legal title. When the legal title to a property has been acquired by unlawful conduct, the court may impose a trust, known as a constructive trust, to benefit the person who has been wrongfully deprived of his or her rights in the property. The primary purpose of a constructive trust is to prevent the unjust enrichment of the wrongdoer. In *Cawley v Lillis*, the legal title to the assets held by the defendant and the deceased under a joint tenancy passed by survivorship to the defendant on the death of the deceased. However, in order to prevent the defendant from benefitting from his unlawful conduct, the Court imposed a constructive trust so that he held the deceased's share on behalf of the victim's estate.

[21] Laffoy J referred to the following case law and texts from these jurisdictions. From Australia, *Rasmanis v Jurewitsch* (1979) 70 SR (NSW) 407; from Canada, *Schobelt v Barber* (1966) 60 DLR (2d) 519; from New Zealand, *Re Pechar, decd* [1969] NZLR 574; from the United States, *Scott on Trusts* (citing the 1st ed, vol. 3, p.2383 and 2nd ed, para. 493.2. This leading US text was first published in 1939 in 3 volumes, now published by Aspen Publishers in 8 volumes as *Scott and Asher on Trusts*). As discussed further below, section 8(3) of the

Laffoy J concluded that this option provided the most appropriate solution under the law. Thus the family home and other assets that had been held in a joint tenancy accrued to the defendant solely on the date of the deceased's death but the defendant held the deceased's share on a constructive trust for the deceased's estate. Laffoy J considered "that outcome, viewed objectively at that time, could not be regarded as conferring a benefit on the defendant as a result of the crime he committed"[22] and was consistent with the principle that a person may not benefit from their wrongdoing.

Judgment in Cawley v Lillis suggested need to review right of survivorship and scope of section 120 of Succession Act 1965

At the end of her judgment in the case, Laffoy J commented that "ideally, there should be legislation in place which prescribes the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner."[23] Any solution would have to be compatible with the property rights in Articles 40.3 and 43.2 of the Constitution under which the exercise of the rights to private property, including the general right to inherit property, may be "regulated by the principles of social justice"[24] and delimited with a view to reconciling their exercise with "the exigencies of the common good."[25] Laffoy J also said that such legislation should have regard to two other matters: the changes to co-ownership of land made by sections 30 and 31 of the *Land and Conveyancing Law Reform Act 2009* (which came into force after the events in the case);[26] and, from a policy perspective, the complications that may arise where there are three or more joint tenants.[27]

Admissibility of criminal convictions in civil proceedings

The question whether evidence from a criminal trial should be admitted in a related civil case was discussed by the High Court in *Nevin v Nevin*.[28] The defendant had been convicted of the murder of her husband and the appeal of the conviction was refused. The deceased's next of kin (the plaintiff) commenced civil proceedings seeking declarations that the defendant was precluded both at common law and by virtue of section 120 of the *Succession Act 1965* from taking any share in her husband's estate. In this context, the Court was asked to consider the admissibility in the civil proceedings of the evidence of the defendant's trial and conviction.

New Zealand *Succession (Homicide) Act 2007* now provides that "property that is owned in joint tenancy by the victim, the victim's killer and any other person (if any) devolves at the death of the victim as if the property were owned by each of them as tenants in common in equal shares."

[22] [2011] IEHC 515, [2012] 1 IR 281 at 300.

[23] [2011] IEHC 515, [2012] 1 IR 281 at 303.

[24] Article 43.2.1°.

[25] Article 43.2.2°.

[26] Section 30 of the 2009 Act prohibits the unilateral severance of a joint tenancy by one or more joint tenants without the consent of the other joint tenants unless a court order has been obtained dispensing with consent. Section 31 empowers the courts to make a wide range of orders in relation to co-owned property including, for example, orders for partition and for sale and division of the proceeds of sale. An application for such orders can be made by any person having an estate or interest in co-owned land.

[27] [2011] IEHC 515, [2012] 1 IR 281 at 303.

[28] [2013] IEHC 80; [2013] 2 ILRM 427.

The plaintiff submitted that the Court should follow the law as set out in *In re Estate of Crippen decd*[29] in which the English Court of Appeal held that a criminal conviction is admissible in evidence as proof of the conviction and also as presumptive proof of the commission of the crime. However the defendant contended that the Court should follow the rule established by the Court of Appeal in *Hollington v F. Hewthorn & Co. Ltd*[30] which provides that a criminal conviction following trial is not admissible in civil proceedings as evidence of the material facts upon which the conviction is based.

In his judgment, Kearns P first addressed an anomaly in section 120 of the *Succession Act 1965*. Section 120(1) of the 1965 Act provides that for the forfeiture rule to apply, a person must have "been **guilty** of the murder, attempted murder or manslaughter..." whereas section 120(4) applies to a person who has "been **found guilty** of an offence against the deceased, or against the spouse or civil partner or any child of the deceased..." (emphasis added).[31] The Court concluded that, as the wording of section 120(1) gives rise to uncertainty as to whether a criminal conviction is required for the section to apply, it must be subject to the rules of strict construction in favour of the defendant, being the person against whom it was sought to enforce it. In relation to the admissibility of criminal convictions in civil proceedings, Kearns P concluded that, following the judgment in *In re Estate of Crippen decd*[32], the defendant's conviction for her husband's murder was admissible in the civil proceedings as *prima facie* evidence of the fact that she committed the murder.

Kearns P stated that a suitable amendment to s. 120(1) of the *Succession Act 1965* to address the anomaly which arose in the case would be of considerable assistance.

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[29] [1911] P 108.

[30] [1943] KB 587.

[31] Section 120(4) provides that "a person who has been found guilty of an offence against the deceased, or against the spouse or civil partner or any child of the deceased (including a child adopted under the Adoption Acts, 1952 and 1964, and a person to whom the deceased was in loco parentis at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117."

[32] [1911] P 108.

ISSUE 1: REFORM OF SECTION 120 OF THE *SUCCESSION ACT 1965* AS IT APPLIES TO PROPERTY HELD IN A JOINT TENANCY

Killer treated as having pre-deceased victim

1.01 One of the issues for determination in *Cawley v Lillis*[33] was whether, as contended on behalf of the plaintiffs, the entirety of the joint assets form part of the estate of the deceased so that the unlawful killer has no interest in or entitlement to them. The defendant submitted that he had vested rights in the joint assets subject to the operation of the right of survivorship, which depended on which of the joint tenants died first. He contended that those rights were property rights which enjoyed the protection of Article 40 of the Constitution.

1.02 Property rights are protected by two provisions of the Constitution. Article 40.3.2° states that "the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the ... property rights of every citizen." Article 43.1.2° provides that the State "guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property." However, Article 43.2.1° acknowledges that these rights ought to be regulated by the principles of social justice. Therefore, the State may enact laws limiting property rights where it is in the interests of the common good to do so.[34] In her judgment in *Cawley v Lillis* Laffoy J stated that it would not be appropriate for the Court to express a view on whether legislation which would have the effect that the defendant would forfeit his pre-existing property rights would be justified having regard to social justice and the exigencies of the common good.[35]

1.03 Property in a joint tenancy is lawfully held by an unlawful killer and any forfeiture of the unlawful killer's property rights must be reconcilable with the exigencies of the common good in accordance with Article 43.2.2° of the Constitution. Legislation which would deprive an unlawful killer of his or her rights in assets held in a joint tenancy can be distinguished from legislation which provides powers of forfeiture where property derives from criminal activity. Whilst such legislation must take into consideration the property rights of citizens, it was noted that "a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use."[36]

1.04 A number of Acts provide powers of forfeiture of property which is the proceeds of crime. Part 2 of the *Criminal Justice Act 1994* empowers the Court to make confiscation orders where it determines that a person convicted of certain drug trafficking offences has benefited from drug trafficking. The *Offences Against the State (Amendment) Act 1985* provides for the forfeiture of moneys held in bank accounts which, in the opinion of the Minister for Justice, are the property of an unlawful organisation. The constitutionality of certain provisions of the Act was challenged in *Clancy v Ireland* in which the plaintiffs contended that they had been wrongly and unconstitutionally deprived of their ownership of their property. The Supreme Court concluded that the Act amounted "to a permissible delimitation of property rights in the interests of the common good."[37] The *Proceeds of Crime Act 1996* provides for the civil forfeiture of property that is the proceeds of crime and has also been the subject of a number

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[33] [2011] IEHC 515, [2012] 1 IR 281.

[34] Article 43.2.2° provides that the State "may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

[35] [2011] IEHC 515, [2012] 1 IR 281 at 301.

[36] *Murphy v GM* [2001] 4 IR 113 at 153.

[37] [1988] IR 326 at 336.

of constitutional challenges. In *Murphy v GM*[38] it was submitted that the Act violated the guarantee of private property under the Constitution. However, the Supreme Court pointed out that the case did not involve a challenge to a valid constitutional right to property as it concerned the right of the State to take property which is proved to derive from criminal activity.

1.05 Any delimitation of property rights must be proportionate.[39] The provision must therefore:

> "(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective."[40]

In *Cox v Ireland*,[41] the Supreme Court stipulated that in imposing forfeiture as a deterrent to the commission of crimes threatening peace, order and State authority, the State must continue to protect the constitutional rights of the citizen.

1.06 The objective of the forfeiture rule is not to punish a killer for his or her crime but to enforce a rule of public policy that a person should not benefit from that crime. The Explanatory Memorandum to the *Succession Bill 1965* explained that section 120(1) "restates the existing rule of public policy which precludes a felon from taking advantage of his crime." Indeed, the Minister for Justice explained during the Oireachtas debates on section 120 that the objective was "to exclude from benefit anyone in respect of whom a conviction exists in regard to murder, attempted murder or manslaughter."[42] Arguably, extending the application of the rule to deprive an unlawful killer of his or her pre-existing rights in the assets held in a joint tenancy would go beyond this objective. It was argued on behalf of the defendant in *Cawley v Lillis* that such a provision amounted to further punishment for the unlawful killing in addition to any criminal sanction already imposed.

Severance of joint tenancy

1.07 In *Cawley v Lillis*[43] Laffoy J also considered whether severance of the joint tenancy occurred on the death of the deceased so that the estate of the deceased and the defendant were

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[38] [2001] 4 IR 113.

[39] Kelly notes that "more recently, discussion of the validity of restrictions on property rights has focussed on whether the means used to implement a justifiable policy can be said to be proportionate." See Hogan and Whyte (eds), *Kelly: The Irish Constitution* 4th ed (LexisNexis, 2003), at paragraph 7.7.58.

[40] *Heaney v Ireland* [1994] 3 IR 593 at 607 (Costello J).

[41] [1992] 2 IR 503. This case involved a constitutional challenge to the validity of section 34 of the O*ffences against the State Act 1939* which provided that State employees convicted by the Special Criminal Court of a scheduled offence would forfeit any pension, superannuation, allowance, or gratuity in respect of service rendered before the date of such conviction. The Supreme Court noted that the operation of section 34 was dependant on the venue of the trial which results in the conviction and that forfeiture applied even if it could be proved that the motive or intention in committing it bore no relation to the maintenance of public peace and order or the authority or stability of the State. The Court therefore concluded that "notwithstanding the fundamental interests of the State which the section seeks to protect, the provisions of s. 34 of the Act of 1939 fail as far as practicable to protect the constitutional rights of the citizen and are, accordingly, impermissibly wide and indiscriminate." ([1992] 2 IR 503 at 524).

[42] Vol 60 No. 3 Dáil Éireann Debates (4 November 1965).

[43] [2011] IEHC 515, [2012] 1 IR 281.

equally entitled to the joint assets. However, she confirmed that having regard to the common law concerning joint tenancies which applied prior to 2009 it was not possible to conclude that the legal estate in the joint tenancy was automatically severed on death.

1.08 In a joint tenancy the co-owners share ownership of the property and have the undivided right to keep or dispose of it. The primary purpose of a joint tenancy is that when one joint tenant dies his or her undivided share in the jointly held assets automatically passes to the surviving joint tenant(s). In the event of severance, the joint tenancy is converted into a tenancy in common so that each of the co-owners has a separate and distinct share in the property and the right of survivorship no longer applies. Because each tenant in common has a distinct share which he or she is free to transfer during his or her lifetime or on death as he or she sees fit, the other tenants in common do not enjoy any right of survivorship.

1.09 If severance of the joint tenancy is deemed to occur on the unlawful killing of one joint tenant by the other, the joint tenancy is converted into a tenancy in common and each owner owns a distinct share in the property. As the right of survivorship does not apply, the unlawful killer will not automatically succeed to his or her victim's share. The deceased's share is distributed in accordance with the terms of his or her will, or in accordance with the rules of intestacy in the event that he or she died intestate. This approach has been adopted in New Zealand and the United Kingdom. In *In re K decd*[44] Vinelott J confirmed that it was rightly conceded that the forfeiture rule unless modified under the *Forfeiture Act 1982* applied in effect to sever the joint tenancy. This approach was followed by the Court of Appeal in *Dunbar v Plant*[45] and by the High Court in *Chadwick v Collinson.*[46] The leading English text *Megarry and Wade* include homicide in their list of five ways in which a joint tenancy may be severed in equity.[47] However, as quoted by Laffoy J they also state that "it has not been conclusively settled in England whether the application of the rule causes the automatic severance of the joint tenancy or whether a constructive trust is imposed to prevent the killer from obtaining any benefit from his crime." In a footnote to this statement, they note that the remarks in *Re K decd*[48] suggests that severance is automatic.

1.10 In relation to the unilateral severance of a joint tenancy the Commission has noted that "with a joint tenancy, each interest is subject to the right of survivorship and each joint tenant has the chance of ultimately ending up with the entire property. It seems unjust that a joint tenant may be deprived of this chance by the unilateral actions of a fellow joint tenant."[49] Severance of a joint tenancy in the event of one joint tenant killing the other is tantamount to a unilateral severance of the joint tenancy by the killer which overrides "the chance that the victim had of surviving the killer and becoming (if there are only two joint tenants) the sole owner."[50] Whilst the New Zealand Law Commission recommended that the killer be treated as having predeceased the victim, it was noted that under New Zealand law this might allow a joint

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[44] [1985] Ch 85.

[45] [1998] Ch 412.

[46] [2014] EWHC 3055 (Ch).

[47] *Megarry and Wade's Law of Real Property* 7th ed (Sweet & Maxwell, 2008), para.13-049.

[48] [1985] 1 Ch 85.

[49] Law Reform Commission, *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other proposals* (LRC 70-2003), p.53.

[50] New Zealand Law Commission; *Succession Law: Homicidal Heirs,* Report 38 (July 1997), p.13. See also Victorian Law Reform Commission; *The Forfeiture Rule*, Consultation Paper (March 2014), p.43.

tenant who killed his or her spouse and had therefore lost his or her interest in the assets held in a joint tenancy, to reclaim an interest under the *Property (Relationships) Act 1976*.[51] Section 8(3) of the New Zealand *Succession (Homicide) Act 2007* therefore provides that "property that is owned in joint tenancy by the victim, the victim's killer and any other person (if any) devolves at the death of the victim as if the property were owned by each of them as tenants in common in equal shares."

Property held on constructive trust

1.11 The approach preferred by Laffoy J in *Cawley v Lillis*[52] was to vest the legal title in the assets held in a joint tenancy in the defendant through the right of survivorship with one half share to be held by him on a constructive trust for the estate of the deceased.

1.12 A constructive trust is an equitable remedy whereby the court imposes a trust to benefit a party who has been deprived of his or her rights due to the wrongful conduct of another. The primary purpose of a constructive trust is to prevent the unjust enrichment of the wrongdoer. In the case of the unlawful killing of one joint tenant by another, because of the right of survivorship the unlawful killer succeeds to his or her victim's interest in the property held in a joint tenancy as a result of his or her wrongdoing. In order to remedy this, and to prevent the unjust enrichment of the killer, the Court imposed a constructive trust in favour of the deceased's estate. As explained by Jacobs J in *Re Thorp & the Real Property Act 1900*[53] and approved by Laffoy J in *Cawley v Lillis* "it is best to leave the legal devolution of title untouched and to hold that the principle of public policy should be enforced by medium of the trust." However, in so doing, he observed that "this is not altogether a satisfactory or logical conclusion because it relegates the enforcement of the principle of public policy to the realm of equity and does not introduce it into the common law from which it sprang." This approach has been adopted in Canada and Australia.[54]

1.13 Laffoy J noted that the beneficiary, the daughter of the defendant and the deceased, wanted to bring finality to the issues which had arisen in relation to the joint assets. She observed that if agreement could not be reached between the parties on how best to achieve this objective, it was open to the courts on the application of the personal representatives to make orders granting various reliefs under section 31 of the *Land and Conveyancing Law Reform Act 2009*.[55] These include an order for partition of the land, an order for sale of the land and distribution of the proceeds of sale as the court directs, or such other order as appears to the court to be just and equitable in the circumstances of the case.

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[51] This issue does not arise in Ireland as section 120(1) of the *Succession Act 1965* bars a claim to the legal right share in the estate of the victim.

[52] [2011] IEHC 515, [2012] 1 IR 281.

[53] See *Re Thorp & the Real Property Act 1900* [1962] NSWR 889; and *Cawley v Lillis* [2011] IEHC 515, [2012] 1 IR 281 at 298.

[54] Laffoy J referred to the following case law and texts from these jurisdictions. From Australia, *Rasmanis v Jurewitsch* (1979) 70 SR (NSW) 407; from Canada, *Schobelt v Barber* (1966) 60 DLR (2d) 519.

[55] Section 31 of the *Land and Conveyancing Law Reform Act 2009* entitles persons having an estates or interest in land which is co-owned, either at law or in equity, to apply to court for certain orders. For the purpose of the section, "a person having an estate or interest in land" includes a trustee.

Multiple joint tenants

1.14 Laffoy J drew attention to the issue of what should happen when there are three or more joint tenants. She stated that any legislation enacted to prescribe the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner would "have to address from a policy perspective the complications which arise in a situation where there are three or more co-owners."[56]

1.15 The concern where there are two or more joint tenants is not only to prevent the killer from acquiring the deceased's share of the property but also to ensure that the killer does not receive part of the deceased's share in the future on the death of any other innocent joint tenants in whom the deceased's share has vested. For example, where there are three joint tenants, if an innocent joint tenant acquires an interest in the share of the victim of an unlawful killing and dies before the killer, the killer will succeed to that innocent joint tenant's interest which will include that part of the victim's interest which had earlier devolved by survivorship to the innocent joint tenant. One way to prevent this would be to treat the joint tenancy as severed on the death of the victim. In the example above the killer, the innocent joint tenant and the victim's estate would each hold a distinct one third share in the property as tenants in common. As the right of survivorship would not apply, the unlawful killer would not succeed to the victim's share either on the death of the victim or at any time in the future through the innocent joint owner. However, the severance of the joint tenancy would also be unfavourable to the innocent joint tenant because he or she would be deprived of the possibility of succeeding to both the victim's and the unlawful killer's share if he or she were still alive when the killer died.

1.16 The Commission welcomes views on the question whether the provisions of section 120 of the *Succession Act 1965* should be amended in order to prescribe the destination of property held in a joint tenancy in the event of the killing of one joint tenant by another. The potential amendments are:

(i) to deem the unlawful killer to have pre-deceased the deceased whereby the entire interest in the property passes to the deceased's estate;
(ii) to apply the right of survivorship under which the legal title to the property passes to the unlawful killer with one half share to be held by him on a constructive trust for the estate of the deceased;
(iii) to deem the joint tenancy as severed so that the unlawful killer and the deceased owns a distinct share in the property.

The question however arises as to whether, in light of the provisions of the *Land and Conveyancing Reform Act 2009*, there is a practical distinction between the constructive trust and deemed severance options. The Commission is therefore seeking views in relation to the following questions:

[56] [2011] IEHC 515, [2012] 1 IR 281 at 303.

Question 1:

1(a) **Should the provisions on unworthiness to succeed in section 120 of the *Succession Act 1965* be amended so that they apply to property held in a joint tenancy thereby precluding an unlawful killer from succeeding to the entire interest in the property held under a joint tenancy?**

1(b) **Should legislation be enacted to provide that an unlawful killer be allowed to retain his or her existing interest in the property? If so, should:**
(i) the legal title pass to the unlawful killer to hold the victim's interest on constructive trust for the benefit of the victim's estate as per the conclusion reached in *Cawley v Lillis*; or
(ii) the joint tenancy be treated as severed so that it is held by the unlawful killer and the victim's estate as tenants in common?

1(c) **What should happen to the victim's share where there are more than two joint tenants?**

Type your comments if any

ISSUE 2: WHETHER SECTION 120 OF THE *SUCCESSION ACT 1965* SHOULD BE EXTENDED BEYOND MURDER, ATTEMPTED MURDER AND MANSLAUGTER

2.01 The exclusion from inheritance in section 120(1) of the *Succession Act 1965* applies to a sane person who has been guilty of the murder, attempted murder or manslaughter of his or her victim, except in relation to a share arising under a will made after the act constituting the offence. During the Oireachtas debates on the 1965 Act, the Minister for Justice explained that "this follows the existing law and is based on grounds of public policy."[57]

2.02 The question arises whether section 120 should be extended to other forms of homicide. This was discussed during the Oireachtas debates on the *Succession Bill 1965* when concern was expressed that under the Bill, as originally drafted, dangerous driving causing death could come within the scope of the forfeiture rule because it was provided that it applied to "felonious killing". The Minister for Justice noted that the original wording of section 120 had been replaced to remove the reference to felonious killing which he stated was to "make sure that that section debarring people benefitting in that fashion applied only to murder, attempted murder or manslaughter. Dangerous driving causing a fatality is excluded and in that case the person can benefit under the will of the deceased."[58]

2.03 The *Forfeiture Act 1870* abolished the common law doctrines of attainder, corruption of blood and escheat under which a person convicted of a felony forfeited all property to the Crown.[59] After 1870 the English courts developed the common law forfeiture rule which was codified in the *Succession Act 1965* but remains a common law rule in England. In *Cleaver v Mutual Reserve Fund Life Association*,[60] which involved a murder, the English Court of Appeal held that it could not contemplate enforcing rights where these arose directly from the commission of the murder.[61] This was applied in *In re Estate of Crippen decd*[62] in which the court held that "it is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights."[63] The application of the forfeiture rule to manslaughter was confirmed by the English Court of Appeal in *In re the Estate of Hall*[64] where the sole beneficiary named in the

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[57] Vol. 60 No. 3 Seanad Éireann Debates (4 November 1965), available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad1965110400004?opendocument.

[58] See Vol 215 No. 14 Seanad Éireann Debates (25 May 1965), available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1965052500068?opendocument.

[59] Under the doctrine of attainder, the civil rights of criminals guilty of committing a felony or treason were extinguished, including the right to own property and to pass property by will or testament. Therefore, the effect of attainder was that all property, both real and personal, was forfeited to the Crown. Corruption of blood is a consequence of attainder in that the attainted person lost all rights to inherit property, to retain possession of such property and to transfer any property rights to anyone, including heirs. Escheat occurs where the owner of property has committed a felony or treason and as a result forfeits his/her right to hold the property.

[60] [1891] 1 QB 147. The case involved an action taken by the executors of the estate of the deceased who had taken out a life insurance policy on his own life for the benefit of his wife. His wife subsequently murdered him. The Court held that, whilst the trust created by the policy in favour of the wife could not be performed because she had murdered her husband, the insurance money nonetheless formed part of the estate of the deceased.

[61] [1891] 1 QB 147 at 156.

[62] [1911] P 108.

[63] [1911] P 108 at 112.

[64] [1914] P 1.

will of the deceased had been convicted of his manslaughter. It was argued that the case should be distinguished from *Cleaver* which involved murder, but the Court held that no distinction should be drawn "between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter."[65]

2.04 Because the forfeiture rule remains a common law rule in England, the issue as to whether the courts have a discretion to apply the forfeiture rule in cases of manslaughter, being a crime "which varies infinitely in its seriousness",[66] was discussed in *Gray v Barr*.[67] In the High Court, Geoffrey Lane J concluded that in deciding whether the forfeiture rule applied "the logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity."[68] He cited the decision in *In re the Estate of Hall*[69] in support of this view. On appeal to the Court of Appeal this approach was approved by Lord Denning MR. The extent of the forfeiture rule has also been considered in a number of subsequent English cases including cases of diminished responsibility, suicide pacts and gross negligence manslaughter.[70]

2.05 In New Zealand, section 7 of the *Succession (Homicide) Act 2007* precludes a killer from succeeding to any interest in property arising under the will of his or her victim, or on intestacy. For the purposes of the 2007 Act, "killer" is defined as "a person who kills a person or a child who has not become a person in any manner and in any circumstances that the person is guilty, either alone or with another person or persons, of the homicide of the person or child who has not become a person or would be so guilty if the killing had been done in New Zealand." Section 4 of the 2007 Act defines "homicide" as "the killing of a person or a child who has not become a person, by another person, intentionally or recklessly by any means that would be an offence under New Zealand law, whether done in New Zealand or elsewhere, but does not include: (a) a killing caused by negligent act or omission; or (b) infanticide...; or (c) a killing of a person by another in pursuance of a suicide pact; or (d) an assisted suicide."

2.06 The Commission seeks views on whether the provisions on unworthiness to succeed in section 120 of the *Succession Act 1965* should be applied to types of unlawful killing other than murder, attempted murder and manslaughter such as infanticide or dangerous driving causing death. Arguably, a person who aids, abets, counsels or procures the killing of another is morally as culpable as the killer. Thus, section 7(1) of the *Criminal Law Act 1997* provides that "any person who aids, abets, counsels or procures the commission of an

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[65] [1914] P 1 at 7.

[66] [1970] 2 QB 554 at 581 (Salmon LJ).

[67] [1970] 2 QB 554. The defendant had used a shotgun to threaten a man and the gun had accidentally gone off killing him. He was acquitted on charges of murder and manslaughter. The plaintiffs, the father and widow of the deceased, brought an action claiming damages on the ground that the death was caused by the defendant's negligence. The defendant claimed an indemnity from the insurers under an insurance policy which indemnified him against all sums which he became legally liable to as damages in respect of bodily injury to any person caused by accidents. The English Court of Appeal upheld the decision of the High Court that, despite the decision of the jury to acquit the defendant, his actions amounted to manslaughter and, therefore, it would be contrary to public policy for him to recover in respect of his liability under a policy of insurance.

[68] [1970] 2 QB 626 at p. 640.

[69] [1914] P 1.

[70] For example, *In re Giles decd* [1972] Ch 544 (diminished responsibility); *Dunbar v Plant* [1998] Ch 412 (suicide pacts); *In re Land decd* [2007] 1 All ER 324 (manslaughter by gross negligent treatment).

indictable offence shall be liable to be indicted, tried and punished as a principal offender." However, the forfeiture rule does not apply to a person convicted under this section. Logic would suggest that section 120(1) should be extended to such a person. The English *Forfeiture Act 1982*[71] and the New South Wales *Forfeiture Act 1995*[72] provide that, for the purpose of those Acts, references to unlawful killing includes aiding, abetting, counselling or procuring such a killing.

Question 2:

Should the provisions on unworthiness to succeed in section 120 of the *Succession Act 1965* be applied to other types of unlawful killing (that is, other than murder, attempted murder and manslaughter)? If so:

(a) which other types of killing should be included in the operation of the rule?

(b) why should these be included?

Type your comments if any

[71] Section 1(2) of the 1982 Act provides that "references in this Act to a person who has unlawfully killed another include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Act to unlawful killing shall be interpreted accordingly."

[72] Section 3 defines "unlawful killing" as "(a) any homicide committed in the State that is an offence, and (b) any homicide that would be an offence if committed within the State, and includes aiding, abetting, counselling or procuring such a homicide and unlawfully aiding, abetting, counselling or procuring a suicide."

ISSUE 3: THE POSSIBILITY OF GRANTING THE COURTS POWER TO MODIFY THE EFFECT OF THE FORFEITURE RULE

3.01 Homicides have differing degrees of moral culpability. The forfeiture rule has the potential to operate very harshly against a convicted person when the conviction is for manslaughter - a crime in relation to which the gravity and moral culpability of the offender vary enormously. To address this, some jurisdictions have enacted legislation to allow the courts the discretion to modify the effect of the forfeiture rule in cases other than murder.[73]

3.02 The English *Forfeiture Act 1982* grants the court the power to make an order modifying the effect of the forfeiture rule. Before making such an order, the court must be satisfied that "having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case."[74] The courts have modified the effect of the rule in a number of cases including:

- In 1986, the court modified the effect of the forfeiture rule where the killer had suffered violence at the hands of the victim and the death resulted from the accidental discharge of a shotgun in response to that violence.[75]

- In 1996, the court modified the effect of the forfeiture rule where the killer was convicted of the manslaughter of his wife on grounds of diminished responsibility. The plaintiff sought an order for modification of the forfeiture rule to put in trust for his son the proceeds of a joint life insurance endowment policy. It was conceded that such was the deliberate nature of the plaintiffs violent attack on his wife, that the forfeiture rule applied so as to disentitle him from any benefit under the policy. However, the Court held that it was appropriate to grant his application to modify the rule as his responsibility for the crime was substantially impaired by abnormality of mind and the order sought would benefit his son rather than the killer himself.[76]

- In 1998, the effect of the forfeiture rule was modified where there was a failed suicide pact. In granting an order modifying the effect of the rule, the Court noted that it is "entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule."[77]

3.03 The 1982 Act has been the subject of some criticism, particularly due to the uncertainty which has resulted from the lack of guidance as to the principles to be applied in determining when

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[73] For example: *Forfeiture Act 1982* (United Kingdom); *Forfeiture Act 1991* (Australian Capital Territory); *Forfeiture Act 1995* (New South Wales).

[74] s. 2(2) of the *Forfeiture Act 1982.*

[75] *Re K (Deceased)* [1986] Ch. 180.

[76] *In re S Deceased* [1996] 1 W.L.R. 235.

[77] *Dunbar v Plant* [1998] Ch. 412.

the justice of the case requires the rule to be modified. It has been noted that it is possible "to postulate cases in which relevant considerations point in different directions" and that "it is difficult to attain precision in formulating principles which would enable confident predictions to be made about the extent to which a degree of moral culpability will be allowed to affect the outcome."[78] It was therefore suggested that "more extensive guidance - perhaps on the pattern of the *Inheritance (Provision for Family and Dependants) Act 1975* - would be found helpful by courts and others concerned."[79]

3.04 The *Forfeiture Act 1995* was enacted in New South Wales to provide relief where appropriate from unduly harsh application of the forfeiture rule.[80] In introducing the Bill, the NSW Attorney General noted that "the operation of the rule may be unduly harsh in some cases of unlawful killing, because the rule may operate regardless of the killer's motive or degree of moral guilt."[81] He explained that "the proposed legislation recognises that there are varying degrees of moral culpability in unlawful killings, and legislation is necessary to give judges sufficient discretion to make orders in deserving cases in the interests of justice."[82] Section 5 of the 1995 Act provides that "if a person has unlawfully killed[83] another person and is thereby precluded by the forfeiture rule from obtaining a benefit, an interested person may make an application to the Supreme Court for an order modifying the effect of the rule"[84] and that "on any such application, the Court may make an order modifying the effect of the forfeiture rule if it is satisfied that justice requires the effect of the rule to be modified."[85] In determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the conduct of the offender and the deceased person, the effect of the application of the rule on the offender or any other person, and such other matters as appear to the Court to be material.[86] The application for an order modifying the effect of the forfeiture rule can be made

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[78] Cretney, "The Forfeiture Act 1982: the Private Member's Bill as an Instrument of Law Reform" (1990) 10 OJLS 289, p.303.

[79] The UK *Inheritance (Provision for Family and Dependants) Act 1975* empowers courts to grant orders for the allowance out of the estate of a deceased person of provision for the spouse, former spouse, child, child of the family or dependant of that person in cases where the deceased's will or the rules of intestacy fail to make reasonable financial provision. Section 3(1) of the 1975 Act sets out the matters which the Court must consider in determining whether to exercise its powers under the Act. These include, for example, the financial resources and financial needs which any beneficiary, the applicant and any other applicant for financial provision has or is likely to have in the foreseeable future; any obligations and responsibilities which the deceased had towards any applicant for financial provision or towards any beneficiary; the size and nature of the net estate; any physical or mental disability of any applicant for an order for financial provision or any beneficiary; and any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant. Further matters for consideration are listed in sections 3(2) to (4) of the 1975 Act, depending on the nature of the relationship between the deceased person and the applicant for financial provision.

[80] The 1995 Act was enacted following the decision in *Troja v Troja* (1994) 33 NSWLR 269 in which the majority of the NSW Court of Appeal held that the application of the rule at common law was not discretionary, but was an inflexible rule of law that the courts had to apply regardless of the circumstances of the case.

[81] New South Wales, Parliamentary Debates, Legislative Council (25 October 1995).

[82] *Ibid.*

[83] Section 4(2) excludes the application of the Act to unlawful killings that constitute murder.

[84] Section 6(1) of the NSW *Forfeiture Act 1995*.

[85] Section 5(2) of the NSW *Forfeiture Act 1995*.

[86] Section 5(3) of the NSW *Forfeiture Act 1995*.

not only by the unlawful killer but by any "interested party".[87] The 1995 Act grants the court the power to make a forfeiture modification order in such terms and subject to such conditions as the Court thinks fit. By way of example, the 1995 Act provides that "in the case of more than one interest in the same property (for instance, a joint tenancy) affected by the rule - by excluding the operation of the rule in relation to any or all of the interests..."[88] The effect of the forfeiture rule has been modified by the court in cases such as:

- In 2002, the court modified the rule where the Crown had accepted a plea of guilty by the plaintiff to the manslaughter of his spouse on the ground that he had available to him a partial defence of diminished responsibility.[89]

- In 2003, the courts granted an order modifying the effect of the forfeiture rule where the killer was convicted of dangerous driving causing the death of his spouse.[90]

3.05 In New Zealand, the *Succession (Homicide) Act 2007* was enacted following a review of the forfeiture rule by the New Zealand Law Commission in 1997 in which it recommended codification of the rule. Whilst the Act does not provide for modification of the effect of the forfeiture rule, it does exclude certain forms of unlawful killing from the definition of homicide for the purposes of the Act, thus excluding the application of the forfeiture rule from persons guilty of such crimes.[91] Despite these exclusions, concerns were raised in the parliamentary debates that "the proposed codification of the law did not take sufficient account of the differing degrees of moral culpability."[92] In response to a proposal that this could be resolved by providing the court with discretion in exceptional circumstances when the interests of justice and fairness so required, the Associate Minister of Justice noted that "other jurisdictions have struggled with the concept. In their view, the question of whether a killing was sufficiently abhorrent to trigger the bar of profiting was better decided by Parliament."[93] He further explained that "a key concern of the bill is to create greater certainty, and it could be argued that having a discretion would actually reduce certainty and that more cases would end up in courts."

3.06 The exclusion from inheritance provided in section 120(1) of the *Succession Act 1965* applies to a sane person who has been guilty of the murder, attempted murder or manslaughter of

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[87] An "interested person" for the purposes of applications for forfeiture modification orders under the Act includes the unlawful killer; the executor or administrator of the estate of the deceased person; a beneficiary under the will of the deceased person or a person who is entitled to any estate of interest on the intestacy of the deceased person, a person claiming through the unlawful killer; and any other person who has a special interest in the outcome of an application for a modification order.

[88] Section 6(2)(a) of the NSW *Forfeiture Act 1995.*

[89] *Jans v Public Trustee* [2002] NSWSC 628. In this case, the beneficiaries under the victim's will (the three children of the killer and his victim) who would succeed to her estate in the event that the application to modify the rule was denied, consented to the order modifying the effect of the rule.

[90] *Straede v Eastwood & Anor* [2003] NSWSC 280.

[91] Section 4(1) of the New Zealand *Succession (Homicide) Act 2007* provides that the forms of unlawful killing excluded are: a killing caused by negligent act or omission; infanticide under section 178 of the NZ *Crimes Act 1961*; a killing of a person by another in pursuance of a suicide pact; and an assisted suicide.

[92] New Zealand, Parliamentary Debates (Hansard), House of Representatives (12 June 2007), Kate Wilkington.

[93] New Zealand, Parliamentary Debates (Hansard), House of Representatives (12 June 2007), Hon Clayton Cosgrove (Associate Minister of Justice).

their victim, except in relation to a share arising under a will made after the act constituting the offence. Thus the rule does not apply to those found not guilty by reason of insanity pursuant to section 5 of the *Criminal Law (Insanity) Act 2006* and those found not guilty of unlawful killing by reason of insanity can benefit from the estate of their victim. In 2005, the New South Wales legislature amended the *Forfeiture Act 1995* to grant further powers to the court to apply the forfeiture rule to killers found not guilty of murder by reason of mental illness where it would not be just for them to inherit from their victim's estate.[94] In determining whether justice requires the rule to be applied in such circumstances, the Court must consider the conduct of the offender and the deceased, the effect of the application of the rule on the offender or any other person and such other matters as appear material.[95] The Court has granted "forfeiture application orders" under these provisions in a number of cases where the killer had been found guilty of murder by reason of mental illness:

- In 2007, the Court applied the forfeiture rule in a case where the deceased was killed when she was attacked with a knife by her husband and son. Her daughter took part in the attack but did not inflict any wounds upon her mother. The attackers were charged with murder but were found not guilty by reason of mental illness. The Court ordered that the forfeiture rule apply to preclude all three from succeeding to the estate of the deceased.[96]
- In 2013, the Court applied the forfeiture rule in a case in which the defendant was found not guilty by reason of mental illness where he had killed his partner in an episode of domestic violence.[97]

3.07 Section 120(1) of the *Succession Act 1965* bars an unlawful killer from making an application for "just provision" pursuant to section 117.[98] The question therefore arises whether, in the event that the courts are granted the discretion to modify the effect of the forfeiture rule, this discretion should extend to permitting an unlawful killer who has killed his or her parent to make an application under section 117 for a share in the estate of that parent.

3.08 The Commission seeks views on whether legislation should be enacted empowering the Courts the discretion to modify the effect of the forfeiture rule.

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[94] See Part 3 of the NSW *Forfeiture Act 1995* (inserted by section 6 of the *Confiscation of Proceeds of Crime Amendment Act 2005*).

[95] Section 11(3) of the NSW *Forfeiture Act 1995*.

[96] *Fitter v Public Trustee and Ors* [2007] NSWSC 1487.

[97] *Hill (Burrowes) v Hill* [2013] NSWSC 524.

[98] Section 117 of the 1965 Act allows a child to seek a share of his or her deceased parent's estate if it can be established that the parent did not make "proper provision" for the child in accordance with his or her means, whether by will or otherwise.

Question 3:

3(a): Should the Courts be given a discretion to modify the effect of the forfeiture rule in cases other than murder? If so,
(i) in what circumstances should the discretion apply?
(ii) what factors should be taken into account in exercising the discretion?
(iii) if there is to be a discretion is it to be exercised on identified grounds?

3(b): Should the courts be empowered to apply the forfeiture rule to those found not guilty by reason of insanity where it would not be just for them to inherit?
If so, what factors should be taken into account?

3(c): Should the power to modify the effect of the forfeiture rule include the power to allow an unlawful killer to make an application under section 117?

Type your comments if any

ISSUE 4: THE EXTENSION OF THE FORFEITURE RULE TO BAR APPLICATONS UNDER SECTION 67A(3) OF THE SUCCESSION ACT 1965

4.01 Section 120(1) of the *Succession Act 1965* bars an unlawful killer from making an application for "just provision" pursuant to section 117. Section 67A(3) of the 1965 Act, as inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, allows the child of a person in a civil partnership who has died intestate leaving a civil partner and one or more children to apply for a greater share in the estate than he or she would otherwise be entitled.

4.02 As both of these applications provide for an application for a share in the estate of a deceased parent, the absence of a reference in section 120(1) prohibiting an application under section 67A(3) is anomalous. The Commission is seeking views in relation to the following question:

Question 4:

Should the forfeiture rule which prohibits an unlawful killer from applying for a share of the victim's estate under section 117 be extended to prohibit an unlawful killer from applying for provision out of the victim's estate under section 67A(3) of the *Succession Act 1965*?

Type your comments if any

ISSUE 5: THE POSSIBLE REVIEW OF SECTION 120(4) OF THE SUCCESSION ACT 1965

5.01 Section 120(4) of the *Succession Act 1965* provides:

> "A person who has been found guilty of an offence against the deceased, or against the spouse or civil partner or any child of the deceased (including a child adopted under the Adoption Acts, 1952 and 1964, and a person to whom the deceased was *in loco parentis* at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117."[99]

A number of issues arise in relation to this provision.

5.02 For the provision to apply, it suffices if the offence is punishable by a sentence of two years imprisonment or more – it is not necessary for the offence actually to be punished by two years imprisonment or more. Thus, the application of the provision has the potential to have excessively harsh consequences where a court decides to impose only a lenient sentence. For example, if a person is convicted of assault causing harm of a sibling (punishable by imprisonment for a maximum period of at least two years) but is sentenced to a fine or short term of imprisonment, he or she is forever barred from making an application pursuant to section 117. Similarly, if a spouse assaults his or her child causing harm but is given a short or suspended sentence or only fined, he or she is forever barred from taking his/her legal right share in the other spouse's estate. In this respect, it contrasts with section 8 of the *Juries Act 1976*[100] where disqualification from jury service depends on the punishment actually imposed and not the maximum to which the person might have been liable.

5.03 The provision also raises an issue with regard to prosecutorial discretion. Violent conduct towards another person might lead to a prosecution for an offence contrary to section 2 (assault) or section 3 (assault causing harm) of the *Non-Fatal Offences Against the Person Act 1997*. There can often be a fine dividing line between the two. Yet, a conviction for an offence under section 2 would not engage section 120(4) but a conviction for a section 3 offence would.

5.04 Furthermore, the section applies where a person has been found guilty of any offence against the deceased (or against the spouse or civil partner or any child of the deceased) and not just a violent offence. It could, for example, be an offence under the *Criminal Justice (Theft and Fraud Offences) Act 2001*. Virtually all offences under that Act carry maximum sentences of two years' imprisonment or more, following conviction on indictment. It seems that the scope of the section could include injuries inflicted as a result of driving offences, for example, driving without due care and attention.[101] This offence carries a maximum penalty of a Class

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[99] Section 120(4) as initially drafted in the *Succession Bill 1965* included a bar on succeeding to a share in the estate on intestacy. During the Oireachtas debates on the 1965 Bill, concerns were expressed on the possible harsh consequences of the provision, particularly on surviving spouses, as a result of which the section as enacted excludes a share in the estate on intestacy.

[100] Section 8 of the *Juries Act 1976* provides, *inter alia*, that a person is disqualified from jury service if on conviction for an offence he or she: (a) has been sentenced to imprisonment for life or for a term of 5 years or more or (b) at any time in the last ten years served any part of a sentence of imprisonment of at least three months. In Chapter 6 of its *Report on Jury Service* (LRC 107-2013), the Commission recommended that a sentence-related approach to disqualification should be retained, but that this should be complemented by providing that disqualification would also apply to conviction for certain designated offences regardless of the sentence imposed.

[101] Section 52 of the *Road Traffic Act 1961*, as inserted by the *Road Traffic (No.2) Act 2011*, provides that a person shall not drive a vehicle in a public place without due care and attention.

A fine but if it results in death or serious bodily harm to another it carries a prison sentence of up to two years imprisonment and/or a fine thereby bringing the offence within the scope of section 120(4) of the 1965 Act.

5.05 In so far as section 117 applications are concerned, relief is discretionary[102] which means that the court can take account of the applicant's past behaviour towards the deceased.[103] In deciding whether to grant relief, the courts have generally adopted a two-stage process. Firstly, the court decides whether the testator has failed in his or her moral duty to make proper provision for the applicant. In *XC v RT*[104] the High Court (Kearns J) confirmed that "there is a high onus of proof placed on an applicant for relief under section 117, which requires the establishment of a positive failure in moral duty."[105] If the applicant overcomes this "relatively high onus to discharge",[106] the court proceeds to assess what provision is to be ordered for the applicant child. In *McDonald v Norris*,[107] the Supreme Court confirmed that the extent to which account should be taken of bad feeling between the parent and the child depends upon the particular circumstances of each case. Barron J. confirmed that the behaviour of the child should be taken into account either to extinguish or to diminish the obligation of the parent. Whilst he noted that "the learned trial judge was appalled by the applicant's conduct towards his father", he confirmed that "however much one may deplore his conduct one cannot ignore the reason for it."[108] He therefore concluded that the applicant's behaviour towards his father diminished the moral obligation of the deceased towards him.

5.06 In light of the foregoing, the Commission is seeking views on whether section 120(4) should be repealed or, in the alternative, if the Courts should be empowered to modify its application.

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[102] Section 117(1) provides that "where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just." In *Re GM, FM v TAM* (1970) 106 ILTR 82, Kenny J set out a number of criteria to assist in the assessment of what constitutes proper provision and, in *XC v RT* [2003] 2 IR 250, the High Court (Kearns J) provided further assistance setting out eighteen relevant legal principles which, it was agreed by counsel, as a result of the authorities which had been cited can be said to be derived under s. 117.

[103] Section 117(2) provides that "the court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

[104] In *XC v RT* [2003] 2 IR 250 Kearns J set out 18 relevant legal principles which it was agreed could be said to be derived from the case law cited on section 117.

[105] *XC v RT* [2003] 2 IR 250 at 262.

[106] *Re IAC* [1990] 2 IR 143 at 148 (Kearns J).

[107] [2000] 1 ILRM 382.

[108] [2000] 1 ILRM 382 at 389.

Question 5:

5(a): Should section 120(4) of the *Succession Act 1965* be repealed?

5(b): If not,
(i) should the section be amended and, if so, what amendments should be made to it?
(ii) should the courts be given the discretion to modify its application and in what circumstances should the modification apply?

Type your comments if any

ISSUE 6: THE NECESSITY OF A CRIMINAL CONVICTION FOR THE APPLICATON OF THE FORFEITURE RULE

6.01 Section 120(1) of the *Succession Act 1965* provides that for the forfeiture rule to apply, a person must have "been **guilty** of the murder, attempted murder or manslaughter..." whereas section 120(4) applies to a person who has "been **found guilty** of an offence against the deceased, or against the spouse or civil partner or any child of the deceased..." (emphasis added).

6.02 Therefore, it is unclear whether a conviction is required before the disqualification on benefit in section 120(1) applies. In *Nevin v Nevin*,[109] Kearns P addressed this anomaly, noting that "it is an extraordinary omission from s. 120(1) for which it is difficult to find any rational explanation, given that a 'finding of guilt' is required under s.120(4) for lesser offences and having regard further to the fact that 'guilt' is a finding appropriate to the criminal rather than the civil process. One is left not knowing what the section is to mean, unless one supplies the word 'found' to subsection (1) where in the text it does not appear."[110] He therefore concluded that "in the circumstances of uncertainty, and given that the section is undoubtedly punitive and conclusive in both nature and effect, its terms must clearly be subject to rules of strict construction in favour of the person against whom it is sought to enforce it."[111] On concluding his judgment, Kearns P noted that a suitable amendment to section 120(1) to address the anomaly would be of considerable assistance.[112]

6.03 The wording of section 120(1) and section 120(4) was also considered by Spierin who noted that "in a previous edition of this book it was suggested that the wording of the section, referring as it does to a person 'who has been guilty' rather than to a person 'who has been found guilty (as in sub-s(4)) does not appear to require a conviction before the disqualification on benefit applies. However the terms 'murder', 'attempted murder' and 'manslaughter' are terms of art in the criminal law and it is perhaps difficult to imagine that a court would apply the disqualification if there is no conviction."[113] During the Oireachtas debates on section 120 the Minister for Justice, addressing a query as to the distinction between "a person who has been found guilty of an offence" and a person who "has been guilty", noted that it might be better to delete the word "found" and that "you can be guilty without being found guilty, and the reverse."[114] However, he subsequently confirmed that he would ascertain "which is better terminology, 'guilty' or 'found guilty', to give expression to the intention which is to exclude

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[109] [2013] IEHC 80; [2013] 2 ILRM 427.

[110] [2013] IEHC 80; [2013] 2 ILRM 427 at 435.

[111] [2013] IEHC 80; [2013] 2 ILRM 427 at 435.

[112] See also Keating "*The Admissibility of Evidence of a Conviction for an Offence in Subsequent Inheritance Proceedings*" (2014) 3 CPLJ 71 in which he concludes that "there is a clear need for amending legislation to rid s.120(1) of the ambiguity identified by Kearns P and to render it certain, determinate and consistent with the other provisions of s.120."

[113] See Spierin, *The Succession Act 1965 and Related Legislation: A Commentary* (3rd ed. Butterworths 2003), p.360 referring to Pearce, *The Succession Act 1965: A Commentary* (2nd ed, 1986), p.292, discussed by Kearns P in *Nevin v Nevin* [2013] IEHC 80; [2013] 2 ILRM 427 at 435.

[114] At Committee Stage in the Seanad, Senator Cole queried the distinction in that the section in the Bill referred to "a person who had been found guilty of an offence" whereas the amendment under discussion referred to "has been guilty"

from benefit anyone in respect of whom a conviction exists in regard to murder, attempted murder or manslaughter."[115]

6.04 The Commission notes, however, that there are instances of unlawful killing where it is not possible to secure a criminal conviction. For example, where an unlawful killer dies prior to conviction or a murder-suicide in which one person kills the other and then kills him or herself. In these instances, if both spouses die intestate without issue, on application of the rules of intestacy the victim's estate will pass to the estate of the killer.[116] As there is no criminal conviction, the forfeiture rule will not apply and the killer's next of kin will succeed to the victim's estate. The Victorian Law Reform Commission, in its 2014 Consultation Paper on the Forfeiture Rule, noted that "proceedings on the right of someone to inherit or take the benefit of property entitlement in circumstances where the forfeiture rule would apply are not about punishing a killer for their crime but about enforcing a rule of public policy that a person should not benefit from their crime" and "will therefore not violate the rule against double jeopardy."[117] In proposing that an interested person should be able to apply to the court for an order as to whether the forfeiture rule applies where a beneficiary has not been convicted of the unlawful killing of the deceased, the Tasmanian Law Reform Institute[118] observed that it is not an uncommon situation for defendants to be found not guilty of a criminal offence and have civil proceedings brought against them. For example, the standard of proof in civil proceedings arising out of an assault or a road traffic accident resulting from dangerous or careless driving is on the balance of probabilities rather than beyond a reasonable doubt.[119]

6.05 In its *Report on Succession Law - Homicidal Heirs*, the New Zealand Law Commission also noted that not all killings are the subject of criminal proceedings in New Zealand, for example, where the killer is not brought to trial because he or she is unfit to plead or where the killing occurs abroad.[120] Arising from this analysis section 16 of the *Succession (Homicide) Act 2007* prescribes the procedure for establishing whether a person has committed homicide in proceedings in which the application of the Act is in issue. Section 16 of the 2007 Act relates to situations where the person who is alleged to be guilty of the homicide of another person either has not been prosecuted in New Zealand, or has been prosecuted in New Zealand but has been acquitted (other than on the grounds of insanity) or the prosecution has been stayed or withdrawn.[121] In these circumstances, in proceedings regarding the application of the Act,

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[115] Vol 60 No. 3 Seanad Éireann Debates (4 November 1965)

[116] In the event that a person dies intestate (without having made a will), his or her estate is distributed in accordance with Part VI of the *Succession Act 1965*.

[117] See Victorian Law Reform Commission; *The Forfeiture Rule*, Consultation Paper (2014), p.29. The Commission cited *Helton v Allen* (1940) 63 CLR 691 as authority that the forfeiture rule may be applied to a person who has been acquitted in criminal proceedings or has not been prosecuted at all if it is proved in court on the balance of probabilities that the person unlawfully killed the deceased.

[118] See Tasmania Law Reform Institute; *The Forfeiture Rule*, Final Report No. 6 (2004), at p.21.

[119] See *Murphy v GM* [2001] 4 IR 113 in which a number of constitutional challenges to the *Proceeds of Crime Act 1996* were rejected, including an argument that the 1996 Act improperly applied civil standards to cases of an essentially criminal nature.

[120] See New Zealand Law Commission; *Succession Law: Homicidal Heirs,* Report 38 (1997), p.11.

[121] The provision applies whether or not the person has been prosecuted, convicted, or acquitted elsewhere. The Bill as initiated dealt only with the situation in which the person had not been prosecuted in New Zealand. In its commentary on the Bill, the Justice and Electoral Committee recommended that the clause be "extended to apply to cases where a person who is alleged to be guilty of homicide has been prosecuted in New Zealand in respect of that homicide but has been acquitted other than on the grounds of insanity or the prosecution has been stayed or withdrawn." See Report of the Justice and Electoral Committee - Succession (Homicide) Bill (April 2007),

a person who alleges that another person is guilty of homicide "must satisfy the court of that fact on the balance of probabilities."[122] For the purposes of the 2007 Act, convictions secured in other jurisdictions are admissible evidence as to whether or not the person is guilty of homicide and are "to be given any weight that the court determines."[123]

6.06 The Commission seeks views on whether a criminal conviction should be necessary for the application of the forfeiture rule:

Question 6:

Should legislation be enacted empowering the Court to apply the provisions on unworthiness to succeed in section 120 of the *Succession Act 1965* where there is no conviction? If so, in what circumstances and what standard of proof should apply?

Type your comments if any

available at http://www.parliament.nz/en-nz/pb/sc/documents/reports/48DBSCH_SCR3735_1/succession-homicide-bill-74-2.

[122] Section 16(2) of the New Zealand *Succession (Homicide) Act 2007*. This standard of proof also applies to a person who alleges that he or she is not guilty of homicide for the purposes of the 2007 Act by reason of insanity.

[123] Section 16(2)(d) of the 2007 Act.

ISSUE 7: COSTS OF CIVIL PROCEEDINGS RELATING TO THE APPLICATION OF THE FORFEITURE RULE AND ALTERNATIVES TO LITIGATION

7.01 In her judgment concerning the costs of the proceedings in *Cawley v Lillis,*[124] Laffoy J held that the jurisprudence in relation to payment of costs out of the estate in probate actions did not apply as the case involved a contest between the estate of the deceased and the defendant as to the beneficial ownership of assets which did not form part of the estate of the deceased, the resolution of which turned on the application of established rules and equity.

7.02 At the outset of the judgment, Laffoy J explained that the implementation of the terms of settlement of the proceedings would create a fund resulting from the realisation of the jointly held assets. The defendant contended that he had made an offer to which there was no response and that, despite making a concession in the terms of his offer at the hearing, the plaintiffs pursued their claim. He argued that he should therefore be awarded his costs against the plaintiffs.[125] The plaintiffs argued that their costs should be paid out of the joint fund and that, as the proceedings were necessitated by the criminal act of the defendant and to award him costs from the joint assets would allow him to benefit from his conduct, there should be no order for costs made in favour of the defendant. In this regard, Laffoy J concluded that "it would not be a proper exercise of the Court's discretion, in determining where liability for costs lies, to penalise the defendant on account of the fact that the issue as to the ownership of the joint assets arose out of the tragic death of the deceased at the hands of the defendant."

7.03 As the defendant had persisted in his contention that he was solely beneficially entitled to the joint assets until less than a week before the hearing, Laffoy J held that he was too late to avoid the costs of the hearing being awarded against him. In granting an order for costs in favour of the plaintiffs, she noted that "it is probable that, if the defendant had adopted a different and more reasonable approach from the outset, the proceedings would have been unnecessary or, at any rate, truncated and less expensive. His failure to engage at all with the plaintiffs' solicitors before the proceedings were initiated, necessitated the initiation of the proceedings." The costs ordered in favour of the plaintiffs were paid out of the joint funds before distribution and not out of the defendant's share.

7.04 The Commission seeks views as to whether the law relating to orders for costs in actions taken by unlawful killers in relation to the application of the forfeiture rule should be amended, including whether it should be provided that the costs of such applications be discharged by the unlawful killer.

7.05 The Commission also invites suggestions as to how current procedures could be altered to ease the burden, financially and administratively, in administering the estate of a victim of an unlawful killing. In its *Report on Succession Law – Homicidal Heirs*, the New Zealand Law Commission noted that an objective of the legislation was where possible "to enable administrators and trustees to act without recourse to the courts."[126] Therefore, the *Succession (Homicide) Act 2007* contained specific provisions regarding the evidential effect of convictions of unlawful killing in subsequent civil proceedings arising out of the killing,

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[124] *Cawley v Lillis (No.2)* [2012] IEHC 70.

[125] Laffoy J explained that a letter from the defendant's solicitor to the plaintiffs' solicitors was brought to the attention of the Court in the context of the issue of costs. The letter stated that the defendant was willing to agree to an equal division of the joint assets with the plaintiffs taking one half and the defendant taking the remaining half, and that each side would bear its own costs. The offer was not taken up by the plaintiffs and counsel for the plaintiffs explained that, subject to one exception, the proposal related to settling "all matters present or future", not just the proceedings.

[126] New Zealand Law Commission; *Succession Law: Homicidal Heirs,* Report 38 (Jul 1997), at p. 11.

similar to the proceedings in *Cawley v Lillis*[127] and *Nevin v Nevin.*[128] Section 14 confirms that for the purposes of the 2007 Act "the conviction in New Zealand of a person for the homicide of another person or a child that has not become a person is conclusive evidence... that the person is guilty of that homicide, unless that conviction has been quashed." Section 146A of the New Zealand *Sentencing Act 2002* (inserted by section 17 of the 2007 Act) grants the Court power, on or after sentencing a person for an offence of unlawful killing, to certify that for the purposes of the 2007 Act, the person convicted is guilty of homicide of that other person.[129]

Question 7:

7(a) **Should the law relating to orders for costs in actions taken by unlawful killers in relation to the application of the forfeiture rule be amended?**

7(b) **Are there ways in which existing procedures could be altered to ease the burden, both financially and administratively, on the legal personal representatives acting in the estate of a victim of an unlawful killing?**

Type your comments if any

[127] [2011] IEHC 515, [2012] 1 IR 281.

[128] [2013] IEHC 80; [2013] 2 ILRM 427.

[129] See also the discussion below, paragraphs 8.01ff, on the admissibility of evidence of criminal prosecutions in subsequent civil proceedings.

ISSUE 8: ADMISSIBILITY OF CRIMINAL CONVICTION IN CIVIL PROCEEDINGS

8.01 The admissibility of criminal convictions as evidence in related civil proceedings was discussed by the High Court in *Nevin v Nevin.*[130] The defendant had been convicted of the murder of her husband and the appeal of the conviction was refused. The defendant had at all times protested her innocence and made a number of unsuccessful applications to appeal the conviction in the High Court and the Supreme Court. The plaintiffs (the deceased's next of kin) commenced proceedings seeking declarations that the defendant was precluded both at common law and by virtue of section 120 of the *Succession Act 1965* from taking any share in her husband's estate. The plaintiffs requested the Court to consider "the admissibility of the evidence of the defendant's trial and subsequent conviction for the murder of her husband."[131] Kearns P outlined the issues to be addressed as follows: "Is a criminal conviction for murder admissible in a later civil proceeding brought against a person convicted of that murder? If not admissible, then it would follow that a defendant in a civil case would be in precisely the same position as a person who was acquitted or never charged with the offence in question. The conviction could not be used in any way whatsoever in the civil case. If on the other hand the conviction is admissible, is it conclusive of the fact that the defendant murdered her husband or is it simply *prima facie* evidence of that fact, leaving to the defendant the right to argue that she should not have been convicted?"[132]

8.02 The plaintiffs in *Nevin* argued that the High Court should follow the law as set out in *In re Estate of Crippen decd*[133] in which the English Court of Appeal had held that "where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims, or to enforce rights, which result to the felon, or to the convicted testator from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime."[134] Although the decision in *Crippen* was overruled in *Hollington v F Hewthorn & Co Ltd*,[135] the plaintiffs in *Nevin* argued, and the Court accepted, that as the decision in *Hollington v Hewthorn* was made after the State was established in 1922, the law in Ireland "may be taken to be that laid down in *Harvey v King* and in *Crippen's* case, cases decided in 1901 and 1911 respectively, unless subsequent Irish authority may be shown to have taken a different course."[136]

8.03 The defendant argued that the Court should follow the rule established by the Court of Appeal in *Hollington v F Hewthorn & Co. Ltd*[137] which provides that a criminal conviction following trial

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[130] [2013] IEHC 80; [2013] 2 ILRM 427.

[131] [2013] IEHC 80; [2013] 2 ILRM 427 at 432.

[132] [2013] IEHC 80; [2013] 2 ILRM 427 at 433.

[133] [1911] P 108.

[134] [1911] P 108 at 115.

[135] [1943] KB 587.

[136] Kearns P considered the judgments in *Kelly v Ireland* [1986] ILRM 318, *Breathnach v Ireland* [1989] IR 489 and *Madden v Doohan* [2012] IEHC 422 but concluded that "none of these three Irish authorities specifically address the issue which this Court is called upon to determine in the present proceedings."

[137] In the *Hollington* case, the plaintiff claimed damages in respect of a collision which occurred between the plaintiff's car and a car owned by the first defendants. At the time of the collision, the plaintiff's car was driven by his son and the defendants' car was driven by the second defendants. The respective drivers were the only witnesses to the collision and the plaintiff's son died after the action was brought. The defendants denied

is not admissible in civil proceedings as evidence of the material facts upon which the conviction is based. Having examined in detail the judgment of the New Zealand Court of Appeal in *Jorgensen v News Media (Auckland) Limited*[138], Kearns P concluded that the decision in *Hollington v Hewthorn* was "unsatisfactory".[139] He confirmed that whilst there were several legal principles which could be invoked, he preferred to base his view "on the proposition that the admissibility of the murder conviction is either authorised on foot of the decision in *Crippen's* case or comes within an exception to the hearsay rule as suggested and found by the Court of Appeal in New Zealand in *Jorgensen's* case."[140]

8.04 Kearns P concluded that "to rule out the conviction as completely inadmissible would...be contrary to logic and common sense and offend any reasonable person's sense of justice and fairness."[141] He therefore held that the defendant's conviction for her husband's murder was admissible in the civil proceedings as *prima facie* evidence of the fact that she committed the murder. He stated that it was open to the defendant on the trial of the civil proceedings to contend that she did not murder her husband and that she should not have been convicted.

United Kingdom

8.05 The admissibility of evidence of criminal convictions in civil proceedings has been discussed by law reform bodies in a number of jurisdictions.[142] Following suggestions in the Court of Appeal in the United Kingdom that the rule in *Hollington v Hewthorn* required reconsideration,[143] the rule was considered in 1967 by the Law Reform Committee.[144] The

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negligence and pleaded contributory negligence. Due to the death of his son, the plaintiff was not able to adduce any direct evidence of the accident. He, therefore, tendered evidence as to the position and the condition of the two vehicles after the collision as well as (i) a conviction of the second defendant for careless driving at the time and place of the collision and (ii) the statement made by his son to the police constable after the collision. The Court of Appeal ruled that the conviction was inadmissible as "the conviction is only proof that another Court considered that the defendant was guilty of careless driving."

[138] [1969] NZLR 961.

[139] [2013] IEHC 80; [2013] 2 ILRM 427 at 449.

[140] *Ibid,* at 455. Kearns P confirmed that the reasons for his conclusion were as set out in the judgment of Turner J in the *Jorgensen* case and were "(a) that there can be no real doubt that a certificate of conviction constitutes unimpeachable evidence not only of the fact that a person was convicted, but also that the court did in fact consider the person guilty of the crime (in other words any of the usual objections to hearsay – that the version given in court may be unsatisfactory as false, unreliable, biased, untested by cross-examination etc – simply do not arise) and (b) any objection that the court may have been wrong is more than addressed by the requirement that the court before convicting must be satisfied beyond all reasonable doubt that the person was guilty of the crime charged."

[141] *Ibid,* at p. 455.

[142] English Law Reform Committee, *The Rule in Hollington v Hewthorn,* Report 15 (September 1967); Law Reform Commission of Western Australia, *Evidence of Criminal Convictions in Civil Proceedings,* Project No. 20 (April 1972); New Zealand Torts and General Law Reform Committee, *The Rule in Hollington v Hewthorn* (July 1972); New Zealand Law Commission; *Evidence: Reform of the Law*, Report 55 Volume 1 and *Evidence: Evidence Code and Commentary*, Report 55 - Volume 2 (August 1999).

[143] *Goody v Odhams Press* [1967] 1 QB 333.

[144] In the introduction to the report, the Committee stated that the decision in the case "offends one's sense of justice." The Committee explained that "the defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness required to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to *prima facie* evidence of his negligent driving at that time and place."

Committee approached its review of the rule from the premise that "any material which had probative value upon any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it" and "any decision of an English court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong."[145] The Committee recommended that a conviction of a criminal offence before a court of competent jurisdiction in the United Kingdom should be admissible in subsequent civil proceedings (whether or not between the same parties) to show that the person concerned was guilty of the conduct constituting the offence. However, the admission of the criminal conviction in such circumstances should not be conclusive evidence of the commission of the offence. The Committee confirmed that a person convicted of a criminal offence should, in the subsequent civil proceedings, be taken to have been guilty of that offence unless the contrary is proven, the onus of proof being on the party seeking to show that the conviction was erroneous. The Committee also recommended that a distinction should not be made between a conviction on a plea of guilty and a conviction after a contested trial. In relation to acquittals, the Committee recommended that an acquittal should not be evidence in subsequent civil proceedings of the non-culpability of the person acquitted. The Committee advocated an exception to these recommendations for defamation actions. In such actions, the Committee advised that "where a statement complained of alleges that the plaintiff has been guilty of a criminal offence, proof that he has been convicted of that offence and that the conviction has not been set aside should be conclusive evidence of his guilt, and proof that he was acquitted of that offence should be conclusive evidence of his innocence."[146]

8.06 Following this Report, the English *Civil Evidence Act 1968* was enacted, sections 11[147] and 13[148] of which clarify the law relating to the admission of convictions as evidence in civil proceedings and defamation actions respectively. In his recent article regarding the admissibility of evidence of a conviction in subsequent inheritance proceedings, Keating highlighted the need for reform of section 120(1) to rid it of the ambiguity identified in the *Nevin* case. In the alternative, he suggested that "new legislation may be introduced, akin to the U.K. Civil Evidence Act 1968, allowing for the admission of evidence of a conviction in *all*

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[145] Law Reform Committee, *The Rule in Hollington v Hewthorn,* Report 15 (September 1967), p.5.

[146] *Ibid,* p.18.

[147] Section 11(1) of the English *Civil Evidence Act 1968*, as amended, provides that "in any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or of a service offence (anywhere) shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section." Section 11(2) provides that "in any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence: (a) he shall be taken to have committed that offence unless the contrary is proved; and (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

[148] Section 13(1) English *Civil Evidence Act 1968*, as amended, provides that "in an action for libel or slander in which the question whether [the plaintiff] did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, [he] stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly."

subsequent civil proceedings, where the person convicted of the offence "shall be taken to have committed that offence unless the contrary is proved."[149]

New Zealand

8.07 As discussed by Kearns P in his judgment in the *Nevin* case, the rule in *Hollington v Hewthorn* was examined by the New Zealand Court of Appeal in the *Jorgensen*[150] case. Whilst the Court of Appeal in *Jorgensen* appears to have rejected the rule in *Hollington v Hewthorn*, it is unclear whether the Court's rejection of the rule applied to all civil proceedings or if it merely abrogated the rule in defamation actions. The subsequent report of the Torts and General Law Reform Committee of New Zealand described the rule as "unsatisfactory" and the reasoning by which the Court of Appeal supported its conclusion as "open to strong criticism."[151] The admissibility of criminal evidence in subsequent civil proceedings was considered more recently by the Law Commission in New Zealand in its review of the law of evidence.[152] Following publication of its report, the New Zealand *Evidence Act 2006* was enacted, sections 47 and 48 of which provide for the admission of criminal convictions as evidence in civil proceedings.[153] Section 47(1) of the 2006 Act states that when the fact that a person has committed an offence is relevant to an issue in a civil proceeding, proof that the person has been convicted of the offence is conclusive evidence of commission of the offence. However, section 47(2) grants power to the Court in exceptional circumstances to "permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and if satisfied to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection."[154] Rather like the English *Civil Evidence Act 1968*, section 48 of the 2006 Act provides that in defamation proceedings, proof that the person has been convicted of the offence is conclusive proof that the person committed the offence. However, this is subject to the condition that the conviction subsisted at the time that the statement was made or subsists at the time of the proceedings.

8.08 The Commission seeks views on whether it would be beneficial to enact legislation regarding the admissibility of criminal convictions in subsequent civil proceedings. Section 43 of the *Defamation Act 2009* provides for the admission of the fact of conviction or acquittal, as well as any findings of fact made during the course of proceedings for the offence concerned, as evidence in defamation actions. This provision implements, in part, the Commission's

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[149] Keating "*The Admissibility of Evidence of a Conviction for an Offence in Subsequent Inheritance Proceedings*" (2014) 3 CPLJ 71 at p. 75.

[150] [1969] NZLR 961.

[151] New Zealand Torts and General Law Reform Committee, *The Rule in Hollington v Hewthorn* (July 1972), p.1. Arising from this, sections 23 and 24 of the *Evidence Amendment Act (No 2) 1980* clarified the law relating to convictions as evidence in civil proceedings and defamation proceedings. The 1980 Act was repealed and replaced by section 215 of the NZ *Evidence Act 2006*.

[152] New Zealand Law Commission; *Evidence: Reform of the Law*, Report 55 Volume 1 and *Evidence: Evidence Code and Commentary*, Report 55 - Volume 2 (1999).

[153] See paragraph 7.05, above, for discussion of section 14 of the NZ *Succession (Homicide) Act 2007* which provides that, for the purpose of the Act, the conviction of a person for the homicide of another person is conclusive evidence that the person is guilty of that homicide.

[154] Section 47 of the 2006 Act applies whether or not the person convicted is a party to the proceeding and whether or not the person was convicted on a guilty plea: see section 47(3).

recommendation in its 1991 *Report on the Civil Law of Defamation*.[155] The proposal in the 1991 Report that proof of conviction in defamation actions be treated as conclusive evidence that the person convicted committed the offence[156] was not implemented in the 2009 Act.

Question 8:

8(a): Should the conclusion reached by Kearns J in *Nevin v Nevin* (ie a conviction is admissible in civil proceedings as *prima facie* evidence that the person committed the offence) be put in statutory form?

8(b): If so, should a conviction in a criminal trial be admitted in a related civil action:
(i) as conclusive proof that the person committed the offence or
(ii) as proof that the person committed the offence unless the contrary is proved?

8(c): Should a conviction on a plea of guilty be admissible?

8(d): Should a conviction be admissible in civil proceedings in which the convicted person is not a party?

8(e): What documents should be admissible to identify the facts on which the conviction was based?

8(f): In defamation proceedings, should:
(i) a conviction be conclusive evidence that the person committed the offence and;
(ii) an acquittal be conclusive evidence that the person did not commit the offence?

Type your comments if any

[155] Law Reform Commission, *Report on the Civil Law of Defamation* (LRC 38-1991), p.48.

[156] The Commission had proposed a "statutory provision that: (a) where in a defamation action the question of whether a person party to the action committed a criminal offence is relevant, proof that he stands convicted of the offence by a court of competent jurisdiction in the State shall be conclusive evidence that he committed the offence; (b) the conviction of a person not party to the defamation action by a court of competent jurisdiction in the State should be evidence, but not conclusive evidence, of the facts on which it was based; (c) the acquittal of a person party to a defamation action should be evidence, but not conclusive evidence, of the facts on which it is based." Law Reform Commission, *Report on the Civil Law of Defamation* (LRC 38-1991), p.48.

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