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REPORT

# SECTION 117 OF THE SUCCESSION ACT 1965: ASPECTS OF PROVISION FOR CHILDREN

(LRC 118 - 2017)



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ



## **Report**

### **Section 117 of the *Succession Act 1965*: Aspects of Provision for Children**

(LRC 118 – 2017)

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Full responsibility for this Report lies with the Commission.



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Sadler v Public Trust	[2006] FRNZ 115	NZ
Re Salmon decd	[1981] Ch 167	Eng
In re SF	[2015] IEHC 851	Irl
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# Summary

## (1) Overview

1. This Report forms part of the Commission's *Fourth Programme of Law Reform*, which contains a project to examine aspects of succession law.<sup>1</sup> This includes<sup>2</sup> a review of section 117 of the *Succession Act 1965*, which provides that where a parent who makes a will has failed in his or her moral duty to make proper provision for a child, a court may make such provision for the child out of the estate as it thinks would be just.<sup>3</sup>
2. A number of important issues have arisen in the application of section 117 since it was enacted. These include: whether and to what extent it has achieved an appropriate balance between testamentary freedom and the obligations of parents to children; whether the use of the phrase "moral duty" remains appropriate; whether the wide-ranging discretion in section 117 could benefit from reform; whether it should be extended to cases where no will has been made (intestacy); and whether the time-limits in section 117 should be extended or clarified. In this project, the Commission has also considered to what extent the application of section 117 has been affected by social and demographic changes in Ireland since the 1960s.
3. In 2016, the Commission Published an Issues Paper<sup>4</sup> on this project and received a significant number of submissions from interested parties. The Commission is extremely grateful for those submissions and has considered them in detail in formulating the recommendations contained in this Report.

## (2) The changing policy context of section 117

4. In **Chapter 1** the Commission considers the interaction between the guiding policy principles of section 117, namely, on the one hand the right of a parent with property to decide how this should be transferred (whether during their lifetime or after they have died) and, on the other hand, the duty of parents to provide for their children.
5. Section 117 is an example of what is often called family provision legislation (other examples in Ireland include section 15A of the *Family Law Act 1995* and section 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*), which has also been enacted in many other jurisdictions. While they share certain features, the legislation in many jurisdictions contains varying balances between these competing

<sup>1</sup> *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 7.

<sup>2</sup> The other element of this project concerned section 120 of the *Succession Act 1965*, on which the Commission published its *Report on Prevention of Benefit From Homicide* (LRC 114 – 2015). The publication of the present Report on section 117 completes the Commission's work on this project.

<sup>3</sup> The full text of section 117, as amended, is set out in Appendix A of the Report, below.

<sup>4</sup> *Issues Paper on Section 117 of the Succession Act 1965* (LRC IP 9 - 2016).

principles. The Commission has benefited from a comparative review of family provision legislation in a number of comparable jurisdictions.

6. The balance between these competing principles has a constitutional dimension in Ireland. Article 43 of the Constitution explicitly recognises the right of a person to dispose of their property, including through a will (this is often referred to as testamentary freedom). However, Article 43 also provides that such property rights may be restricted in accordance with principles of social justice and the common good. In addition, Article 41 provides protection for the family unit. Property rights such as testamentary freedom, therefore, may be limited or restricted having regard to those constitutional provisions.
7. The Oireachtas debates that led to the enactment of the *Succession Act 1965* were informed by these competing constitutional principles. During the debates a number of alternatives were proposed, which gave different weights to the two guiding principles. The Oireachtas ultimately settled on a system of discretionary provision for children where their parents had “failed in their moral duty” to make “proper provision” for them.
8. In **Chapter 1**, the Commission also considers the relevance of social and demographic changes in Ireland since 1965. Important social changes have included the recognition of equal rights for all children in succession law<sup>5</sup> and the introduction of divorce,<sup>6</sup> with consequent effects on the application of section 117. Demographic and related economic developments since the 1960s have resulted in changing patterns of intergenerational wealth transfers. The “generational contract”,<sup>7</sup> that is, the structure of the exchange of wealth between generations, has changed since 1965. This change was prompted by the increased longevity of later generations and the increasing dependence of young adults on their parents.

### **(3) Key features of the case law on section 117**

9. In **Chapter 2** the Commission considers the key features of the case law on section 117, including the meaning of the testator’s “moral duty” to make “proper provision” for their children (including adult children).
10. The wording of section 117 is examined by reference to the case law. Because of the discretionary nature of section 117, the outcome of a case will often depend on its particular facts. The Commission explores the important cases on section 117 and how the courts have applied the statutory language to the facts of the particular application. The courts’ interpretation of the section is essential to understand the nature of family provision legislation in Ireland.
11. In the early case law, the courts set out the 5 factors that should be considered in deciding whether the testator has failed in his or her moral duty. These factors are:

<sup>5</sup> See generally the *Status of Children Act 1987*.

<sup>6</sup> *Fifteenth Amendment of the Constitution Act 1995*.

<sup>7</sup> Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 125.

- (a) the amount left to the surviving spouse or the value of the legal right if the surviving spouse elects to take this;
  - (b) the number of children, their ages and their position in life at the date of the deceased person's death;
  - (c) the means of the testator;
  - (d) the age, financial position and prospects in life of the applicant;
  - (e) whether the deceased person has already made proper provision for the child.
12. The early cases also made it clear that "proper provision" had to include some opportunity for advancement in life, beyond mere maintenance or provision for day to day expenses.
  13. Later cases clarified that section 117 placed an onerous burden on applicants. In order to succeed in an application under section 117, the child must establish a positive failure of moral duty. A testator is presumed to be best placed to decide how to fulfil their obligations to their children.
  14. As a result of the large volume of decided cases on 117, there is a rich body of case law on the meaning of "moral duty" and how the courts have applied this phrase to particular circumstances.

#### **(4) Family provision legislation in other countries**

15. The Commission has also considered the family provision legislation in a number of other jurisdictions. In its analysis of these jurisdictions the Commission has considered the relevant legislation, as well case law, and reviews by Law Commissions.
16. New Zealand is significant, as the first common law jurisdiction to enact family provision legislation. The New Zealand model confers a wide discretion on courts and does not contain fixed or automatic entitlements for spouses or children. By contrast, many civil law jurisdictions have enacted legislation containing such fixed shares. This approach was highly influential in Scotland, which enacted the *Succession (Scotland) Act 1964*, which also includes fixed shares. The *Succession Act 1965* can be said to involve a "half way house" because it enacted civil law type fixed shares for spouses and a common law type discretionary approach for children in section 117.
17. As to the scope of section 117, England and Wales provides an interesting contrast, because its legislation is restricted to mere "maintenance", rather than "proper provision" or "moral duty." The case law in Australia makes extensive reference to the "moral duty" of parents as well as making "proper provision." The United States of America, by contrast, is noteworthy for the greater priority that is given to testamentary freedom than the other jurisdictions examined.

18. The Commission has also considered the position in the other jurisdictions discussed, from the point of view of the procedural elements of family provision legislation.

### **(5) Section 117 should be based on “proper provision” but not “moral duty”**

19. The Commission is of the view that that the fundamental policy behind section 117 remains sound. The courts should continue to adjudicate on the limits on testamentary freedom as it applies to the facts of each case before the courts. However, the Commission also recommends that section 117 should be amended by the removal of references to “moral duty” to simply provide that a deceased parent has a duty to make “proper provision” for a child. The Commission considers that the phrase “moral duty” may unduly emphasise an expectation or entitlement to inherit, rather than an appropriate focus on the needs of a child, including an adult child.

### **(6) A presumption that parents have already provided for their adult children, subject to exceptions**

20. Reflecting the approach that emphasises the needs of the child, the Commission considers that section 117 does not require any further reform so far as it applies to children under the age of 18. However, for a child who is over the age of 18 (or over 23, if in full time education), it is appropriate to presume that a parent has already properly provided for them. Again, applying the needs test the Commission also recommends that this presumption should be subject to 3 specified exceptions: (a) where the applicant has a particular financial need arising from their health or decision making capacity; (b) where the estate contains an item of particular sentimental value to the applicant or (c) where the applicant had provided care and support for the deceased.

### **(7) The relevant dates for applying the two-stage test of assessing proper provision**

21. The courts apply a two-stage test in determining whether proper provision has been made. The first stage is to determine whether the deceased parent has failed to make proper provision and, if the court so decides, then it proceeds to the second stage. The second stage is where the court decides on the form of the order to be made under section 117. The Commission recommends that this two-stage test should be retained.
22. For the first stage, the Commission recommends that the relevant date should continue to be the date of death of the deceased with a new proviso that this should be based on facts that were either known to the deceased parent, or were reasonably foreseeable by him or her immediately prior to his or her death. For the second stage, the Commission

recommends that the relevant date should continue to be the date of the hearing of the case.

## **(8) Section 117 should be extended to intestacy cases**

23. In **Chapter 3**, the Commission recommends that section 117 should be amended to provide for applications by children of parents who have died wholly intestate.
24. Under the current law where a parent dies wholly intestate, the estate is distributed in accordance with the fixed intestacy shares.<sup>8</sup> The courts may not vary these shares, even in cases of particular hardship, and under the current law an application under section 117 is not possible. In 1965 the Oireachtas decided not to extend section 117 to include intestacy because, it was argued, it would give rise to too much additional litigation. The Commission considers however, that it is preferable to allow for an application under section 117 in cases where injustice might otherwise arise.
25. In addition, under the current law, where the deceased parent has made a will and it is not effective, for example where the intended beneficiary has already died, the deceased parent is deemed to have died partly intestate. In such circumstances the entirety of the deceased estate could be distributed by the rules of intestacy. At the same time however, a section 117 application is available because the deceased is still deemed to be a testator within the meaning of section 117. This rather technical application of section 117 supports the Commission's conclusion that section 117 should be extended to include claims by children of parents who die wholly intestate.

## **(9) Ring-fencing the shares of surviving spouses**

26. The Commission is conscious of the implications, for other parties, of extending section 117 to intestacy, in particular, for surviving spouses who are not the parent of the applicant child. Section 117 currently prohibits the courts from redistributing the surviving spouse's legal right share, his or her entitlement under the will, or his or her intestacy share, but only where that surviving spouse is the parent of an applicant under section 117. On the other hand, where the surviving spouse is not the parent of the applicant, only the legal right share is protected in this way. The Commission therefore recommends that, in making an order under section 117, the court may not reduce the spouse's share to less than the amount to which he or she would have been entitled had the deceased died wholly testate. This means that the legal share of the surviving spouse who is not the parent of the applicant is ring-fenced, so that he or she would always be entitled to one-third of the total value of the estate.

<sup>8</sup>

See section 67 of the *Succession Act 1965*.

## (10) Current time limits should remain but be clarified

27. In **Chapter 4**, the Commission considers the time limits that apply to applications under section 117. Section 117 currently provides that an application must be brought within 6 months of the “first taking out of representation of the deceased’s estate.” In *In re estate of F decd*,<sup>9</sup> the High Court held that this referred to the date on which the will is proved either by grant of probate or a grant of letters of administration with the will annexed. The Court held that the time limit did not apply to a case where a grant was taken out for a more limited purpose. The Commission recommends that this clarification should be expressly set out in section 117.
28. As to the length of the time limit, section 117 currently provides for a 6 month period, which is fixed and may not be extended. Section 117, as enacted in 1965, provided for a 12 month time limit. This was reduced to 6 months by the *Family Law (Divorce) Act 1996* in order to align the time limit with the 6 month time limit for applications for family provision under the 1996 Act.
29. Having considered the arguments for and against a fixed period, and the argument for reinstating the 12 month time limit, the Commission has concluded that there should be no change to the 6 month time limit under section 117. Of particular importance in this context, in the Commission’s view, is that any lengthening of the time limit or provision for a discretion to extend, would cause further delay in the administration of estates with the potential to create undue uncertainty over inheritance.
30. The Report also notes that case law suggests that applications may be made before the 6 month time limit starts to run. The Commission recommends that section 117 should be amended to clarify this.

## (11) No duty to notify potential claimants

31. In **Chapter 4**, The Commission also considers whether personal representatives, that is, executors and administrators, of the deceased’s estate, should be under a duty to notify potential claimants of the existence of section 117.
32. Current case law has held that no such duty arises, and the Commission recommends that this should remain the position, in particular because such a duty would conflict with the personal representative’s obligations to the estate. The Commission also recommends that personal representatives should not be under a more limited duty to notify potential claimants of the fact of death of the parent as this would give rise to similar difficulties.

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<sup>9</sup> [2013] IEHC 407, [2013] 2 IR 302.

## (12) Summary of recommendations

33. **Chapter 5** comprises a summary of the 19 recommendations contained in the Report.

## (13) Appendices

34. **Appendix A** contains the text of section 117, as amended.
35. **Appendix B** contains the draft *Succession (Amendment) Bill*, which is intended to implement the recommendations for reform in the Report.
36. **Appendix C** contains a thematic analysis of the specific factors that the courts have considered in determining whether proper provision has been made under section 117. While the Commission does not make any recommendations in this Appendix, the Commission considers that this material may be of use for reference purposes.

## CHAPTER 1

# THE POLICY AND SOCIAL CONTEXT OF SECTION 117

## A. The principles of testamentary freedom and family property

- 1.01 Section 117(1) of the *Succession Act 1965*<sup>1</sup> provides:

“Where, on application by or on behalf of a child of a testator,<sup>2</sup> 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.”

- 1.02 Section 117 involves a balance between two principles: the freedom of a person to dispose of his or her property and his or her parental obligations. These two principles are fundamental to the policy context of section 117.

### 1. Testamentary freedom

- 1.03 An individual’s liberty to dispose of his or her property after death is often referred to as “freedom of testation” or “testamentary freedom”. Although freedom of testation first arose in Roman law as an alternative to a rigid system of intestate succession,<sup>3</sup> its modern, principled basis has its roots in the liberal intellectual tradition. As discussed below, in Ireland this is also reflected in relevant constitutional provisions on property rights, including limits that may be on them by reference to principles of social justice and the common good. Like other liberal concepts such as freedom of contract, private property rights and *laissez-faire* economics, testamentary freedom is often justified on the basis that individual liberty should be prioritised over interference from the state. In support of such ideas, both moral and economic arguments are often employed.

<sup>1</sup> The full text of section 117, as amended, is set out in Appendix A of the Report, below.

<sup>2</sup> The *Succession Act 1965* uses the word “testator” to refer to both males and females who have died leaving a valid will. While in some other publications the word “testatrix” is used to refer to a female person who has made a will, this Report uses “testator” to refer to all will makers, as there is no legal difference between the two words. Similarly, “executor” and “administrator” are used in this Report to refer to both males and females performing these functions.

<sup>3</sup> Lehmann, “Testamentary Freedom versus Testamentary Duty: in Search of a Better Balance” (2014) *Acta Juridica* 9, at 22.



- 1.04 Locke, often referred to as the father of liberalism, saw the law as a facilitator of liberty.<sup>4</sup> He argued that the right to private property was an essential ingredient of individual liberty. It would be an infringement of that liberty to compel someone to work against their will or to deprive that person of the fruits of that labour. The right to property, according to Locke, is a natural extension of a person's general entitlement to be free from deprivation of liberty. Because property rights are a bundle of rights which relate to things, such as the right to possess or to dispose of property in whatever way the owner wishes, Locke considered the freedom to dispose of property after death as a corollary of this entitlement to do so during life.
- 1.05 John Stuart Mill also agreed that the power to bestow property, during life or after death, was one of the attributes of property.<sup>5</sup> While it was clear that Mill considered that the right to bequeath property was inherent in property, he did not agree that there was any general entitlement to inherit property from one's parents.<sup>6</sup> Mill did, however, argue that parents had obligations to dependent children until they were of age. Like Locke, Mill viewed the power of bequest as an incentive to further generations; the ability of the testator to distribute an estate to those the testator felt deserving would encourage virtue and hard work.
- 1.06 Although, at first glance, an obligation to provide for children might appear to be a limitation of personal freedom, some perspectives view the moral duty as a component of, and justification for, testamentary freedom. The 19<sup>th</sup> century English case *Banks v Goodfellow*<sup>7</sup> was decided at a time when ideas of personal autonomy such as testamentary freedom prevailed in England, and there was no scope for family provision in English law. In this case the Court explored the relationship between parental duties and personal autonomy. The Court held that, although the testator had absolute freedom to dispose of property, the children were owed a moral (but not legal) obligation to provide for them. It is because of, rather than in spite of, this moral obligation that the court considered that the testator had such liberty to dispose of the property. Although in exceptional cases this privilege is abused, a testator is more familiar with the particular circumstances of his or her own family. Usually he or she will be able to effect a fairer distribution of his or her estate than could be achieved by inflexible rules of law. Similarly some commentators have argued that testamentary freedom is valued for its ability to make provision for deserving family members in a way that is not possible under a law of succession that provides for fixed shares on intestacy, that is, where no valid will has been made.<sup>8</sup>

<sup>4</sup>. Locke, *Second Treatise on Civil Government* (Churchill, 1698), at 206, asserts: "So that however it may be mistaken, the end of law is not to abolish or restrain but to preserve and enlarge freedom."

<sup>5</sup> Mill, *The Principles of Political Economy* (Parker, 1849) at 276.

<sup>6</sup> *Ibid*, where Mill asserts: "Whatever fortune a parent may have inherited, or still more, may have acquired, I cannot admit that he owes to his children, merely because they are his children, to leave them rich, without the necessity of exertion."

<sup>7</sup> (1870) LR 5 QB 549.

<sup>8</sup> Lehmann, "Testamentary Freedom versus Testamentary Duty: in Search of a Better Balance" (2014) *Acta Juridica* 9.

- 1.07 As with other individual rights, testamentary freedom is not unlimited and may be restricted for reasons of social justice or in the public interest, as provided for in Article 43 of the Constitution. Mill accepted that the right of bequest was a privilege that might be restricted in the interest of society. One such restriction Mill suggested was that provision should be made out of the estate of a deceased person for their descendants where they would otherwise become a burden on the state.
- 1.08 Locke's and Mill's understanding of personal liberty arose in a context of unwarranted interference of irresponsible and capricious monarchies in the private affairs of individuals. It is also clear that they were contrasting complete testamentary freedom with the alternative of fixed inheritance rights with little consideration of a compromise between these two extremes. The argument in favour of testamentary freedom, therefore, may be less persuasive in a modern, democratic context and may admit more exceptions.
- 1.09 Moreover, as already noted, in Ireland this issue has a clear constitutional dimension. Article 40.3.2° of the Constitution guarantees that the State will protect "from unjust attack" and "vindicate" a citizen's property rights, and other personal rights. Article 43.1.1° recognises the general right to private property. Article 43.1.2° guarantees that the State will not abolish the institution of private property itself, or particular characteristics of private property, such as the right to "inherit" or "bequeath", whether during life and after death".<sup>9</sup> Legislation, therefore, may not entirely extinguish the legal capacity to bequeath or inherit property.
- 1.10 While legislation may not remove the general capacity of someone to deal with property, Article 43.2 recognises that property rights are "subject to principles of social justice" and that, in addition, the State may also limit their exercise in the interest of the "common good." Article 43, therefore, explicitly recognises this dichotomy between private property and the public good that was discussed by Mill. Despite the importance of property rights, Article 43.2 of the Constitution envisages that such rights may be restricted on the basis of principles of social justice, as well as on the basis of the common good. Notable examples include taxation legislation, compulsory purchase legislation and, of course, the restrictions on testamentary freedom in the *Succession Act 1965*. Any such restriction must comply with the principle of proportionality. In summary, therefore, freedom to transfer property, including the freedom to do so after death, is an important constitutional principle, but it is not absolute and may be restricted.
- 1.11 The qualified property rights in Article 43 of the Constitution clearly rejects the idea of complete testamentary freedom permitted by the common law when *Banks v Goodfellow* was decided in England in the 19<sup>th</sup> century. Article 43 specifically acknowledges that private property, which expressly includes the right to transfer property on death, may be restricted on grounds of either social justice or the public good. Separately, complete testamentary freedom would arguably not be constitutionally permissible in Ireland in

<sup>9</sup> See *O'B v S* [1984] IR 316, in which the Supreme Court recognised that the right to transfer property includes transfers of property after death.

light of the protections provided for the family (admittedly, limited to the family based on marriage) under Article 41.

## 2. Family property and parental obligations to provide for children

- 1.12 Legal systems that provide for an entitlement of children to inherit can be contrasted with systems that confer on the testator substantial freedom to dispose of his or her assets as he or she pleases.
- 1.13 Just as complete freedom to dispose of property is an extreme example of testamentary freedom, “family property” also exists at the extreme end of the spectrum of parental obligations. “Family property,” generally speaking, refers to the concept of family members sharing in the estate of another family member by virtue of the relationship itself (parent-child or spouse-spouse, for example). Under family property, any claim is automatic and not based on either needs or the conduct of the parties.<sup>10</sup> Many civil law jurisdictions (which include virtually all the states of Continental Europe) give more weight to ideas of family property, while many (though not all) common law jurisdictions (countries with historical ties to Britain) favour testamentary freedom.<sup>11</sup> The UK Supreme Court has acknowledged that the law in England and Wales (though not, as discussed below, Scotland, which has both a civil law and common law history) emphasises testamentary freedom more strongly than civil law jurisdictions. This explains many common law jurisdictions’ preference for court discretion rather than automatic fixed shares.<sup>12</sup> Ireland, a common law jurisdiction, has followed the civil law preference for fixed shares in the *Succession Act 1965*, at least so far as spouses are concerned (as discussed below, this was influenced by Scots law), while section 117 of the 1965 adopts a more discretionary, “half way house” for children that reflects the traditional common law approach.
- 1.14 A jurisdiction that emphasises “family property” as an important social value, may seek to restrict the individual exercise of autonomy when it appears to come in conflict with interests or entitlements of the family. This perspective emphasises the important social function which the family plays in the socialisation of children and the fostering of important relationships, which are essential for a cohesive society. The family is seen as the fundamental unit group and notions such as property rights cannot be untangled from the social context and belong, to a greater or lesser extent, to the family unit. In civil law jurisdictions such as France and Germany, family provision legislation reflects a greater reliance on family property than is the case in many common law jurisdictions. Both jurisdictions have enacted minimum fixed legal shares for children, sometimes referred to as “forced heirship,” and some protection (though less extensive) for spouses, which clearly restrict testamentary freedom. One commentator noted that the German attitude to testamentary freedom shows “a deep scepticism against the development of unfettered individualism” reflecting “the (ideological) importance of the family,

<sup>10</sup> Reid, “From the Cradle to the Grave: Politics, Families and Inheritance law” (2010) Edin LR 391.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ilott v Blue Cross and Ors* [2017] UKSC 17.

conceived as a crucial instrument of social organisation.”<sup>13</sup> It is worth noting that this approach is also reflected in Article 41 of the Constitution and in the key UN Human Rights Conventions, which all recognise the family as the fundamental unit group of society.<sup>14</sup>

- 1.15 This recognition of children in modern succession law also has its historical origins in the Roman law concept of *Legitim* which was one of several restrictions on testamentary freedom.<sup>15</sup> Roman law, as one of the first legal systems to allow true testamentary freedom, also acknowledged that complete freedom might conflict with a parent’s family obligations. Under *Legitim* the deceased’s immediate family had a right to at least one-quarter of the estate.<sup>16</sup> Where they were unjustly disinherited, children could have the will invalidated<sup>17</sup> or alternatively they had a claim<sup>18</sup> against the heir.
- 1.16 Scotland is often referred to as a “hybrid” jurisdiction because it has both civil and common law influences. The Scottish approach has been described as a compromise between the automatic legal rights of civil law jurisdictions and the testamentary freedom of pure common law jurisdictions. The legal right may be exercised at the discretion of the spouse and this option is rarely exercised, because provision is usually made for them in the will of the deceased. Ireland’s *Succession Act 1965*, which is discussed in more detail below, confers on surviving spouses a fixed legal share but confers on children a right to apply for provision at the discretion of the court. The 1965 Act therefore strikes a “half way house” balance between the common law and civil law approaches.
- 1.17 Just as the right to private property contained in Article 43 is an important constitutional principle in Ireland, so too is the concept of the family. Article 41.1.1° of the Constitution recognises the family as the fundamental unit group of society and as “a moral institution” that has certain rights that are “inalienable” (cannot be given away) and “imprescriptible” (cannot be taken away). The family, therefore, has interests which must be protected by legislation. Legal right shares for spouses in the *Succession Act 1965* are arguably a product of this constitutional principle as well as being expressly influenced by civil law ideas (via Scottish succession law) of family property. Under the 1965 Act,

<sup>13</sup> Beckert, “Political and Social Interests in the Transfer of Property” (2005) *European Journal of Sociology* 359.

<sup>14</sup> As to the recognition of the family as the fundamental group of society in Article 41 of the Constitution and in the key UN Human Rights Conventions, see the discussion in the Commission’s *Report on Children and the Law: Medical Treatment* (LRC 103-2011), paragraphs 1.22-1.27.

<sup>15</sup> The other notable exception was the *lex falcidia*, or the entitlement of a testator’s designated heir to at least one-quarter of his estate. It was common the testator’s designated heir was the child of the deceased but it was not a requirement, this entitlement often coincided with *legitim* causing some confusion in the literature. The heir performed the functions of a modern executor but could have refused to serve, resulting in intestacy. The *lex falcidia* was intended to prevent intestacies. See Helmholz, “Legitim in English Legal History” (1984) *University of Illinois Law Review* 659.

<sup>16</sup> Lehmann, “Testamentary Freedom versus Testamentary Duty: in Search of a Better Balance” (2014) *Acta Juridica* 9, at 24.

<sup>17</sup> Under an action called *querela inofficiosi testamenti*.

<sup>18</sup> Under an action called *ad supplendam legitimam*.

spouses are entitled to an automatic share by virtue of their relationship with the deceased, irrespective of any need or conduct.

### 3. Interaction between testamentary freedom and parental obligations

- 1.18 Almost no country applies either the concept of unlimited testamentary freedom on the one hand or a complete entitlement of the family members on the other; and succession law in most jurisdictions usually operates some combination of testamentary freedom with family obligations. In making its recommendations in this Report, the Commission has considered the submissions received since the publication of the Issues Paper as to the relevant constitutional principles while also having regard to the appropriate social values applicable to inheritance.
- 1.19 A balancing exercise must be undertaken, between the interests of the individual, their property rights and testamentary freedom, and the limits that are constitutionally permissible on such property rights, and in the interests of the family as an important social institution. The doctrine of proportionality is central to the balance; any restriction of a property right should only be restricted to the extent that is consistent with the concepts of social justice and the common good in Article 43 and to the extent required to vindicate the rights of the family.
- 1.20 While a society that values ideas of private property over family property is likely to value testamentary freedom, it does not necessarily follow that a society that values family property will oppose testamentary freedom. Testamentary freedom can be said to conflict with family property in certain cases, for example where a will seeks to leave all of the testator's property to charity at the expense of his or her family. However, it is also clear in Ireland that the rights of the family, albeit subject to restrictions on property rights in Article 43, also embody elements of freedom from state interference and the family's entitlement to manage its own affairs.<sup>19</sup>
- 1.21 The Commission's approach in this Report, therefore, is to balance, on the one hand, the principles of property rights and testamentary freedom, and, on the other hand, the principles of social justice and the common good as well as public interest in the protection of the family. The interaction between these two important social and constitutional principles has informed the Commission's discussion in this Report as to what reforms of section 117, if any, are appropriate.

<sup>19</sup>

In *In re the Matrimonial Home Bill 1993* [1994] 1 IR 305, the Supreme Court declared unconstitutional the *Matrimonial Home Bill 1993* (which provided for joint ownership of the family home) on the ground that it sought to restrict unduly the family's right under Article 41 to make a joint decision regarding the ownership of the family home.

## B. Policy context of section 117

### 1. Legal policy underlying section 117

- 1.22 As discussed in the previous section, family provision legislation, such as section 117, can be seen as an attempt to reconcile the often conflicting principles of testamentary freedom with constitutionally permissible restrictions on property rights and family obligations. The *Succession Act 1965* represents a compromise between these two principles.
- 1.23 Before the 1965 Act, a testator had complete freedom to dispose of his or her estate as he or she wished. It was viewed as unconscionable by some that a person of means could leave their entire estate to charity, for example, leaving their surviving spouse or children at the mercy of the State.
- 1.24 The Department of Justice's 1962 *Programme of Law Reform* examined the legislative approaches adopted in other jurisdictions to the protection of surviving spouses and children from disinheritance.<sup>20</sup> It noted that the approaches favoured in other jurisdictions included:
- (i) excluding from testamentary disposition a fixed portion of a deceased person's estate and reserving that share for certain classes of beneficiaries, that is, a fixed legal right share;<sup>21</sup>
  - (ii) allowing a claimant to apply for a definite part of the inheritance if he or she chose to do so;<sup>22</sup>
  - (iii) giving certain dependants the right to apply to the court and empowering the court to award maintenance at its discretion.<sup>23</sup>
- 1.25 In 1963, the Dáil adopted a unanimous resolution calling for the introduction of legislation preventing disinheritance of dependants.<sup>24</sup> Following the analysis of the approaches in other jurisdictions, a *Succession Bill 1964* was debated in the Oireachtas that incorporated the first approach, that is, a fixed legal right share approach for both the spouse and surviving children irrespective of dependency. The problem that this measure sought to

<sup>20</sup> The enactment of a comprehensive *Succession Bill*, to include limits on testamentary freedom, had been included in the Department of Justice's *Programme of Law Reform* (Pr.6379, 1962), at 7-9.

<sup>21</sup> See Department of Justice *Programme of Law Reform* (Pr.6379, 1962), at 9, noting this was the approach applied in Scotland, Brazil, France, Spain and Switzerland, and derived from Roman law. The approach in these civil law jurisdictions is discussed in more detail in Chapter 2, below.

<sup>22</sup> *Ibid*, noting that this approach, also derived from Roman law, was applied in New York and Louisiana. The approach in the United States is also discussed in more detail in Chapter 2, below.

<sup>23</sup> *Ibid*, noting that this approach was applied in New Zealand, some Canadian Provinces, and in Northern Ireland and England. See also the detailed discussion of these jurisdictions in Chapter 2, below.

<sup>24</sup> See Vol. 205 No.7 Dáil Éireann Debates (6 November 1963) available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1963110600040?opendocument>.



remedy was “the problem of the inofficious will,”<sup>25</sup> that is, wills that do not fulfil the testator’s family obligations to spouses and children. The 1964 Bill, insofar as it related to children, was primarily directed at dependent children and the Bill contained a provision that permitted adult children to renounce their legal rights. Some members of the Oireachtas expressed concern that a family could be left destitute owing to the actions of the testator.

- 1.26 Although the primary focus of the 1964 Bill was maintenance, the Minister for Justice also argued that it would be unconscionable to permit a testator to give all of his or her property to a stranger at the expense of his or her family. The discretionary family provision regime employed in New Zealand, discussed below, under which both spouses and children could apply for provision, was rejected by the Minister on the grounds that often family obligations go beyond mere provision of maintenance. The argument advanced by the Minister, however, was largely focused on the entitlements of spouses. Provision for children, on the other hand, was primarily seen as something to prevent destitution and provide for the needs of dependants.
- 1.27 While there was unanimous agreement that disinheritance posed a problem, the Oireachtas was far from unanimous in deciding on a solution to this problem and the 1964 Bill was controversial for a number of reasons. As a result of public criticism, the Minister proposed amendments to the Bill providing that the legal right shares would not apply either where the spouse had been left at least two-thirds of the estate or the child was not dependent on the testator.<sup>26</sup> These amendments, however, were insufficient to assuage criticism of the fixed legal shares. It was felt that the system of fixed shares was still too broad and restricted freedom of testation for everyone, the vast majority of whom fulfilled their obligations to their children. So-called “disinheritance” was a serious, but uncommon, problem and it would be less intrusive to allow the courts to adjudicate on the rare occasions on which they were required to do so. Furthermore, it was argued that the inflexibility of the fixed shares would result in the breaking-up of farms into smaller units which may not be economically viable. Although the debate primarily focused on Article 41 and the protection of the family, property rights were also clearly engaged by the 1964 Bill, and Article 43 was raised by some members during the Oireachtas debates.<sup>27</sup>

<sup>25</sup> See Vol. 213 No.4 Dáil Éireann Debates (3 December 1964) available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/zoomin?readform&chamber=dail&memberid=303&pid=VivionDeValera&year=1964&month=12&day=03>

<sup>26</sup> The Minister also proposed that for the purposes of calculating the proportion of the legal right share to which a child was entitled, all children, not merely dependants should be considered.

<sup>27</sup> See Vol. 213 No.7 Dáil Éireann Debates (15 December 1964) available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1964121500029?opendocument>.

- 1.28 Arising from this and other concerns expressed about the 1964 Bill, it was withdrawn by Government and a *Succession Bill 1965* was introduced which, with relatively minor amendments, was enacted as the *Succession Act 1965*. It is notable that, by contrast with the fixed legal share proposals in the 1964 Bill for spouses and children, the 1965 Act provides for statutory fixed legal shares for spouses only. Where the deceased has written a will, the 1965 Act provides that the spouse is entitled a legal right share of one-half of the estate (or one-third if there are children) whereas the child is not entitled to an automatic share of the estate but may apply under section 117 if they feel that they were not properly provided for. On intestacy, the surviving spouse is entitled to two-thirds of the estate, or the whole estate if there are no children; and children are entitled to a fixed share of one-third between them if there is a surviving spouse and the whole estate between them if there is no surviving spouse.<sup>28</sup>
- 1.29 It is clear from the Oireachtas debates that preventing disinheritance of dependent children remained a major motivation for the reforms. As with the 1964 Bill, the Minister for Justice also invoked arguments to prevent unconscionable disinheritance in support of the 1965 Bill, which went beyond mere prevention of destitution. The Minister observed that “in a country such as ours which recognises the very special position of the Family [in Article 41.1.1° of the Constitution] ‘as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law’, so-called freedom of testation is a paradox which cannot be defended on any ground.”<sup>29</sup>
- 1.30 The combination of fixed shares for spouses and the discretionary approach for children under section 117 in the case where a will was made proved to be an acceptable compromise and the *Succession Bill 1965* was enacted as the *Succession Act 1965* with relatively minor amendments.
- 1.31 In summary, therefore, under the default situation of intestacy, where the deceased writes no will, the 1965 Act provides that the estate is divided up under the fixed intestacy shares. The deceased may decide to write a will to overrule these default rules subject to two important limitations. First, the spouse is entitled to a minimum “legal right share” of the estate, which is one-half of the estate where there are no children, or one-third where there are children. Second, the children are entitled to apply under section 117 if they consider that the parent has failed in their moral duty to make proper provision for the child in accordance with their means. It has been observed that “many legal systems restrict testamentary freedom in the interests of testators’ families but Irish law is unusual, possibly even unique, in employing a combination of two, quite different methods they use to achieve this.”<sup>30</sup> Although the Minister did not refer to Article 43

<sup>28</sup> Section 67 of the *Succession Act 1965*.

<sup>29</sup> See Vol 215 No. 14 Dáil Éireann Debates (25 May 1965), available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail1965052500068?opendocument&highlight=succession%20bill>.

<sup>30</sup> Cooney, “Succession and Judicial Discretion in Ireland: the Section 117 Cases” (1980) *Irish Jurist* 62, referring to the legal right shares for spouses on the one hand but discretionary provision for children on the other.



directly, he argued that “[t]he right to disinherit one’s spouse and family is not a fundamental right inherent in property”.<sup>31</sup>

- 1.32 It is worthwhile to reconsider whether this balance struck by the Oireachtas between testamentary freedom and family obligations remains appropriate, especially in light of developments in Irish society since the enactment of the 1965 Act, to which the Commission now turns.

## 2. Demographic context of family provision in Ireland

- 1.33 Ireland has undergone considerable demographic and social changes since section 117 of the 1965 Act was enacted. A number of submissions received by the Commission in response to the Issues Paper suggested that the Commission should have regard, for example, to the increasing prevalence of non-nuclear families. Many others argued that the concepts of “moral duty” and even of “proper provision” in section 117 were outdated and that testamentary freedom should prevail. Several submissions highlighted general demographic trends but others questioned the relevance of such broad, societal considerations to a private dispute.
- 1.34 As noted during the Oireachtas debates on what became the 1965 Act, section 117 was derived, in part, from the family provision legislation first enacted in New Zealand in 1900. As already noted, however, the fixed shares in the 1965 Act owe their origin to civil law jurisdictions, mediated through Scottish succession law. In 1900, family provision legislation was arguably focused on dependency and the protection of young vulnerable spouses and under age children from being left destitute. Since 1965, the premature death of the sole breadwinner of a household has become less likely. In addition, in the early 20th century the family played a greater role in social security, when alternatives such as the welfare state or market mechanisms were less widely available than they are now.<sup>32</sup>
- 1.35 Since the early 20th century, medical and scientific advances, combined with better nutrition, have extended life expectancy.<sup>33</sup> Even since 1965, life expectancy in Ireland has increased by approximately 10 years.<sup>34</sup> At the same time fertility rates in many western nations have dropped,<sup>35</sup> although this trend is less pronounced in Ireland than elsewhere. Also, the average age at which women have their first child has stayed relatively stable.<sup>36</sup> Although the mean has increased, the amount of variation in age has become less amplified, and the age of the mother at childbirth is more likely to be close to the average

<sup>31</sup> See Vol 215 No. 14 Dáil Éireann Debates (25 May 1965), available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail1965052500068?opendocument&highlight=succession%20bill>.

<sup>32</sup> Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 205.

<sup>33</sup> <https://esa.un.org/unpd/wpp/DataQuery/> life expectancy at birth has increased by almost 15 years between 1950 and 2016.

<sup>34</sup> There was an increase in life expectancy at birth from 72.9 years to 82.9 between 1966 and 2011. See <http://www.cso.ie/multiquicktables/quickTables.aspx?id=vs30>.

<sup>35</sup> Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 45.

<sup>36</sup> *Ibid* at 168.

than it had been in the past.<sup>37</sup> These trends have resulted in what has been described as the vertical expansion of family structures, with more generations alive at any point but with fewer members in each generation. Children often remain dependent for longer than was previously the case, relying on their parents for support during third level education.<sup>38</sup> Additionally, parents may rely on their own children to look after them later in life. Lifetime earnings are increasingly viewed as a safety net to provide for someone's later years, rather than a helping hand to give the next generation.

- 1.36 In addition to the demographic changes, changes in social attitudes have also altered family dynamics. The *Status of Children Act 1987* provided for equality in succession law for children whose parents were not married to each other, and the 1987 Act therefore amended section 117 to allow for claims by such children for the first time. In 1995, the Constitution was amended to permit divorce,<sup>39</sup> which means that section 117 cases increasingly involve claims by children from 2 or more parental relationships; and in the future the effect of the introduction in 2015 of marriage equality will also add to this.<sup>40</sup> In addition, the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* provides for "proper provision" on death for a financially dependent survivor of a cohabitant relationship. Cohabitation, single parent families and remarriage have become more prevalent in the 50 years since the *Succession Act 1965* was enacted.<sup>41</sup> As a result, families are often less "nuclear" than they once were, with multiple families and step-families blending together and overlapping. Overall, the make-up of the typical family has changed. Indeed there has been a shift away from one standard type of family to a more diverse range of family structures.<sup>42</sup> Additionally, a shift in attitudes to retirement, from "rest to reward to right",<sup>43</sup> over the last few decades may serve to eclipse any desire among some individuals to remain in the workplace in later years to provide for themselves or others. Although it must be acknowledged that other individuals have challenged mandatory retirement at 65, and have successfully sought to work beyond that age (which was set in the late 19<sup>th</sup> and early 20<sup>th</sup> century as the retirement age, and pensionable age, when average life expectancy was 67 to 68). Many of these changes can be explained by a shift towards a more individualistic, rather than family centric, view of society,<sup>44</sup> which considers the individual as the appropriate perspective from which to view interaction with others. Although this perspective has its origins in the early classical liberalism of Mill and Locke discussed above, it has had a considerable influence on policy since the second half of the 20th century. Liberal social values have implications for family dynamics as it views the family as an interaction between individuals, rather than a monolithic institution. Nonetheless, as already noted, both Article 41 of the Constitution, as well as 20<sup>th</sup> and 21<sup>st</sup> century international human rights instruments, continue to recognise the family as the fundamental unit of society.

<sup>37</sup> This point was highlighted in one of the submissions in response to the Issues Paper.

<sup>38</sup> Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 166.

<sup>39</sup> *Fifteenth Amendment of the Constitution Act 1995* and *Family Law (Divorce) Act 1996*.

<sup>40</sup> *Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015* and *Marriage Act 2015*.

<sup>41</sup> Available at: [www.cso.ie](http://www.cso.ie). See also Harper at 158, 173.

<sup>42</sup> Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 178.

<sup>43</sup> *Ibid* at 194.

<sup>44</sup> *Ibid* at 204-206.

- 1.37 The English gerontologist, Professor Sarah Harper, has written and commented extensively on how these social and demographic changes affect issues of generational succession,<sup>45</sup> including what she describes as the “generational contract.”<sup>46</sup> The traditional generational contract that operated in 20th century Europe and comparable developed states referred to an exchange between generations in which the adult generation first cared for young people, then the young people grew up and they cared for their older parents.
- 1.38 Professor Harper has commented that we may currently be moving into an “adapted generational contract,” which means that older people will have more responsibility for themselves than in the past.<sup>47</sup> This will arise because parents are having fewer children, and therefore there are fewer of them to care for the parents in later life. Parents also live longer, so that they have to plan for a potentially longer time period to fund their own later life, notably their health and care requirements.
- 1.39 This “adapted generational contract” also means that the older generation may be less likely to leave inheritances for their children in the way that children in the 20<sup>th</sup> Century may have expected. Professor Harper has referred to evidence that those who can, have increasingly started to pay a kind of “up front” inheritance during their lifetime, such as their child’s college fees or a lump sum to contribute to the purchase of a house, which would previously have been the inheritance left behind. Indeed, many parents will rely on the value of their family home to fund their longer life expectancy, including health and care costs, which in the past would have formed the main asset inherited by their children. Although Harper has also commented elsewhere that the fear of costs increasing with increased longevity is often misplaced. If greater life expectancy is obtained by healthier lifestyle, then often the effect is to postpone the same end of life care until later, rather than to increase it.<sup>48</sup> Indeed the narrative of contract between generations is arguably influenced by modern individualistic view of social relations as discussed above.
- 1.40 There are several advantages of this “modern” approach to intergenerational wealth transfer. First, as the investment in education is made early on in life the benefits last throughout the child’s adult life. Second, it can be more beneficial to provide for children early in life when they are less financially secure, rather than later in life where they are already comfortable. Third, the growth of the “smart economy” means that investment in human capital can be more fruitful than land, for example, which may previously have been the main source of income for a family or individual.

<sup>45</sup> *Ibid.* See also Benedictus, “Disinheritance and the Law” *The Guardian*, 31 July 2015, which includes comments by Professor Harper in the aftermath of the decision of the English Court of Appeal in *Ilott v Mitson and Ors* [2015] EWCA Civ 797, [2016] 1 All E.R. 932; on appeal *sub nom Ilott v Blue Cross and Ors* [2017] UKSC 17, discussed below.

<sup>46</sup> Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 125.

<sup>47</sup> Benedictus, “Disinheritance and the Law” *The Guardian*, 31 July 2015.

<sup>48</sup> Indeed, Harper discusses the growing evidence for the “compression of morbidity” which means that increased longevity actually shortens the period of disability prior to death. See Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006) at 188.

- 1.41 On the other hand, there is some concern that in the 21st century the growth of capital will exceed the growth of personal income,<sup>49</sup> meaning that inheritance of assets may still have a role to play in the intergenerational wealth transfer and increasing social stratification. This experience is borne out in Ireland: many section 117 disputes centre around the transfer of a farm or family business on death which is often the main source of wealth for the family. Harper has noted that the new generational contract may entrench class divisions between those who have been able to pass on family wealth to the next generation by way of property transfer or provision of education, and those who have not. The British Institute for Fiscal Studies, in its 2017 Briefing Note, emphasised the increasing importance of inheritance, particularly among the more wealthy in society.<sup>50</sup> The Briefing Note observed that those with higher incomes are also more likely to receive greater inheritance, something which contributes to income inequality. Although the Institute for Fiscal Studies used data from the UK for its study, some of the contributing factors would also be familiar in Ireland, such as the regional variation of house prices and the high price of property in relation to income. The relevance of this to the Commission's discussion of section 117 was questioned in some of the submissions received in response to the Issues Paper. Arguably it is beyond the expertise of the courts, and arguably not relevant to an individual section 117 application, to grapple with such broad issues of social policy in a dispute between parties over an entitlement to share in the parents' estate.
- 1.42 Nonetheless, it is important in the context of any reform of section 117 to have regard to these social and demographic developments, in order to consider whether the objectives the Oireachtas had in mind in enacting section 117 of the 1965 Act, as discussed in the previous section, should continue to apply to all adult children. On the one hand, it could be argued that if section 117 continues to apply in that manner, needy and deserving beneficiaries under a will may be displaced by comfortable, middle-aged applicants seeking proper provision. On the other hand, because of the financial crisis and recession that emerged in 2008 in Ireland, the current generation of adult children remain in need of the ability to apply for relief under section 117.<sup>51</sup>
- 1.43 Strong family relationships and intergenerational transfer of wealth are important for a family's ability to perform its crucial social functions of maintenance, care and education. As modern social and demographic changes alter family dynamics, the application in practice of section 117 may need to be considered in the context of whether it can accommodate these developments so that it facilitates the reciprocal obligations of increasingly complex family structures.

<sup>49</sup> One of the submissions on this point referred to Piketty, *Capital in the 21st Century* (Harvard University Press, 2014).

<sup>50</sup> Institute of Fiscal Studies, "Inheritances and Inequality Across and Within Generations" (2017) BN192 available at <https://www.ifs.org.uk/publications/8831>.

<sup>51</sup> This arose in *Re SF* [2015] IEHC 851, discussed in Appendix C, below.

### 3. Conclusions on the policy context

- 1.44 Section 117 represents an attempt to counterbalance the principles of testamentary freedom with principles of family obligations. In 1965, the Oireachtas was influenced by both common law jurisdictions, which emphasise testamentary freedom, and civil law jurisdictions, which favour automatic family entitlements. Ultimately the Oireachtas settled on a succession regime that had influences from both legal systems, with fixed shares for spouses and, in the case where a will has been made, discretionary provision for children under section 117. Furthermore, the discretionary provision provided for by section 117 encompassed obligations of maintenance and support, which was stronger than the mere maintenance obligations of some other jurisdictions, such as England and Wales. The Commission is of the view that this approach remains sound. Section 117 strikes a reasonable balance between the principles of testamentary freedom and family obligations.
- 1.45 In light of the demographic changes discussed above, the Commission also considers that it is important to ask whether section 117 would benefit from reform that has more regard to the needs of children, including adult children, rather than any perceived expectation of inheritance. In that respect, the Commission has considered whether section 117 should be reformed to refocus the balance between testamentary freedom and family obligations.
- 1.46 While the discussion of demographic changes provides important context to the debate, it is outside of the expertise of the Commission to discuss the wider policy implications of these changes, such as general taxation policy, that lie well beyond the narrow focus of section 117 applications. Furthermore, because section 117 is discretionary in nature, it is likely to be more resilient to such changes than rigid or mandatory rules. However, the Commission considers that modern patterns of intergenerational transfers justify a re-examination of the balance between testamentary freedom and family obligations, particularly where adult children are concerned.

## CHAPTER 2

### SECTION 117, MORAL DUTY AND PROPER PROVISION

#### A. Key elements of section 117 of the Succession Act 1965

- 2.01 Section 117(1) and (2) of the 1965 Act set out the key elements concerning the moral duty to make proper provision as follows:

"(1) 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.

(2) 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."

#### 1. Any child, including an adult child, may apply under section 117

- 2.02 Section 117(1) provides that an application may be made "by or on behalf of a child of a testator." During the Oireachtas debates on what became the 1965 Act, the following question was posed, though not answered: "There is not, as far as I can discover, any definition of the term 'children'. It is obvious what is meant by spouse, the widow or widower, but 'children' is a somewhat loose term. I should like to know if it is meant to refer to minors or could it conceivably refer to, say, a Dublin publican of 45 years of age?"<sup>1</sup>
- 2.03 In fact, because section 117 uses the word "child" rather than "infant" it is clear that it provides for applications not only by children under 18 but also by adult children.<sup>2</sup>

<sup>1</sup> See Dáil Éireann Debate Vol. 215 No. 14 (25 May 1965) available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1965052500068>

<sup>2</sup> Section 3 of the 1965 Act (as affected by the *Age of Majority Act 1985*, which lowered the age of majority from 21 to 18 with effect from 1 March 1985) defines "infant" as a person under 18 years of age (before the 1985 Act came into effect, "infant" for the purposes of the 1965 Act meant a person under 21 years of age). By contrast, section 117 of the 1965 Act uses the term "child" rather than "infant", and since "child" is not further defined it includes adult children for the purposes of an application under section 117.



- 2.04 In *EB v SS*<sup>3</sup> the Supreme Court held that, while it was reasonable to expect that the primary aim of section 117 was to protect dependants, “since the legislature... declined to impose any age ceilings which would preclude middle aged or even elderly offspring from obtaining relief, the courts must give effect to the provision, irrespective of the age which the child has attained.”<sup>4</sup>
- 2.05 The case law on section 117 indicates that, although some applicants are under the age of 18, many of them are in their mid-30s and mid-40s at the time of hearing. The demographic changes discussed in Chapter 1, above, strongly suggest that this pattern will continue into the future.
- 2.06 As discussed further below, the age of the applicant is relevant to the court in determining whether the parent has failed in the duty under section 117 and if so, what proper provision is needed to remedy that failure.
- 2.07 Section 117 does not provide for applications by children of parents who died intestate, that is, without making a will. Since the enactment of the *Status of Children Act 1987*, which inserted section 3(1A) into the 1965 Act, there is no requirement that the applicant child’s parents were married to each other (or, since 2010, in a civil partnership with each other). However, applications are restricted to the legal parents of the child; no application is possible in respect of the estate of a person who was not the parent of the child but was married to, or in a civil partnership with, the child’s parent. Section 117 is restricted to children of the testator and applications by “issue” other than children, such as grandchildren, are not possible under section 117.
- 2.08 Adopted children are considered children of their adoptive parents, and no one else (including birth parents) for the purposes of succession rights.<sup>5</sup> For section 117 purposes, this means that adopted children may make a claim against the estate of their adoptive parents, but not their birth parents. *In re GM; FM v TAM*<sup>6</sup> is an example of a case in which the plaintiff was the adopted son of the testator.

## 2. Section 117 currently applies only where a will has been made

- 2.09 The requirement that the applicant for provision under section 117 must be a “child of the testator” limits section 117 to situations where the deceased had made a valid will. Section 117, therefore, will not apply to intestacy situations where no will has been made.
- 2.10 In *RG v PSG*<sup>7</sup> the High Court (Carroll J) examined the meaning of the terms “testator” and “partial intestacy” under the 1965 Act. The Court noted that no definition of “testator” is contained in the 1965 Act. Under his will, the testator had left his entire estate to his wife,

<sup>3</sup> [1998] 4 IR 527.

<sup>4</sup> *Ibid.*

<sup>5</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 438. See also section 3(2)(a) of the *Status of Children Act 1987* and Section 4A(1) of the *Succession Act 1965*.

<sup>6</sup> (1970) 106 ILTR 82.

<sup>7</sup> [1980] ILRM 225.

who predeceased him and the entire estate was to be distributed under the rules of intestacy. The Court held that an order could be made by the Court under section 117 even where a will failed to dispose of any property. Although the plaintiff argued that such a manifest failure of a will amounted, in effect, to intestacy the High Court held that a person who makes a will in accordance with the statutory requirements is a testator even if the will is partially or even wholly ineffective in disposing of his or her property. The state of testacy, therefore, does not depend on the effectiveness of the will but rather the effective execution of the will. If the will disposes of all of the deceased's property, the testator is said to have died wholly testate; in all other cases where there is a valid will the testator is said to have died partly testate. Where there is no will, the deceased died wholly intestate and the estate is not subject to an application under section 117 because the deceased is not a testator within meaning of the 1965 Act.

- 2.11 Section 121 of the 1965 Act is also relevant to situations of partial testacy because it invalidates any disposition of property made within 3 years of death of the testator where this was done to defeat or substantially diminish the share of the deceased's spouse, or the intestate share of any children. If the court is satisfied that section 121 applies, it may order that the disposition was made as if it was part of a will. This disposition is, therefore, part of the estate of the deceased. Where the parent of a child has died wholly intestate, the child may still make an application under section 117 coupled with an application under section 121. While it may appear that complete intestacy would be a barrier to an application under section 117, the courts have held that if the application under section 121 is successful it has the effect of bringing the estate of the deceased within section 117.<sup>8</sup> This is because, once an order is made by the court under section 121, it treats any disposition as part of a will, which has the effect of rendering the deceased a "testator" within the meaning of the 1965 Act.
- 2.12 The issue of intestacy is discussed further in Chapter 3, below.

### 3. The meaning of estate under section 117

- 2.13 Section 45(1) of the *Succession Act 1965* provides that the deceased's estate that is available for the payment of debts or legal rights is limited to those assets in respect of which the estate of the deceased enjoys a beneficial interest. For example, in the case of insurance policies it will be necessary to clarify whether the deceased has a beneficial interest in the proceeds. Section 109 also provides that references to the net estate of the testator in Part IX of the *Succession Act 1965* (which contains section 117) means the estate to which he or she was beneficially entitled for an estate or interest not ceasing on his or her death. For the purposes of section 117 applications, this has the effect of restricting the net estate to property (including any interest in insurance policies) to which the deceased or his or her estate would be beneficially entitled. In *PD v MD*,<sup>9</sup> the widow of

<sup>8</sup> *PD v MD* [1981] ILRM 179.

<sup>9</sup> [1981] ILRM 179.



the deceased was entitled to the proceeds of an insurance policy under the *Married Women's Status Act 1957* and this sum did not form part of the estate of the deceased.<sup>10</sup>

- 2.14 In Ireland, unlike in England and Wales, discussed below, any property held in joint tenancy is not included in the estate of the testator for the purposes of the section 117. Such property automatically passes to the other joint tenant (or tenants) by "survivorship" on the death of the deceased and therefore falls outside the scope of the definition in section 109 which limits the estate to interests not ceasing on death.<sup>11</sup>
- 2.15 Case law from England and Wales can be helpful in determining when a court will consider the benefit of an insurance policy to form part of the estate. The English textbook Williams, Mortimer and Sunnucks draws a distinction between policies made for the benefit of the deceased and his or her estate and policies made for the benefit of someone else.<sup>12</sup> The proceeds of a policy for the benefit of the deceased or the deceased's estate will form part of the estate and may be subject to an order for family provision. On the other hand where a trust of the policy is created, for the benefit of someone else (a spouse for example), the proceeds will not form part of the estate of the deceased. However, anti-avoidance provisions may still apply to payment of premiums under these policies and to the act of creating the trust of a policy.<sup>13</sup>
- 2.16 It is worth considering the law in England and Wales which deals with joint interests in insurance policies. A deceased's share in property, of which he or she is a beneficial joint tenant (rather than a tenant in common), will pass to the surviving joint tenant on death and will accordingly not be disposed of under the deceased's will. However, section 8 of the English *Inheritance (Provision for Family and Dependants) Act 1975* enables the court to treat the deceased's joint interest in property as part of his or her personal estate. This was included on foot of a 1974 Report of the Law Commission of England and Wales that it should be possible to make provision out of the share of the deceased in a joint tenancy despite the fact that it is not part of the estate of the deceased.<sup>14</sup> It is clear that there can be a joint tenancy over the benefit under an insurance policy. In *Lim v Walia*,<sup>15</sup> the English Court of Appeal held that, because the insurance policy specified that both parties were to be paid terminal illness benefit, the benefit was held on a joint tenancy. On the facts, however, the Court held that the wife's joint interest in the terminal illness benefit was valueless because, when considered immediately before her death, the benefit could never be claimed and was superseded by death benefit which was not held jointly as it could only be claimed by one person.

<sup>10</sup> *Cullinan v Keogh* [2013] IEHC 400 involved an interlocutory (that is, preliminary) application for an order preventing dissipation of funds. A dispute arose as to whether the estate was beneficially entitled to the proceeds of an insurance policy, although this substantive issue was not decided at preliminary stage and the case never went to a full hearing.

<sup>11</sup> Section 4(c) of the *Succession Act 1965*.

<sup>12</sup> Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013).

<sup>13</sup> *Ibid* at 1109.

<sup>14</sup> Law Commission of England and Wales *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974), at 36.

<sup>15</sup> [2014] EWCA Civ 1076.

#### 4. Fixed shares of surviving spouses who are parents are protected

- 2.17 Besides the meaning of “estate” as discussed above, section 117 also imposes limits on the court’s ability to distribute the assets of the deceased. Section 117(3) provides that an order under the section must not affect the legal right share of the spouse of the deceased.<sup>16</sup> Additionally if the spouse of the deceased is also the parent of the applicant an order may not affect their intestacy entitlement or entitlement under the will of the deceased. Non parent spouses are treated differently from those who are parents to the deceased. The legal right share is immune from distribution under section 117 in all cases, as a minimum entitlement for all spouses. Bequests and intestacy shares<sup>17</sup> are protected from distribution in the case of parents of the deceased as the child may benefit from this in the future where the spouse is the parent of the applicant. Where the spouse is not the parent of the applicant, bequests and intestacy entitlements are not protected from distribution. The reason for this distinction is probably that a parent is more likely to provide for their child, indeed as discussed below the duty under section 117 is considered to be jointly held by both parents.
- 2.18 Ireland is unusual in its combination of fixed legal right shares for spouses but discretionary provision for children where a valid will has been made, and this combination is not found in any of the jurisdictions discussed below. Legislation in Australia, New Zealand and England and Wales all provide for spouses to make discretionary provision applications. In these jurisdictions, no portion of the estate is protected from applications for discretionary provision, whether or not they are the parents of the child.

#### 5. Section 117 involves an objective standard

- 2.19 Parents are presumed to know their children better than anyone else. Each section 117 application depends on its own circumstances and the parents are more likely to be in a position than a court to assess correctly what their obligations are to their children.

<sup>16</sup> Section 111 of the 1965 Act entitles the spouse of a person who has made a will to a share in the estate of their deceased spouse, commonly known as the legal right share. If the deceased person leaves a spouse and no children, the surviving spouse is entitled to one half of the estate. If the deceased person leaves a spouse and children, the surviving spouse is entitled to one third of the estate. Section 111A of the 1965 Act (inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*) provides that the position is, broadly, the same for civil partners, subject to an exception where there are children of the deceased civil partner. Section 111A of the 1965 Act provides that if the deceased person leaves a civil partner and no children, the surviving civil partner is entitled to one half of the estate. If the deceased person leaves a civil partner and children, the surviving civil partner is, in general, entitled to one third of the estate. An order under section 117 can, however, interfere with the legal right of a surviving civil partner if the court, after consideration of all the circumstances, is of the opinion that it would be unjust not to make an order. In considering such an application, the court must consider the deceased person’s financial circumstances as well as his or her obligations to the surviving civil partner. The *Marriage Act 2015* (enacted after the insertion of Article 41.4 on marriage equality into the Constitution in 2015) provides that a civil partnership under the 2010 Act may be converted into a marriage; and that, after the 2015 Act came into force, no further civil partnerships may be entered into. As a result, the specific provisions concerning succession and civil partnership are likely to have very limited practical application in the future. For this reason, the Commission does not review those provisions in this project.

<sup>17</sup> The intestacy shares can become relevant where, for example, the testator dies partially intestate and part of the estate is distributed in accordance with the intestacy shares.

Nonetheless, section 117 places an obligation on parents to make proper provision for their children in accordance with the parent's means and that obligation is assessed by objective standards. This means that the testator is compared to the hypothetical "prudent and just parent" when deciding whether proper provision was made.

- 2.20 Because section 117 is primarily concerned with provision for children, it is not a question of whether the testator acted in good faith or bad faith. In *In re NSM deceased*<sup>18</sup> the High Court (Kenny J) held that the testator in that case had not discharged his duty under section 117 because, although he had attempted to do so in his will this had not resulted in making proper provision for some of his children. This effect arose because the substantial inheritance tax due on the estate greatly reduced what was actually available to the affected children. It is the actual fact of provision which is relevant, rather than the intention of the testator.
- 2.21 This also means that it is not relevant whether the testator was subjectively aware of his or her own failure to properly provide for a child in order for it to be a breach of the section 117 duty. As the High Court (Kenny J) stated in *In re GM; FM v TAM*:<sup>19</sup>
- "The existence of the duty must be decided by objective considerations: the court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive."
- 2.22 In some cases it may be impossible for the testator to know the extent of his or her failure to make proper provision for his or her children. In *In re JLW Deceased, CW v LW*<sup>20</sup> the High Court (O'Sullivan J) observed that the objective standard results in the fiction that a testator is expected to anticipate the future costs of litigation. In many of the cases the testators appeared to make a sincere effort to provide fairly for all their children, but a court might nonetheless conclude that they have fallen short of the objective standard of behaviour. In *W v D*,<sup>21</sup> for example, the High Court (Parke J) held that, although there was no "blameworthy breach of duty" by the testator and that he sincerely wished to make proper provision for his children, nonetheless, the Court held that the testator had fallen short of that standard. At the same time, while the intention of the testator is of secondary importance, some account is taken on this on the basis that the testator is deemed to be best placed to assess his or her obligations to their children. Thus, in *In re estate of IAC decd*<sup>22</sup> the Supreme Court took account of the testator's attitude which was "indicative of a concerned assistance" for her children.
- 2.23 Section 117 is not intended to provide protection against the unrealised ambition of a parent to alter a will in favour of a particular child, nor does the court merely enquire as to whether a testator was ignorant of certain facts which would have caused him or her to distribute the estate differently if he or she had been aware of them. Section 117 simply states that a parent has certain obligations to provide for their children, and the court will

<sup>18</sup> (1973) 107 ILTR 1.

<sup>19</sup> (1970) 106 ILTR 82.

<sup>20</sup> [2005] IEHC 325, [2005] 4 IR 439.

<sup>21</sup> High Court, 28 May 1975.

<sup>22</sup> [1990] 2 IR 143.

intervene if there is a breach of these obligations; the testator's intentions are not decisive in determining this issue.

- 2.24 It is also worth noting that the court is not concerned with assigning blame to the testator, merely redressing the shortcoming in providing for the child. However, the use of the phrase "moral duty" at times appears to create a tension with the objective nature of the standard. Submissions received by the Commission in response to the Issues Paper have suggested that the use of the phrase "failure of moral duty" is divisive and can exacerbate disputes because it appears that the judge is rewarding good behaviour or punishing bad behaviour. The Commission considers this question in Part D of this chapter, below.

## 6. Two-stage test under section 117

- 2.25 Since the enactment of section 117 of the *Succession Act 1965* the courts have, in general, applied a two-stage process in deciding such applications. Although section 117 does not explicitly state that there should be a two-stage test, this approach can be inferred by the wording of section 117. Section 117(1) makes it clear that the court must first conclude that the parent has failed in his or her moral duty to make proper provision for a child. Only then can the court proceed to the second stage, to decide to make such provision as it thinks "just."
- 2.26 Thus, the court first decides whether the testator has failed in his or her moral duty to make proper provision for the applicant under section 117(1) of the 1965 Act. In *XC v RT*<sup>23</sup> the High Court (Kearns J) confirmed that there is a high onus of proof on an applicant under section 117, which requires establishing a positive failure in the duty to make proper provision.<sup>24</sup> If the applicant overcomes this relatively high onus of proof,<sup>25</sup> the court proceeds to the second stage to assess what provision should be made for the applicant.

## B. Case law on failure in moral duty to make proper provision under section 117

- 2.27 The outcome of cases involving section 117 is often heavily dependent on the particular facts of the case. It is therefore important to examine more closely how the courts deal with particular factual circumstances in order to address the question of whether section 117 creates a legal duty consistent with the moral duty.

### 1. Overview of the case law on section 117

- 2.28 The factors to be considered by the court in assessing whether the testator has failed in his or her moral duty to make proper provision for the applicant have been discussed by

<sup>23</sup> [2003] IEHC 6, [2003] 2 IR 250.

<sup>24</sup> *Ibid.*

<sup>25</sup> *In re estate of IAC decd* [1990] 2 IR 143 at 148.

the courts in a number of cases. Section 117(2) sets out the general approach that the courts must take in deciding section 117 cases. Section 117(2) is not usually read in isolation and the overall approach of the courts is best understood by taking sections 117(1) and 117(2) together.

- 2.29 *In re GM; FM v TAM*<sup>26</sup> is one of the first cases under section 117. The plaintiff was 32 years of age at the time of the hearing. He was the adopted son of the testator and had worked as a merchant seaman. The testator had been a medical doctor and had funded the plaintiff's education. The plaintiff was not provided for in the will of the testator. The High Court (Kenny J) confirmed that whether there had been a breach of the moral duty to make proper provision must be decided by objective considerations must depend on the following 5 factors:
- (a) the amount left to the surviving spouse or the value of the legal right if the surviving spouse elects to take this;
  - (b) the number of children, their ages and their position in life at the date of the deceased person's death;
  - (c) the means of the testator;
  - (d) the age, financial position and prospects in life of the applicant;
  - (e) whether the deceased person has already made proper provision for the child.<sup>27</sup>
- 2.30 The Court also concluded that the existence of the duty must be judged by facts existing at the date of death and not at the date of the making of the will. The plaintiff was awarded one-half of what remained from the £135,000 estate, once the mother's legal right share (under section 111 of the 1965 Act) and testamentary expenses were accounted for.
- 2.31 In *PD v MD*,<sup>28</sup> although the High Court (Carroll J) held that the Court did not have jurisdiction to make an order under section 117 because the application was outside the time limit, the Court felt it appropriate to adjudicate on whether the plaintiff had been properly provided for. The testator in this case was survived by a widow and 4 children of his marriage. At the time of hearing the children's ages were 21, 18, 17 and 16. The testator was separated from his wife and was in a new relationship with another woman, the defendant, with whom he had 2 other children. During the life of the testator, the defendant acquired a one-half interest in the deceased's business and was named a joint tenant in the home in which they lived together. Under a separation agreement with his wife, she received a life interest in the family home, annual maintenance, a car and expenses for the children's education. The estate was valued at approximately £145,000 at the date of hearing. Under the will, the widow received one-third of the estate, which was to include the family home. The defendant received the testator's interest in his

<sup>26</sup> (1970) 106 ILTR 82.

<sup>27</sup> Keating, *Succession Law in Ireland: Principles, Cases and Commentary* (Clarus Press, 2016) at 128 refers to these as "The Kenny Criteria."

<sup>28</sup> [1981] ILRM 179.

business. The residue, worth about £6,000 at the time of the hearing, was left on trust for the testator's 6 children for their "benefit, maintenance, education and advancement" at the absolute discretion of the trustees, one of whom was the defendant. The Court stated that in deciding whether the testator had failed to make proper provision, it was necessary to consider the effect of the separation agreement, as well as the will. In addition, "proper provision" must provide some opportunity for advancement in life, beyond mere maintenance or payment of day to day expenses. There should be a reasonably equitable distribution between the two families, including provision made during life, so that there would not be a large discrepancy between the standard of living enjoyed by the children of either relationship.

- 2.32 Because of the small value of the residue after testamentary expenses, the Court held that this would not be sufficient to properly provide for the child. Under the 1965 Act, the testator's widow was entitled to one-third of the testator's interest in the business premises. Carroll J held that proper provision could be achieved by an order appropriating the remaining two-thirds of the deceased's interest in the business premises for the benefit of the widow and the children. Carroll J also held that a prudent and just parent would have created two separate trusts for the residue, one for each family.
- 2.33 In *In re estate of IAC decd*,<sup>29</sup> the Supreme Court considered an application under section 117 by twin daughters of the deceased, aged 41 at the time of the case. The Court adopted and approved the principles set out in *In re GM; FM v TAM*<sup>30</sup> and also added further principles which it accepted might be considered a qualification of them. The Court confirmed that section 117 placed a "relatively high onus of proof on an applicant."<sup>31</sup> In this regard, the applicant must establish a positive failure in moral duty to make proper provision and that "it is not sufficient to establish that the provision made for the child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous."<sup>32</sup> An order should not, therefore, be made simply because the court would have made different dispositions. Furthermore, the court should be reluctant to vary the terms of a will where the testator has given financial support to his or her children "indicative of a concerned assistance" and where the relationship between the deceased parent and their children is "one of caring and kindness." The Supreme Court upheld the award made to one of the plaintiffs in the High Court on the basis that, in comparison with her siblings she had not received proper provision from the testator and that the testator should have anticipated the expense arising from the probable breakdown of her marriage. The award made to the other plaintiff in the High Court was set aside on the basis that there had been no failure to make proper provision for her.
- 2.34 In *EB v SS*,<sup>33</sup> the plaintiff was aged 40 at the time of the hearing in the High Court. He had initially dropped out of college but later returned to complete his degree with the

<sup>29</sup> [1990] 2 IR 143.

<sup>30</sup> (1970) 106 ILTR 82.

<sup>31</sup> [1990] 2 IR 143, at 148.

<sup>32</sup> *Ibid.*

<sup>33</sup> [1998] 4 IR 527.



financial assistance of his father. He developed a major substance abuse problem and had spent time in various treatment facilities. At the time of the hearing the plaintiff was married with 3 children living on social welfare in a house provided for him by his father. The plaintiff's mother (the testator) had also made financial provision for him and his siblings during her lifetime worth £275,000 each. The plaintiff "unhappily dissipated the sum", while his siblings remained financially comfortable. The gross value of the mother's estate was £300,000, the majority of which was left to 5 charities with small sums for her grandchildren. One of the motivating factors for the plaintiff's claim was his desire to obtain an award so that he could provide for his own children.

- 2.35 The Court confirmed that it is not a defence to an application under section 117 of the 1965 Act that the testator provided equally for all of his or her children. In particular, a testator could be said to have failed to make proper provision for his or her children where he or she has divided the estate equally between the children to the detriment of a child with special needs. However, the Court acknowledged that it must also recognise the concern of parents to avoid friction among their children by dividing their estate equally amongst them. The Court also recognised that, in applications under section 117, it cannot disregard "the fact that parents must be presumed to know their children better than anyone else."<sup>34</sup> The Court also held that they could not consider the position of the grandchildren of the testator. Section 117 only creates a moral duty to make proper provision for children, and to include grandchildren would extend the scope of the duty beyond the words of section 117.
- 2.36 Having considered these principles, the Supreme Court upheld the decision of the High Court that the plaintiff was not entitled to any provision out of the estate of the deceased under section 117. It is also clear from the decision of the Supreme Court that strong evidence to support a finding by a court of a failure in the moral duty to make proper provision was a precondition of the making of an award. The court is empowered to remedy the failure of duty, but where no such failure exists, no remedy is required.
- 2.37 In *PMcD v MN*,<sup>35</sup> the plaintiff was one of two children of the testator. At the time of the hearing, the plaintiff was in his late 40s and his brother was in his mid 50s. The testator had suffered an injury that made him unable to work on the farm. As a result the plaintiff had left school in his teens to help the testator look after the farm. The plaintiff did the vast majority of the farm work for a number of years while receiving nothing in return, apart from food, accommodation and a small opportunity to profit from use of the land. The plaintiff's brother also left school at a young age but ultimately became a skilled glass cutter.
- 2.38 A rift occurred in the family when the plaintiff married, as his father (the testator) did not approve of his wife's family. Around the same time the testator became quite close to the defendant's family, who were his neighbours, and he began to live with them. The relationship between the father and sons deteriorated as the sons tried to put pressure on

<sup>34</sup> [1998] 4 IR 527.

<sup>35</sup> [1998] IEHC 183, [1999] 4 IR 301.

the testator to transfer the property to them. The plaintiff became involved in an altercation with a neighbour (who was a member of the defendant's family) over the use of the land and ultimately threatened the neighbour with a shotgun. As a result of this incident the testator altered his will for the benefit of the defendants and sought to eject the plaintiff from his land. The testator obtained an injunction in the Circuit Court, ordering the plaintiff to vacate the land and the plaintiff was awarded £11,000 on his counterclaim in consideration of unpaid wages. Later, an agreement was negotiated permitting the plaintiff to remain on the lands for a limited time. However, when this limited time ran out, the plaintiff refused to leave the property, and as a result he was imprisoned for contempt of court. During this time, the deceased transferred some of the property to the plaintiff's brother. When the plaintiff purged his contempt by apologising to the court he was released from prison; but he then threatened to damage the property of the testator and the defendant's family. In his will the testator left all of his property to the defendant's family, subject to a bequest of £5,000 to the plaintiff.

- 2.39 The plaintiff's application under section 117 asserted that the testator had failed in his moral duty to make proper provision for him, particularly in light of the sacrifices he made to work on the farm. The High Court (McCracken J) held that the Court may take account of the conduct of the plaintiff in order to comply with its obligation under section 117 to be as fair as possible. The Court held that the legacy of £5,000 was sufficient to satisfy any moral duty which the testator owed to his son. On appeal, the Supreme Court (Barron, Barrington and Keane JJ) held that, although the court could not ignore the appalling behaviour of the plaintiff, it was not sufficient to extinguish the duty the testator owed to him in this case.
- 2.40 In *XC v RT*,<sup>36</sup> the High Court (Kearns J) refused an application under section 117 by the plaintiffs, who were aged 37, 34 and 32 at the date of hearing. The Court held that the testator had provided for his children during his lifetime by funding education, purchasing cars and guaranteeing loans. Any remaining duty owed to the plaintiffs was discharged by the creation of a discretionary trust for their benefit. In reaching this decision the Court set out 18 matters which it was agreed were derived from the case law on section 117:
- (a) The social policy underlying section 117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents, against the failure of parents who are unmindful of their duties in that area.
  - (b) What has to be determined is whether the deceased parent, at the time of his or her death, owes any moral obligation to the children and if so, whether he or she has failed in that obligation.
  - (c) 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.

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[2003] IEHC 6, [2003] 2 IR 250.



- (d) Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.
- (e) The duty created by section 117 is not absolute.
- (f) The relationship of parent and child does not, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.
- (g) Section 117 does not create an obligation to leave something to each child.
- (h) The provision of an expensive education for a child may discharge the moral duty, as may other gifts or settlements made during the lifetime of the deceased parent.
- (i) Financing a good education so as to give a child the best start in life possible and providing money, which, if properly managed, should afford a degree of financial security for the rest of one's life, does amount to making "proper provision".
- (j) The duty under section 117 is not to make adequate provision but to provide proper provision in accordance with the deceased parent's means.
- (k) A just parent must take into account not just his or her moral obligations to the children and to his or her spouse, but all his or her moral obligations, for example, to aged and dependent parents.
- (l) In dealing with a section 117 application, the position of an applicant child is not to be taken in isolation; and the court's duty is to consider the entirety of the deceased parent's affairs and to decide the application in the overall context, so that while the moral claim of a child may require the deceased parent to make a particular provision for the child, the moral claims of others may require such provision to be reduced or omitted altogether.
- (m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he or she will ultimately become the owner of it, thereby causing him or her to shape his or her upbringing, training and life accordingly.
- (n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.
- (o) Special circumstances would also refer to the physical or decision-making capacity<sup>37</sup> of the child.
- (p) Although the court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court a power to make a new will for the deceased parent.
- (q) The test to be applied is not which of the alternative courses open to the deceased parent the court itself would have adopted if confronted with the same situation

<sup>37</sup>

See generally the *Assisted Decision-Making (Capacity) Act 2015*.

but, rather, whether the decision of the deceased parent to opt for the course he or she did, of itself and without more, constituted a breach of moral duty to the child.

- (r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else.

- 2.41 Since the decision of the High Court in *XC v RT*<sup>38</sup> the courts have used these 18 factors in order to determine whether there is a breach of moral duty and if so what order should be made.
- 2.42 Lyall suggests that this list of factors is an attempt to confine the jurisdiction of the court to situations where there is a clear discrepancy between what the court would award and what the testator has provided.<sup>39</sup> Spierin refers to this list of factors as a “helpful compendium” but cautions that judges retain discretion over what provision is to be made.

## 2. Key principles from the case law on section 117

- 2.43 A number of key principles can be extracted from the case law on section 117 discussed above (and which are also discussed in greater detail in the thematic analysis of the case law in Appendix C of the Report, below):
- an applicant faces a heavy onus of proof to establish a positive failure in moral duty to make proper provision.
  - provision for a child during the lifetime of the parent may discharge the parent’s obligations under section 117 to that child.
  - section 117 encompasses not just a duty to provide maintenance but also the more extensive concept of support for a child.
  - the courts assess “proper provision” by reference to both the financial circumstances of the applicant child and the means of the deceased parent.
  - the conduct of the parties is relevant to the court’s determination.

## 3. Other family provision legislation in Ireland based on whether “proper provision” has been made

- 2.44 In addition to section 117 of the 1965 Act, there are several other pieces of legislation concerning family relationships that allow the courts to make provision out of the estate of a deceased. Because they derive from similar origins in the family provision legislation of other jurisdictions, they share significant features, notably that where the deceased has not made “proper provision” for the applicant a court may make such proper provision for the applicant out of the estate of the deceased spouse as it considers appropriate. A

<sup>38</sup> [2003] IEHC 6, [2003] 2 IR 250.

<sup>39</sup> Lyall, *Land Law in Ireland* 3rd ed (Roundhall, 2010).

significant difference, however, is that none of the other pieces of legislation uses the phrase “moral duty” but instead refers simply to “proper provision.” In addition, mirroring the wide scope of who may apply under family provision legislation in other jurisdiction, they apply not only to children of the deceased, but also to other relationships with the deceased, such as separated spouses<sup>40</sup>, former spouses<sup>41</sup>, civil partners<sup>42</sup>, and qualified cohabitants.<sup>43</sup>

- 2.45 For example, section 15A of the *Family Law Act 1995*<sup>44</sup> and section 18 of the *Family Law (Divorce) Act 1996* apply to judicial separation and divorce respectively. They empower a court, following a decree of judicial separation or divorce, to make orders for provision for spouses out of the estate of their deceased spouse.<sup>45</sup> The court may grant an order for “such provision for the applicant out of the estate of the deceased spouse as it considers appropriate” in circumstances where “proper provision” has not been made for the applicant during the lifetime of the deceased spouse.
- 2.46 The court may make a range of orders, a periodical or lump sum order,<sup>46</sup> a property adjustment order,<sup>47</sup> a financial compensation order,<sup>48</sup> a pension adjustment order<sup>49</sup> or other ancillary order.<sup>50</sup> In considering whether to make an order, the court must have regard to all the circumstances of the case including the rights of any other person with an interest in the matter, any lump sum orders made in favour of the applicant<sup>51</sup> and any devise or bequest made by the deceased spouse to the applicant.
- 2.47 Section 20(1) of the *Family Law (Divorce) Act 1996* provides that, in deciding whether to make an order:

“the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.”<sup>52</sup>

<sup>40</sup> Section 15A of the *Family Law Act 1995*, inserted by the *Family Law (Divorce) Act 1996*.

<sup>41</sup> Section 18 of the *Family Law (Divorce) Act 1996*.

<sup>42</sup> Section 127 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

<sup>43</sup> Section 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

<sup>44</sup> Inserted by section 52(g) of the *Family Law (Divorce) Act 1996*.

<sup>45</sup> The court cannot make an order under Section 15A of the *Family Law Act 1995* unless there has previously been an order under section 14 of the 1995 Act. The court cannot make an order under Section 18 of the *Family Law (Divorce) Act 1996* cannot be made unless there has previously been a decree of divorce granted.

<sup>46</sup> Section 8 of the *Family Law Act 1995* and section 13 of the *Family Law (Divorce) Act 1996*.

<sup>47</sup> Section 9 of the *Family Law Act 1995* and section 14 of the *Family Law (Divorce) Act 1996*.

<sup>48</sup> Section 11 of the *Family Law Act 1995* and section 16 of the *Family Law (Divorce) Act 1996*.

<sup>49</sup> Section 12 of the *Family Law Act 1995* and section 17 of the *Family Law (Divorce) Act 1996*.

<sup>50</sup> Section 10(1)(a) of the *Family Law Act 1995* and section 15(1)(a) of the *Family Law (Divorce) Act 1996*.

<sup>51</sup> Section 8(1)(c) of the *Family Law Act 1995* and section 13(1)(c) of the *Family Law (Divorce) Act 1996*.

<sup>52</sup> The equivalent section 16(1) of the *Family Law Act 1995* similarly provides that “the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case.”

- 2.48 In addition to this general principle, section 16(2) of the 1995 Act and section 20(2) of the 1996 Act set out broadly similar factors to which the court should have "particular" regard when making specified orders under the Acts.<sup>53</sup> These provisions are also broadly similar to section 20(2) of the *Judicial Separation and Family Law Reform Act 1989*, which the 1995 Act repealed and replaced.<sup>54</sup> These factors include: the financial resources of the parties, the physical capacity or decision-making capacity (referred to in the Acts as mental disability) of one of the parties, and whether one of the parties had relinquished or forgone the opportunity for remunerative activity, among other factors.
- 2.49 Section 16(4) of the *Family Law Act 1995* and section 20(4) of the *Family Law (Divorce) Act 1996* set out the further factors to which the court should have "particular" regard in relation to other dependant members of the family. These factors include the financial needs of the child, their physical capacity, their decision-making capacity (referred to in the Acts as mental disability) and their educational needs.
- 2.50 Another piece of family provision legislation is section 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, which empowers the court to make "proper provision" for a qualified cohabitant out of the estate of a deceased person. *DC v DR*<sup>55</sup> involved an application under section 194 of the 2010 Act.<sup>56</sup> The plaintiff, who was in his 60s when the testator died, applied for provision from her estate under the 2010 Act. The High Court (Baker J) noted that, while the case law on section 117 could assist the Court in making an order for proper provision under section 194 of the 2010 Act, it was also the case that the test under the 2010 Act was different to that under section 117 of the 1965 Act. This was because, unlike under section 117, the circumstances of the cohabitants' relationship are relevant to the court's decision under section 194 of the 2010 Act.<sup>57</sup> However, the Court held that some of the factors set out by the High Court (Kearns J) in *XC v RT*<sup>58</sup> in respect of section 117 of the 1965 Act (discussed above), such as the financial resources of the plaintiff, could also be useful to determine what level of provision would be appropriate under section 194 of the 2010 Act. The Court made provision for the plaintiff valued at approximately 45 per cent of the €1.4 million estate.

<sup>53</sup> These specified orders include orders for proper provision out of the estate of the deceased under section 15A of the *Family Law Act 1995* and section 18 of the *Family Law (Divorce) Act 1996*.

<sup>54</sup> Shatter, *Family Law* 4th ed (Butterworths 1997) at 885 noted the similarity between the *Judicial Separation and Family Law Reform Act 1989* on the one hand and the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996* on the other hand to the extent that the judicial approach under the 1989 Act "can properly be regarded as a reliable indicator of the manner in which the courts will apply the law to both preliminary and ancillary relief under the later Acts."

<sup>55</sup> [2015] IEHC 309, [2016] 1 ILRM 178.

<sup>56</sup> There was some dispute as to whether the parties were in fact cohabiting in an intimate and committed relationship. The Court accepted that the testator had reasons for not making the cohabitation obvious to her family because of social attitudes about an unmarried couple living together.

<sup>57</sup> Section 173(3) of the 2010 Act sets out a list of the circumstances of the parties' relationship to which the court must have regard when deciding whether to make an order. By contrast, section 117 of the 1965 Act does not provide a list of factors to help determine if the testator has failed in his or her duty to make proper provision.

<sup>58</sup> [2003] IEHC 6, [2003] 2 IR 250.

- 2.51 Section 117 can, therefore, be seen as one example of a wider category of family provision legislation in Ireland. The courts have, rightly, been cautious about making generalisations about the similarities between these pieces of legislation; the rights and responsibilities inherent in the parent-child relationship differ from those of former spouses or cohabitants. However, there are certain common elements. In particular, the nature of the court's enquiry in making "proper provision" can usefully be compared across the different provisions.

## C. Family provision legislation in other jurisdictions

### 1. New Zealand

- 2.52 As already observed, during the Oireachtas debates on the *Succession Act 1965*, it was noted that section 117 was derived, in part, from the system of judicial discretion that had been first adopted in New Zealand; notably, however, the fixed share provisions in the 1965 Act derive from comparable succession legislation in civil law jurisdictions, mediated through Scottish succession law, discussed below. The New Zealand *Testator's Family Maintenance Act 1900* pioneered this type of family provision legislation and inspired similar pieces of legislation in many other common law jurisdictions, also discussed further below. Indeed, the provisions discussed above in the *Family Law Act 1995*, the *Family Law (Divorce) Act 1996* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* are more closely aligned to the New Zealand model than section 117 of the 1965 Act. The 1900 Act was subsequently incorporated into the New Zealand *Consolidated Statutes Enactment Act 1908* as the *Family Protection Act 1908*. Section 33(1) of the New Zealand 1908 Act provided that where a person died leaving a will without making "adequate provision for the proper maintenance and support" of his or her spouse or children, the court could, in its discretion "order that such provision as the court thinks fit shall be made" out of the estate of the deceased person for the surviving spouse or children.
- 2.53 The *Family Protection Act 1908* was repealed by the *Family Protection Act 1955* which consolidated the enactments relating to claims for maintenance and support of children and other family members out of the estates of deceased persons. The *Family Protection Act 1955*, as amended, provides for applications for provision out of the estate of a deceased person by a spouse or civil union partner, a *de facto* partner who was living with the deceased in a *de facto* relationship at the date of death,<sup>59</sup> children, grandchildren, certain stepchildren and, in certain circumstances, the parents of the deceased.<sup>60</sup> Like the

<sup>59</sup> A *de facto* partner and a *de facto* relationship are, respectively, comparable to a cohabitant and to cohabitation within the meaning of Part 15 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. Part 15 of the 2010 Act is not affected by the *Marriage Act 2015*, which as noted in footnote 16 of Chapter 2, above, has had significant effects on the provisions of the 2010 Act concerning civil partnership.

<sup>60</sup> Section 3 of the *Family Protection Act 1955*.

1908 Act, section 4 of the 1955 Act empowers the court to order that any provision the court thinks fit be made out of the deceased's estate for any or all of these persons, where "adequate provision" is not provided from his or her estate for their "proper maintenance and support".<sup>61</sup> While the 1955 Act does not list the factors which the court must take into account in considering whether to grant such an order, section 11 of the 1955 Act provides that the court may have regard to the deceased's reasons for making the dispositions made by his or her will, or for not making any provision, or for making further provision for any person, whether or not such evidence would otherwise be admissible in court.

- 2.54 As noted during the Oireachtas debates on the *Succession Act 1965* the concept of "moral duty" was developed in the case law in New Zealand rather than in the text of the 1908 Act or the 1955 Act. It was formally introduced into the New Zealand legislation in 1967, albeit limited to claims made by grandchildren of the deceased. Thus, section 3(2) of the *Family Protection Act 1955*, which was inserted by the *Family Protection Amendment Act 1967*, provides that in any application by a grandchild of a deceased person for provision out of the estate of that person, the court "in considering the moral duty of the deceased" shall have regard to all of the circumstances of the case, and shall have regard to any provision made by the deceased, or by the court under the 1955 Act, in favour of either or both of the grandchild's parents.
- 2.55 Initially, the New Zealand courts adopted a more conservative approach focused on maintenance and dependency rather than entitlement.<sup>62</sup> As discussed above the first piece of legislation in New Zealand uses the language "adequate provision for the proper maintenance and support."
- 2.56 In the early cases such as *Re Rush*,<sup>63</sup> the courts took a needs based approach to adequate provision and considered the new family provision legislation to be an extension of the *Destitute Persons Act 1894*. Peart notes that financial need was considered a prerequisite for success under the very early cases.
- 2.57 Subsequently, however, the courts in New Zealand began reading moral considerations into the text of the legislation. In *Allardice v Allardice*,<sup>64</sup> the Court of Appeal, adopting a more liberal approach, held that the wealthy testator had not failed to adequately provide for his sons but he had failed to provide for his daughters. The testator's 3 daughters were being maintained by their respective husbands but they were not particularly wealthy, so in light of the available funds in the estate they were awarded a small annual sum of maintenance from the estate of the deceased. The sons were given no additional provision as they were physically able and had the potential to earn increased income, although this potential was not yet realised. Any provision from the estate might weaken their motivation to improve their standards of living. The Court

<sup>61</sup> Section 4 of the *Family Protection Act 1955*.

<sup>62</sup> Peart, "The Direction of the Family Protection Act" [1994] NZLR 193. The author notes that this was the case for children but not necessarily for spouses who were entitled to claim under the 1955 Act. A spouse's obligation was based on an agreement of mutual support and care whereas parents only had an obligation to provide for their children's maintenance.

<sup>63</sup> (1901) 20 NZLR 249.

<sup>64</sup> (1909)29 NZLR 959.



stated that the test was, whether the testator was “guilty of a manifest breach of moral duty,” giving rise to the phrase which has been central to family provision legislation for a century. Peart notes that this liberal approach was not applied immediately.<sup>65</sup> *Allardice* was subsequently relied on by the Commonwealth Privy Council in *Bosch v Perpetual Trustee*,<sup>66</sup> which ultimately resulted in the phrase “moral duty” making its way into the lexicon of the Australian courts, as discussed further below.

- 2.58 The conservative approach still persisted even after the decision in *Allardice*. The Privy Council in *Bosch*, in considering the difference between “adequate” and “proper”, held that the word “proper” imported moral considerations beyond mere maintenance. The Privy Council cited *Allardice* with approval in support of a more liberal interpretation of comparable family provision legislation in Australia. Still however, this decision was not met with universal approval in New Zealand until the liberal, moral duty focused approach finally became the dominant standard by the time *Re Harrison*<sup>67</sup> was decided in 1962.<sup>68</sup>
- 2.59 In one of the first cases under section 117, *In re GM; FM v TAM*,<sup>69</sup> (discussed in Part B, above), the High Court (Kenny J) considered some of these authorities because there had not yet been any decided cases in Ireland. The Court however, held that the early authorities from New Zealand were of little value because the text of the relevant legislation focused on need or dependency, rather than on “moral duty” in contrast with the 1965 Act.<sup>70</sup> “Moral duty” was clearly a decisive factor in Ireland from the very first case, because of its inclusion in the text of the legislation. However, the Court’s characterisation of the New Zealand case law arguably understates the importance of moral considerations to the law in that jurisdiction.
- 2.60 In the second half of the 20th century the New Zealand courts regularly used section 4 of the *Family Protection Act 1955* to overrule the wishes of testators.<sup>71</sup> The term “moral duty” was interpreted broadly to justify significant and frequent restriction on testamentary freedom, even in situations where there was no financial need.<sup>72</sup>

<sup>65</sup> Peart, “The Direction of the Family Protection Act” [1994] NZLR 193.

<sup>66</sup> [1938] AC 463.

<sup>67</sup> [1962] NZLR 6.

<sup>68</sup> By that time the relevant Act in New Zealand was the 1955 Act rather than the 1908 Act.

<sup>69</sup> (1970) 106 ILTR 82.

<sup>70</sup> Furthermore New Zealand had no automatic legal right share for spouses but the courts had a discretion under family provision legislation for spouses, which meant that the courts’ assessment of the various duties in New Zealand was different.

<sup>71</sup> Peart, “Awards for children under the Family Protection Act” (1995) 1 BFLJ 224. The author observed that the majority of applications were successful and that the judiciary seemed to treat distribution under the will of a parent as something of an entitlement.

<sup>72</sup> Peart, “New Zealand’s Succession Law: Subverting Reasonable Expectations” (2008) 37 CLWR 356 commented that “in the latter two decades of the twentieth century adult children were almost invariably successful in their family protection claims, even if they were financially well off and made no significant contributions to their deceased parents estate or enjoyment of life.” See also: Peart, “Provision for Adult Children on Death - The Lesson From New Zealand” [2000] CFLQ 333, at 336, the same author also noted that since the decision of the New Zealand Court of Appeal in *Re Harrison* [1962] NZLR 6 the courts had abandoned the prerequisite of financial need for making an order.

- 2.61 In its 1996 Discussion Paper, *Succession Law: Testamentary Claims*,<sup>73</sup> the New Zealand Law Commission noted that the concept of a “moral duty” of deceased parents to their children had been added by way of judicial gloss by the courts to both the 1908 and 1955 Acts and had not been endorsed as a general test by the New Zealand legislature (although as noted above it was expressly alluded to in a limited way in the *Family Protection Amendment Act 1967*). The Commission considered that it was not a defensible foundation for succession law, observing that the interpretation of “moral duties” may vary according to the views of individual judges, that courts become uncertain about who should get an award and that “judicial practice then ceases to be transparent.”<sup>74</sup> Furthermore, the Commission noted that moral duties are personal to each testator, are difficult to generalise and testators may not be able to ascertain and comply with such duties. The Commission therefore confirmed that the concept of a moral duty to family is “too vague to ensure that the purpose, meaning and effect of the law are clearly communicated.”<sup>75</sup> The Commission accepted, however, that “the term ‘moral duty’ might be acceptable (but unnecessary) if it were merely a code for a coherent, precise and widely accepted set of criteria.”<sup>76</sup>
- 2.62 In its subsequent 1997 Report,<sup>77</sup> the New Zealand Law Commission expressed particular concern about applications for provision by adult children under the 1955 Act. The Commission noted that a parent’s legal duties to support a child during the parent’s lifetime ended when the child reached the age of majority at 18, subject to further extension if the child remained in full time education up to the age of 25 or if the child remained dependent arising from physical or decision-making capacity. By contrast, the Commission noted, the 1955 Act provided for potentially indeterminate duties of a deceased parent to a surviving child, regardless of the actual needs of that child. The Commission observed that “powers to provide for adult children that are as extensive and indeterminate as those in present law would, if applied to the living, be judged rightly as unacceptable.”<sup>78</sup> In the draft Bill accompanying its 1997 Report, the Commission therefore recommended that the extensive provisions in the 1955 Act should be replaced by more limited provisions that would be aligned with those that applied to the duties of support to a child during the parent’s lifetime, though adapted to take account of the specific setting that the parent was deceased. In this respect, the 1997 Report recommended that provision be made for 4 types of applications for provision by children of the deceased.
- 2.63 The first was a support claim, which could be made by a child of the deceased who is under 20; or under 25 and undertaking education or training; or unable to earn a reasonable, independent living because of a disability which arose before the child reached 25. A support award would be sufficient to ensure that “the child is maintained in a reasonable way and to a reasonable standard, and so far as is practical, educated and

<sup>73</sup> New Zealand Law Commission; *Succession Law: Testamentary Claims*, Preliminary Paper 24 (1996), at 13.

<sup>74</sup> *Ibid* paragraph 47.

<sup>75</sup> *Ibid* paragraph 50.

<sup>76</sup> *Ibid* paragraph 51.

<sup>77</sup> New Zealand Law Commission; *Succession Law - A Succession (Adjustment) Act, Report 39 (1997)*.

<sup>78</sup> *Ibid* at 28.



assisted towards the attainment of economic independence.”<sup>79</sup> In assessing what would be reasonable in these circumstances, the court would be obliged to have regard to the age and stage of development of the child; any other actual or potential sources of support available to the child; the amount of support provided by the deceased to the child; and the actual and potential ability of the child to meet his or her needs.

- 2.64 The second recommended claim was a needs claim, which would apply if the child is an adult; the applicant would not be entitled to make a support claim but would need to be provided with the necessities of life. A needs award could be made only against the residue of the estate. In considering whether to grant a needs award or the amount of such an award, the court would consider the extent to which the needs of the child were the result of the child’s own acts or omissions, the effect that the making of the award would have on the speedy and efficient administration of the estate or any other relevant matters.
- 2.65 The third type of claim recommended was a memento claim, which would allow the child of a deceased person to make a claim for an item that has special significance to the child as a memento or keepsake.<sup>80</sup>
- 2.66 The fourth proposal was for a contribution claim, which would allow those who had made contributions to the deceased person during that person’s lifetime to make a claim if the deceased person expressly promised to make provision for the applicant in return for the benefit; or where it would be unjust for the estate of the deceased to be unjustly enriched as a result of the benefit conferred by the applicant. The New Zealand Law Commission accepted that this fourth proposal would not greatly change New Zealand law in relation to such contributions but recommended that it should be introduced to replace a variety of complex and overlapping statutory sources.
- 2.67 These recommendations have not been implemented at the time of writing (May 2017), although since the publication of the 1997 Report the New Zealand courts have shown more restraint in deciding whether to make an order under the 1955 Act. In *Williams v Aucutt*,<sup>81</sup> the New Zealand Court of Appeal reduced a High Court award under section 4 of the 1955 Act on the grounds that a smaller sum was more appropriate in recognition of the applicant’s contribution to the family. The distribution of assets in the will reflected the fact that the claimant had no financial need but both the High Court and Court of Appeal agreed that the claimant should have been given greater recognition in the will for her sacrifices in support of the family, although they disagreed on the amount of the award. The Court of Appeal held that the test was not whether the division of assets was an appropriate one for a just and wise testator to make, but rather whether adequate

<sup>79</sup> *Ibid* at 86.

<sup>80</sup> Such claims are made to a Disputes Tribunal under the New Zealand *Disputes Tribunal Act 1988*. At the time of the New Zealand Law Commission’s 1997 Report, the amount in respect of which an order could be sought could not exceed NZ\$7,500 (section 10(3) of *Disputes Tribunals Act 1988*). This was increased to NZ\$15,000 by section 4 of the *Disputes Tribunals Amendment Act 2009*. It may be extended to NZ\$20,000 by agreement between the parties (section 13 of the *Disputes Tribunals Act 1988*).

<sup>81</sup> [1999] BCL 948 (NZHC), [2000] 2 NZLR 479 (NZCA).

provision had been made for proper maintenance and support for the claimant.<sup>82</sup> In reaching this decision the Court stated that the issue of the breach of moral duty was to be decided on the facts at the date of death, but that in making provision to remedy the breach the Court could have regard to subsequent events. The Court concluded that the will had made inadequate provision for the claimant but that the High Court award had been excessive and that a smaller award was more appropriate to serve the limited purpose of supplementing the recognition of the claimant's family belonging.

- 2.68 The New Zealand Court of Appeal, by way of explanation for what it acknowledged was a departure from the approach in previous case law, referred to changing societal attitudes to testamentary freedom.<sup>83</sup> The Court noted the 1988 *Report of the Working Group on Matrimonial Property and Protection*<sup>84</sup> which had criticised the excessive emphasis placed by previous case law on the blood-link of children rather than the need for maintenance and support.<sup>85</sup> Section 4 of the 1955 Act referred to "maintenance and support,"<sup>86</sup> and the Court considered that "support" meant that it was entitled to look beyond mere economic necessity when considering whether to make an award.
- 2.69 The Court also acknowledged that the observations of the New Zealand Law Reform Commission in relation to adult children in its 1997 Report, referred to above, had some merit, and the Court was critical of the previous practice which it considered involved making "overly generous awards" out of line with social attitudes to testamentary freedom.<sup>87</sup> The Court observed that the liberal, "expansive" view of the moral duty had not been met with universal approval, and while the Law Commission's analysis was described as "extreme" the Court conceded that there was some substance to the criticism.<sup>88</sup> The Court therefore concluded that the concept of the "moral duty" should remain central to claims under the *Family Protection Act 1955*, albeit in a less expansive form.
- 2.70 The decision in *Williams v Aucutt*<sup>89</sup> represented the beginning in New Zealand of a trend away from such a strong entitlement of children to a share in their deceased parent's estate. This is arguably a more restrictive approach which requires a successful claimant to demonstrate how to justify an order for either "maintenance" or "support," although in doing so the Court embarked on a new departure by interpreting "support" to go beyond mere necessity in a broad manner.<sup>90</sup> The Court of Appeal showed a degree of restraint

<sup>82</sup> [2000] 2 NZLR 479, at 492.

<sup>83</sup> *Ibid* at 489, 490.

<sup>84</sup> New Zealand Department of Justice, *Report of The Working Group on Matrimonial property and Protection* (1988).

<sup>85</sup> *Williams v Aucutt* [2000] 2 NZLR 479, at 491.

<sup>86</sup> Section 4(1) of the *Family Protection Act 1955*.

<sup>87</sup> *Williams v Aucutt* [2000] 2 NZLR 479, at 490.

<sup>88</sup> *Ibid*, at 496.

<sup>89</sup> [2000] 2 NZLR 479.

<sup>90</sup> Patterson and Peart, "Testamentary Freedom" [2006] NZLJ 46, at 48, cast doubt on whether the decision in *Williams v Aucutt* was in fact narrower than the previous case law. They described the Court's interpretation of "support" as mandating "a totally new type of claim. One looks in vain for earlier authorities supporting this." They go on to describe this decision as ironic in that it sought to restrict the class of persons whom could successfully make a claim, but actually expanded it. Nonetheless,

regarding the amount of the award, which was relatively modest to serve the limited purpose of recognition of the family connection.<sup>91</sup> The decision in *Williams v Aucutt* has therefore been referred to as the “conservative approach”, by contrast with the perceived “expansive approach” that preceded it.<sup>92</sup> This language is reminiscent of the earlier change in the opposite direction after the decision in *Allardice* and *Bosch* discussed above. Subsequent case law continued this more conservative trend,<sup>93</sup> namely, that orders made under the 1955 Act should be limited to the amount required to repair the breach of moral duty.<sup>94</sup> Although the courts in New Zealand have been more circumspect since the decision in *Williams v Aucutt*, the case also entrenched “moral duty” as the appropriate standard.

- 2.71 The subsequent case *Auckland City Mission v Brown*<sup>95</sup> highlights this more conservative approach to how the courts in New Zealand address the question of moral duty. In this case the testator left a net estate worth \$4.5 million. Under his will, the testator bequeathed a valuable property on trust for his grandchildren, \$500,000 to the New Zealand Cancer Society, \$400,000 to a friend, and \$250,000 and a car to a trusted employee. The testator had an acrimonious relationship with his daughter and bequeathed to her certain items of furniture and some small investments and forgave a loan of \$20,000. The testator’s daughter was awarded \$1.6 million in the High Court. The Court of Appeal held that any orders made under the 1955 Act had to be limited to the amount required to repair the breach of moral duty. The Court sought to move away from the approach which had been adopted by judges in the past and *Williams v Aucutt*<sup>96</sup> was an authority for the less expansive modern approach. The Court noted that before *Williams* there had been concern that awards had been out of line with social attitudes. Again, the Court of Appeal stressed that it should not rewrite the will, particularly where the deceased had been very deliberate in his or her actions.<sup>97</sup> The Court reduced the award of the High Court to \$850,000 which was considered the amount necessary to remedy the breach.
- 2.72 In *Henry v Henry*,<sup>98</sup> the New Zealand Court of Appeal again affirmed the approach favoured in *Williams v Aucutt* and held that it applied not only to the issue of a breach of moral duty but also to the amount of the award. The applicant in this case was challenging his mother’s will, which left him with one-quarter of an estate worth over \$1 million while his brother received the remaining three-quarters. The applicant also had financial needs, and significant health concerns which had been diagnosed after the death of his mother. The Family Court made provision of \$75,000 for a grandchild of the

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subsequent New Zealand case law, discussed below, appears to indicate that the decision in *Williams v Aucutt* has overturned the more expansive approach of previous case law.

<sup>91</sup> An order was made under the *Family Protection Act 1955* even in the absence of economic necessity or the need for “maintenance” on the part of the claimant.

<sup>92</sup> See *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640 at 650.

<sup>93</sup> *Auckland City Mission v Brown* [2002] 2 NZLR 650, *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.

<sup>94</sup> *Auckland City Mission v Brown* [2002] 2 NZLR 650.

<sup>95</sup> *Ibid.*

<sup>96</sup> [2000] 2 NZLR 479.

<sup>97</sup> *Auckland City Mission v Brown* [2002] 2 NZLR 650 at 658.

<sup>98</sup> *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640 at 652.

deceased and ordered that the remainder of the estate be split equally between the two children. The High Court upheld the order of the Family Court in relation to the grandchild but reinstated the original distribution between the siblings under the will. The Court of Appeal allowed the appeal and remitted the issue back to the Family Court to make an award on the basis of the principles articulated in the judgment. The Court of Appeal held that the court should make the minimum disruption to the will and do no more than was necessary to remedy the failure, and that this approach should also apply to cases of financial need. The Court also held that, while the moral duty should be assessed at the date of testator's death, events after the death could be taken into account provided that a breach of moral duty had been established.

- 2.73 Although the New Zealand courts have accepted some of the criticisms expressed in the New Zealand Law Commission's 1997 Report, they have stopped short of endorsing in full its recommendations. The New Zealand courts have instead advocated restraint in making family provision orders so that the concept of "moral duty" is interpreted harmoniously with prevailing social attitudes concerning testamentary freedom and proper provision. While acknowledging this criticism, the courts remain confident of their ability to assess societal attitudes to testamentary freedom;<sup>99</sup> but it has been argued that judicial thinking is still out of line with public opinion<sup>100</sup> and that the "conservative" judicial approach maintains the broad basis of intervention and merely urges moderation when it comes to the assessment of relief.<sup>101</sup> The result, it has been argued, is that the case law since *Williams v Aucutt* can be said to be in some ways broader and in some ways narrower than the previous authorities. Thus, while the more recent case law arguably makes it easier to trace the principles applied by the courts in deciding whether to make orders and how much to award, it has been suggested that the New Zealand courts have yet to address the criticism that there is a disparity between the testamentary duties to adult children and the duty to maintain adult children when the parent is alive. The courts, under the conservative approach, have been less generous in their awards. The jurisdiction of the court to intervene is, however, still based on entitlement rather than need.

## 2. England, Wales and Northern Ireland

- 2.74 The English *Inheritance (Family Provision) Act 1938* and its Northern Ireland equivalent the *Inheritance (Family Provision) Act (Northern Ireland) 1960* were also based on New Zealand's *Family Protection Act 1908*. It is notable, however, that the Acts were limited to "maintenance" and that, unlike the New Zealand legislation (and unlike section 117 of the 1965 Act), they did not provide for the wider concept of "support." The aim of the 1938 Act, shared by the 1960 Act, was to ensure that reasonable provision was made for the

<sup>99</sup> *Auckland City Mission v Brown* [2002] 2 NZLR 650.

<sup>100</sup> Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" [2008] CLWR 356. The author argues that the case law since *Williams v Aucutt* does not reflect societal attitudes and is inconsistent with attitudes concerning obligations to children during a parent's lifetime.

<sup>101</sup> *Ibid.*

maintenance of the surviving spouse<sup>102</sup> and dependent children.<sup>103</sup> Section 1 of the 1938 Act empowered the court to grant an order for such reasonable provision as the court thought fit out of the testator's net estate where he or she died leaving a will, and where the court was of the opinion that the will did not make reasonable provision for the maintenance of a dependant. While the 1938 Act originally applied to the estates of deceased persons who died having left a valid will, it was subsequently extended to the estates of those who died intestate.<sup>104</sup>

- 2.75 In determining whether to grant an order under the *Inheritance (Family Provision) Act 1938*, and the form of such order, the court was obliged to consider any past, present or future capital or income from any source of the applicant; the conduct of the applicant in relation to the testator; and any other matter which in the circumstances the court might consider relevant or material in relation to the applicant, the beneficiaries under the will or otherwise.<sup>105</sup> Furthermore, the court was obliged to have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by the will, or for not making any provision as the case may be.<sup>106</sup>
- 2.76 In its 1974 *Second Report on Family Property: Family Provision on Death*,<sup>107</sup> the Law Commission of England and Wales reviewed the 1938 Act. The Commission considered whether the aim of family provision should be extended beyond maintenance so that it could be used to secure ownership of a share of the family property for the surviving spouse.<sup>108</sup> The Commission had taken an initial view that the aim of family provision should remain that of securing reasonable provision for maintenance. The Commission was concerned that, if the scope of family provision law was extended, this would introduce uncertainty, litigation and expense into the administration of estates, and that it would be difficult for the courts to determine what would be a fair and reasonable share of the estate to award to an applicant.
- 2.77 However, in light of the consultation it carried out, the Commission concluded that in the case of a surviving spouse the general public was prepared to see the law in relation to family provision on death assume a wider role beyond maintenance.<sup>109</sup>

<sup>102</sup> The *Matrimonial Causes (Property and Maintenance) Act 1958* introduced applications for reasonable provision by former spouses who had not remarried. The 1958 Act was subsequently incorporated into the English *Matrimonial Causes Act 1965*.

<sup>103</sup> For the purposes of the 1938 Act, dependent children included: a daughter who had not been married or who was, by reason of some mental or physical disability, incapable of maintaining herself; an infant son; or a son who was, by reason of some mental or physical disability, incapable of maintaining himself.

<sup>104</sup> Section 7 of the *Intestates Estate Act 1952*.

<sup>105</sup> Section 1(6) of the *Inheritance (Family Provision) Act 1938*.

<sup>106</sup> Section 1(7) of the *Inheritance (Family Provision) Act 1938*.

<sup>107</sup> Law Commission of England and Wales *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974).

<sup>108</sup> In 1974, when a person died having made a will which either excluded or failed to meet the needs of the surviving spouse, the surviving spouse had no fixed proprietary rights in the estate but could apply to the court for family provision under the *Inheritance (Family Provision) Act 1938* on the basis that the deceased person failed to make reasonable provision for his or her maintenance.

<sup>109</sup> Law Commission of England and Wales, *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974), at 14.

- 2.78 By contrast, the Law Commission of England and Wales confirmed that the aim of family provision legislation in relation to children should “remain that of securing reasonable provision for their maintenance.”<sup>110</sup> The Commission recommended that “it should be made clear in new family provision legislation that the test to be applied in respect of all applications is whether the provision in fact made by the deceased for the applicant was reasonable.”<sup>111</sup> In applying this test, the Commission recommended that the relevant circumstances for the court to consider were those existing at the date of the application and not those at the date of the death. Thus, the court would be able to take into account any change in circumstances that had arisen since the date of death. The Commission recommended that, in determining whether the deceased has made reasonable provision for the maintenance of a child, the court should have regard to the following matters:
- (a) the income, earning capacity, property and other financial resources which the applicant has or is likely to have in the foreseeable future;
  - (b) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
  - (c) the financial resources and financial needs of any other applicant for family provision from the estate of the deceased;
  - (d) the financial resources and financial needs of any beneficiary of the estate of the deceased;
  - (e) the obligations and responsibilities of the deceased towards any applicant for family provision and towards any beneficiary of the estate of the deceased;
  - (f) the size and nature of the estate of the deceased;
  - (g) the physical or decision-making capacity of the applicant;
  - (h) the manner in which he or she has been, is being or might be expected to be educated or trained;
  - (i) any other matter, including the conduct of the applicant or of any other person, which in the circumstances of the case the court may consider relevant.
- 2.79 Following the English Law Commission’s 1974 Report, the *Inheritance (Provision for Family and Dependants) Act 1975* was enacted to empower the courts to make orders for provision out of the estate of a deceased person for the spouse, former spouse, child or other dependant of that person.<sup>112</sup> Although the 1975 Act contains more categories of

<sup>110</sup> *Ibid* at 21.

<sup>111</sup> *Ibid* at 27.

<sup>112</sup> Section 1 of the 1975 Act, as amended, lists the persons entitled to make an application for family provision under the Act. These include: the spouse of the deceased person; a former spouse of the deceased person who has not remarried; civil partners; certain persons who had been living with the deceased person as husband or wife ending immediately before the date of death; a child of the deceased; any person who, though not the child of the deceased was treated by the deceased as a child of his or her family regardless of whether that treatment was referable to the deceased’s marriage or civil



eligible persons, for most applicants relief is restricted to provision for “maintenance.”<sup>113</sup> The only exception is spouses, in respect of which the 1975 Act – as recommended by the English Law Commission – provides for provision beyond maintenance. Comparable provisions for Northern Ireland were made in the *Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979*.<sup>114</sup>

- 2.80 A leading English textbook notes that, although the 1975 Act recognises that the deceased may have been under a “moral obligation” to provide for some members of his or her family circle, nevertheless his or her testamentary freedom is preserved, subject only to the scrutiny of the court that his or her dispositions should be capable of being regarded as reasonable in all of the circumstances.<sup>115</sup> The textbook suggests that any such moral obligation may derive from a view that family and dependants ought to be left money to live on, or it may derive from a view that family and dependants have the primary right to the deceased person’s property. It also notes that these differing views will point the court in divergent directions: the view that family and dependants ought to be left money to live on points “towards a restrictive exercise of the jurisdiction, emphasising the concept of maintenance” and the view that family and dependants have the primary right to the deceased person’s property points “towards a generous exercise of the jurisdiction, and towards ideas of family property.”<sup>116</sup>
- 2.81 Section 2 of the *Inheritance (Provision for Family and Dependents) Act 1975* empowers the court to make a variety of orders if it is satisfied that the disposition of the deceased person’s estate, whether by will or intestacy, does not “make reasonable financial provision for the applicant.” In the case of applications by the spouse of the deceased, reasonable financial provision is defined in section 1(2) of the 1975 Act as such provision “as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance.” In applications by a child, as noted above, reasonable financial provision is limited to such provision as it would be reasonable for the applicant to receive for his or her maintenance. England and Wales, like Ireland, operates a two-stage test. First the court must decide whether reasonable provision has been made, if reasonable provision has not been made the court then proceeds to the second stage of the test to assess what provision would be

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partnership; and any person who immediately before the death of the deceased was being maintained by the deceased.

<sup>113</sup> In *Re Coventry* [1980] Ch 461, at 465 the English High Court (Oliver J) noted that the limitation to maintenance levels means that the 1975 Act was not as dramatic a change from the 1938 Act as it might have appeared. The Court observed that applications by “employed, able bodied young men,” although possible under the 1975 Act “must be relatively rare and need to be approached... with a degree of circumspection.”

<sup>114</sup> 1979 SI No.924, an Order in Council made under the legislative arrangements in place before post-1998 devolution to the Northern Ireland Assembly. The 1979 Order has the equivalent status of a Northern Ireland Act (and thus also has the notation “NI No.8”). The 1979 Order also revoked and replaced the *Inheritance (Family Provision) Act (Northern Ireland) 1960*, as amended, which corresponded to the English *Inheritance (Family Provision) Act 1938*, as amended.

<sup>115</sup> See Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 58-01.

<sup>116</sup> *Ibid* paragraph 58-08.

reasonable.<sup>117</sup> The test of whether reasonable provision has been made is objective: the court is not concerned with whether the deceased acted reasonably but whether the provision actually made is reasonable.<sup>118</sup> Consistent with this objective standard, section 3(5) of the 1975 Act provides that the court is to have regard to the facts as known to the court at the date of the hearing, and this applies to both stages of the test.<sup>119</sup>

- 2.82 Unlike Ireland, the law of succession in England and Wales does not provide spouses with fixed “legal right shares.” In contrast to section 117(3) in the Irish 1965 Act, which restricts the courts from making provision out of certain entitlements of spouses or civil partners,<sup>120</sup> there are no such restrictions in England and Wales. However, compared with the stronger entitlement in Ireland, provision for children that the courts in England and Wales may make is limited to that which would be reasonable for their maintenance. This may make it less likely that a spouse’s share is significantly eroded by an order in favour of a child.
- 2.83 In determining whether and in what manner to exercise its power under the *Inheritance (Provision for Family and Dependents) Act 1975*, the court must have regard to the following matters:<sup>121</sup>
- (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
  - (b) the financial resources and financial needs which any other applicant for an order under the Act has or is likely to have in the foreseeable future;
  - (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
  - (d) any obligations and responsibilities which the deceased had towards any applicant for an order under the Act or towards any beneficiary of the estate of the deceased;
  - (e) the size and nature of the net estate of the deceased;
  - (f) any physical or mental disability of any applicant for an order under the Act or any beneficiary of the estate of the deceased;
  - (g) 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.

<sup>117</sup> Section 3(1) of the English *Inheritance (Provision for Family and Dependents) Act 1975*.

<sup>118</sup> Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 58-16.

<sup>119</sup> In *Ilott v Mitson and Ors* [2015] EWCA Civ 797, [2016] 1 All ER 932; *sub nom Ilott v Blue Cross and Ors* [2017] UKSC 17 the Court of Appeal, hearing an appeal on the amount of the award, considered whether the date of hearing referred to the original County Court hearing or the date of the hearing of the appeal. The Court held that the relevant date was the date of hearing of the appeal.

<sup>120</sup> The court may not make provision out of the legal right share of the spouse or, if the spouse is also the parent of the applicant, a bequest under a will or share on intestacy.

<sup>121</sup> Section 3(1) of the English *Inheritance (Provision for Family and Dependents) Act 1975*.



- 2.84 In applications by the deceased person's children, the court must also have regard to the manner in which the applicant was being educated or trained, or in which he or she might expect to be educated or trained.
- 2.85 In applications by children who have been treated by the deceased person as a child of the family, the additional matters which the Law Commission for England and Wales recommended should be considered were included in section 3(3) of the 1975 Act, namely:
- (h) whether the deceased person had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, the deceased person assumed such responsibility and the length of time for which the duty was discharged;
  - (i) whether in assuming such responsibility, the deceased person did so knowing that the child was not his or her own;
  - (j) the liability of any other person to maintain the child.
- 2.86 The courts in England and Wales have explored the meaning of reasonable provision for the maintenance of a child of the deceased. In *Re Christie*,<sup>122</sup> the English High Court acknowledged that a higher level of provision was required for spouses, but for a child of the deceased there was no need for them to be destitute before they could successfully make an application. Under the terms of her will the testator had attempted to provide her son with a house and her daughter with a one-half share of another house with the residue of the estate to be divided equally between them. However, the testator subsequently sold the house intended for her son and gave the daughter the one-half interest in the other house while she was still alive. The testator then bought herself a new house. The testator expressed the intention to update her will to reflect the changed circumstances but never did. After her death, the son applied for additional provision out of the estate under the 1975 Act. Although he received one-half of the estate worth £13,600 the son argued that he should have also been entitled to the new house that his mother had bought. The Court held that "maintenance" included considerations of "well-being, health, financial security and allied matters."<sup>123</sup> The Court ordered that the new house should be transferred to the son with the residue of the estate divided equally to reflect the intentions of the testator.
- 2.87 In *Re Coventry*,<sup>124</sup> the English Court of Appeal took a more restrictive interpretation of the meaning of maintenance. The deceased, who was the father of the plaintiff, died intestate<sup>125</sup> leaving a modest estate of £7,000. The plaintiff, the only child of the deceased, had lived with the deceased for a number of years paying no rent. He was separated from his wife, had a modest income and had to pay maintenance for his own

<sup>122</sup> [1979] 1 All ER 546.

<sup>123</sup> *Ibid* at 550.

<sup>124</sup> [1980] Ch 461.

<sup>125</sup> The English 1975 Act also applies to intestacy, in contrast to the current situation in Ireland under section 117 of the 1965 Act.

children. The defendant, who was the deceased's widow, stood to inherit the entire estate under the rules of intestacy. The defendant had lived apart from the deceased for a number of years but had received no maintenance from him, her sole income being her pension. The High Court (Oliver J) interpreted "maintenance" more narrowly than in *Re Christie* and was critical of the broader interpretation of equating maintenance to "wellbeing" or "benefit." Although the applicant was relatively impoverished, the Court held that there needed to be "some sort of moral claim" or "some reason why it can be said that in the circumstances, it is unreasonable that no or no greater provision was in fact made."<sup>126</sup> The Court held that it is not enough that provision could be made to assist the applicant and make his circumstances more comfortable, the provision (or lack of provision) must be unreasonable in making provision for maintenance. The Court of Appeal upheld this interpretation, clarifying that a "moral duty" may not be required in every case for a claim to be successful but that a breach of such a moral duty may amount to "unreasonableness" in providing for maintenance. The plaintiff's claim was dismissed.

- 2.88 *Myers v Myers*<sup>127</sup> is an example of the application of this narrower maintenance standard. In this case the English High Court considered the case of a wealthy testator who had made provision in his will for his 3 children of his second marriage but made very little provision for a child of his earlier marriage. The testator had adequate resources to provide for all his children but had refused to provide for the claimant's education because of animosity between them. The plaintiff suffered from anxiety and was in difficult financial circumstances. The English High Court (Munby J) held that the disposition of the testator's estate did not make reasonable financial provision for the plaintiff. The parent had neglected his duty to provide his daughter with the means with which to obtain financial security. The Court awarded the plaintiff £275,000 from the testator's estate worth over £8 million to cover her living expenses and pay for her accommodation. In calculating the award, the Court held that providing the plaintiff with an absolute interest in property would be going too far, as to do so would provide the plaintiff with a capital asset. The Court instead provided her with a sum sufficient to obtain a life interest in property because the purpose of the 1975 Act was to make reasonable provision for maintenance rather than provide the plaintiff with a legacy.
- 2.89 The leading English textbook referred to above has identified 3 possible approaches to proper provision for children.<sup>128</sup> The first "cautious approach," is represented by the decision of the English High Court in *Re Coventry*<sup>129</sup> and its disapproval of other, broader interpretations of maintenance. The second, "more adventurous," approach represented by *CA v CC*<sup>130</sup> relies on a comparison between legal relationships and *de facto* relationships (the true nature of the relationship rather than the technical legal form) in

<sup>126</sup> [1980] Ch 461, at 474.

<sup>127</sup> [2004] EWHC 1944, [2005] WTLR 851.

<sup>128</sup> See Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 58-09.

<sup>129</sup> [1980] Ch 461.

<sup>130</sup> (1979) 9 Fam Law 26. The applicant was treated part of the *de facto* family of the deceased and provision was determined by reference to what would be appropriate for the deceased to provide for his family.

order to determine what provision is appropriate. *Re Christie*<sup>131</sup> represents the third and “most adventurous” approach and has been subject of criticism although some support for it has been expressed.<sup>132</sup> The textbook suggests that the cautious approach, which strictly applies the statutory guidelines, is the correct one. This was supported by the 2011 English Court of Appeal decision in *Ilott v Mitson and Ors*,<sup>133</sup> and later in the 2017 UK Supreme Court decision in *Ilott*,<sup>134</sup> which affirmed the approach in *Re Coventry*.

- 2.90 In its 2011 *Report Intestacy and Family Provision Claims on Death*, the Law Commission of England and Wales again reviewed this area. One of the issues considered by the Commission was the treatment of children under the English 1975 Act, in particular, claims made by adult children. The Commission noted that under the 1975 Act, a child of the deceased is entitled to apply for provision regardless of the applicant’s age. However, the Commission observed that “the limitation of family provision to the ‘maintenance’ level sets an important practical limit on an adult’s claim, because most adults will be supporting themselves.”<sup>135</sup> It considered whether this “maintenance” limitation should be removed but concluded that such reform was not appropriate as it would be a move away from testamentary freedom and would leave the courts with the difficult task of determining the standard of reasonable provision for a child.<sup>136</sup>
- 2.91 In the 2017 UK Supreme Court decision *Ilott v Blue Cross and Ors*<sup>137</sup> Lady Hale, commenting principally on the Law Commission’s 1974 Report, criticised its failure to address the absence of legislative guidance on the issue of adult children. She noted that the 1975 Act provides no standard by which the court may distinguish deserving and undeserving applicants.
- 2.92 In the *Ilott* case,<sup>138</sup> the English Court of Appeal and, on appeal, the UK Supreme Court, continued to approve of the relatively narrow “maintenance” approach in the 1975 Act, as discussed in the case law and leading textbook discussed above. However, they also held that where an adult child, in this case a daughter in her 50s, lived modestly and was not

<sup>131</sup> [1979] 1 All ER 546.

<sup>132</sup> In the English Court of Appeal decision in *Leach v Lindeman* [1985] 2 All ER 754, Slade LJ cited the Canadian case of *In Re Duranceau* [1952] 3 DLR 714 at 720 in support of the view that the question of maintenance is answered by determining whether the provision was “sufficient to enable the dependant to live neither luxuriously nor miserably, but decently or comfortably according to his or her station in life.”

<sup>133</sup> [2011] EWCA Civ 346, [2012] 2 FLR 1070. In the later 2015 Court of Appeal decision in the same proceedings, *Ilott v Mitson and Ors* [2015] EWCA Civ 797, [2016] 1 All ER 932, a similar view appears to have been taken.

<sup>134</sup> *Ilott v Blue Cross and Ors* [2017] UKSC 17.

<sup>135</sup> Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), paragraph 6.6.

<sup>136</sup> The Law Commission of England and Wales observed, however, that the strongest case for reform of the family provision legislation is in cases where the deceased parent’s estate passes to a surviving spouse who is not the parent of the surviving children. While the Commission acknowledged that such children might feel aggrieved that their parent’s estate has passed to a beneficiary who may not ultimately pass it to them, it concluded that the complications in such situations are so difficult that to enable such children to claim family provision (other than that already provided for in the 1975 Act) would be impracticable.

<sup>137</sup> *Ilott v Blue Cross and Ors* [2017] UKSC 17, on appeal from the English Court of Appeal *sub nom. Ilott v Mitson and Ors* [2015] EWCA Civ 797, [2016] 1 All ER 932.

<sup>138</sup> [2015] EWCA Civ 797, [2016] 1 All ER 932; *sub nom Ilott v Blue Cross and Ors* [2017] UKSC 17.

dependent on the deceased parent, this did not preclude the court from concluding that the deceased had failed to make proper provision for the daughter. The English Court of Appeal and UK Supreme Court differed only in the application of the maintenance test to the particular circumstances of the case.

- 2.93 The applicant's claim under the 1975 Act related to the will of her mother, from whom she had been estranged for 26 years after she ran away from home to live with her boyfriend who she later married but of whom her mother strongly disapproved. The claimant was her mother's only child. Her mother left an estate valued at £486,000 which, subject to a legacy of £5,000 in favour of the BBC Benevolent Fund, she left to be divided between 3 charities, Blue Cross, the Royal Society for the Protection of Birds and the Royal Society for the Prevention of Cruelty to Animals. The claimant knew that her mother planned to leave her none of her estate in her will. The claimant and her family lived in a rented house and she and her husband's income derived primarily from State social security benefits.
- 2.94 In the English County Court, the claimant had been awarded £50,000 from the estate. On appeal, the Court of Appeal of England and Wales increased the award. The Court of Appeal held that the County Court judge should not have limited the award on the grounds that the claimant was able to live within her limited means and she knew her mother intended not to leave her anything in her will. The Court of Appeal noted that the County Court judge had been required to calculate financial provision for the claimant's maintenance under the 1975 Act but had not known what effect the award would have on her State social security benefits. The Court held that he had made a working assumption that the effect of a large capital payment would disentitle the family to most if not all of their State benefits. Nevertheless, he went on to make the capital award of £50,000 but failed to verify the assumption, which undermined the logic of the award. The Court held that reasonable financial provision could only be made for the claimant by providing her with the sum which was required to buy her home, namely £143,000, together with reasonable costs for the acquisition. The Court also awarded her a capital sum of £20,000 to meet her income needs, which was calculated not to affect her State social security benefits.
- 2.95 The Court of Appeal decision in *Ilott* could be interpreted as a modest widening of the scope of applications under the 1975 Act, though it involved an admittedly exceptional case so that it also be viewed as remaining within the "narrow" approach taken in the cases discussed above.<sup>139</sup>
- 2.96 On appeal by the charities against the amount of the award, the UK Supreme Court reversed the decision of the Court of Appeal, reinstating the original decision of the County Court judge.<sup>140</sup> In reaching its decision, the Court affirmed the importance that English law places on testamentary freedom.

<sup>139</sup> See Sloan, "The 'Disinherited' Daughter and the Disapproving Mother" (2016) 75(1) CLJ 31.

<sup>140</sup> *Ilott v Blue Cross and Ors* [2017] UKSC 17.

- 2.97 The Supreme Court held that the County Court judge had made neither of the errors that the Court of Appeal suggested had been made. First, the County Court was correct to consider the estrangement of the applicant from her mother and the fact that she was an adult as relevant factors that would reduce the level of “maintenance” to which she would be entitled. Second, the County Court had not, as was suggested by the Court of Appeal, failed to take account of the effect of the award on the applicant’s state benefit. The Court of Appeal was wrong to suggest that the award made was of little or no value to the applicant, because if the applicant used the award to purchase household appliances, which would be consistent with “maintenance” in the 1975 Act, she would once again become eligible for benefits in the form of tax credits.
- 2.98 As noted above, Lady Hale in her concurring judgment commented on the “unsatisfactory state of the present law” in failing to provide guidance for the courts in considering the claims of adult children. The legislation provides no guidance as to how the courts should make the difficult value judgement as to the question of whether the applicant is “deserving” of maintenance.
- 2.99 The UK Supreme Court, in reaching these conclusions, emphasised that maintenance did not mean something that it would be desirable for the claimant to have, but rather what would be necessary to meet her living expenses. The Court endorsed the decision in *Coventry* as a correct statement of the test to be applied. Furthermore, in determining whether the claimant had made reasonable provision for the maintenance of their child, the test is not whether the deceased acted reasonably but whether the provision was, in fact reasonable. The Supreme Court acknowledged that the outcomes of these two questions would often be the same, but not always.
- 2.100 Some of the initial commentary characterises the UK Supreme Court decision in *Ilott* as a victory for testamentary freedom. One commentator in particular notes that the Court clearly stated that beneficiaries do not have to justify their entitlement to inherit.<sup>141</sup> The default position is that a testator’s wishes are to be respected subject only to any need of maintenance on the part of the applicant, within the meaning of the 1975 Act. Another commentator notes that the Supreme Court decision will lead to more potential claims being settled and for smaller sums, because of the narrow meaning given to the term “maintenance.”<sup>142</sup>

### 3. Australia

- 2.101 The law on proper provision for family members in Australia also has its roots in New Zealand’s legislative regime. In Victoria, the *Widows and Young Children Maintenance Act 1906* was the first to follow New Zealand and the 7 other mainland Australian jurisdictions subsequently followed suit.<sup>143</sup> While they have since been amended and replaced,<sup>144</sup> the

<sup>141</sup> Jones, “*Ilott*—Upholding Testamentary Freedom” available at <http://www.familylawweek.co.uk/site.aspx?i=ed176769>.

<sup>142</sup> Davidoff, “Charity can begin at home” (2017) NLJ 7739, at 9.

<sup>143</sup> *Testator’s Family Maintenance Act 1912* (Tasmania); *Testator’s Family Maintenance Act 1914* (Queensland); *Administration and Probate Act 1915* (Victoria) (consolidating); *Testator’s Maintenance and Guardianship of*

language remains broadly similar. In general, the legislation provides that if the applicant is left with “inadequate provision” for “proper maintenance and support,”<sup>145</sup> the court may provide for the applicant “such provision as it thinks fit” out of the estate of the deceased. The High Court of Australia has provided guidance to ensure consistency of interpretation for these statutory provisions, bearing in mind that the object of each is the same.<sup>146</sup> Those entitled to claim includes spouses, children and grandchildren although this varies between jurisdictions.<sup>147</sup> As in New Zealand, the term “moral duty” is not included in the text of the relevant legislation but it has been used by the courts to assist in deciding whether to make an order for maintenance and support. Australia is also similar to many of the other common law jurisdictions discussed – with the exception of Scotland and, of course, Ireland – in that it does not operate a system of fixed legal shares for spouses. Additionally, again in contrast to the position in Ireland, Australia does not prevent the distribution of the spouse’s entitlement under the will or intestacy share.

- 2.102 In *Bosch v Perpetual Trustee*,<sup>148</sup> the Commonwealth Privy Council considered the meaning of the words “adequate provision” and “proper maintenance” in the New South Wales legislation, which were common to all Australian family provision legislation. The testator, a wealthy man, had created discretionary trusts in favour of each of his 2 sons for their maintenance up to the age of 25 at which point the funds would become theirs absolutely. The Court held that the word “proper” has moral connotations, as distinct from “adequate” which might, on its own, refer only to some need of the applicant. In support of this position, the Court referred to case law from New Zealand, including *Allardice v Allardice*<sup>149</sup> which, as discussed above, first recognised the moral dimension to the statutory obligation. In order to make proper provision for them, the Court awarded each of the sons additional sums to be held by the trustees under the same terms as were set out in the will.

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*Infants Act 1916* (New South Wales); *Testator’s Family Maintenance Act 1918* (South Australia); *Guardianship of Infants Act 1920* (Western Australia); *Administration and Probate Act 1929* (Australian Capital Territory); *Testator’s Family Maintenance Order 1929* (Northern Territory).

<sup>144</sup> Section 3(1) of the *Testator’s Family Maintenance Act 1912* (Tasmania); section 41(1) of the *Succession Act 1981* (Queensland); section 91A of the *Administration and Probate Act 1958* (Victoria); section 59(2) of the *Succession Act 2006* (New South Wales); section 7(1) of the *Inheritance (Family Provision) Act 1972* (South Australia); section 6(1) of the *Family Provision Act 1972* (Western Australia); section 8(2) of the *Family Provision Act 1969* (Australian Capital Territory); section 8(1) of the *Family Provision Act 1970* (Northern Territory).

<sup>145</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories*, Issues Paper Number 2, QLRC WP 47 (1995) at 25 observed that some states and territories referred to “advancement in life” in addition to “proper maintenance and support”. The Commission was of the opinion that this additional requirement was associated with the expenditure of capital whereas the others were associated with the expenditure of income and therefore raised some uniformity issues.

<sup>146</sup> In *Coates v National Trustees Executors & Agency Co Ltd* [1956] HCA 23, (1956) 95 CLR 494, at 507, Dixon CJ stated: “The legislation of the various States is all grounded in the same policy and found its source in New Zealand. Refined distinctions between the Acts is to be avoided.” Fullagar J agreed, at 517, stating: “The approach which assumes uniformity of intention is the correct approach.”

<sup>147</sup> See Table 2 in McGregor-Lowndes and Hannah, “Reforming Australian Inheritance Law: Tyrannical Testators v Greying Heirs?” [2009] APLJ 62, at 68.

<sup>148</sup> [1938] AC 463.

<sup>149</sup> (1909) 29 NZLR 959.



- 2.103 In *Coates v National Trustees Executors & Agency Co Ltd*,<sup>150</sup> the High Court of Australia heard an application by the only son of a wealthy testator. The testator left the majority of her estate to charities, only providing a modest income from an annuity for her only son. Citing *Bosch v Perpetual Trustee*, the Court held that the case was to be decided on the basis of the “moral duty” of the testator. The Court held that, where possible, the various Australian family provision statutes are to be interpreted harmoniously and the phrase “moral duty”, therefore, is central to the legislation in all states and territories. Fullagar J, concurring, stated that the standard of “failure of moral duty” was a “gloss,” by which he meant that it was a helpful guide for the court but not the ultimate question which will be decisive. Despite the discussion on the importance of the phrase “moral duty”, ultimately it was a relatively clear case and the High Court increased the annuity accordingly.
- 2.104 In *Singer v Berghouse*,<sup>151</sup> the High Court of Australia made it clear that the courts operate a two-stage process in deciding whether to make an order for family provision. The court must first answer a “jurisdictional question” and then a “discretionary question.” In deciding the jurisdictional question the court must decide whether, as a result of the distribution by the deceased, an eligible person has received inadequate provision for his or her maintenance. If so, the court must then answer the discretionary question: what provision if any should be made from the deceased person’s estate? This two stage approach, the jurisdictional and then the discretionary question, is similar to the Irish approach under section 117 of the 1965 Act, discussed above.
- 2.105 In *Vigolo v Bostin*<sup>152</sup> the High Court of Australia again considered the relevance of “moral duty” to the statutory test for “proper provision.” The testator died leaving an estate of \$1.9 million, and his estate was divided equally between 4 of his 5 children, each of whom had assets worth between \$70,000 and \$270,000. The applicant, who was the wealthiest of the siblings with assets worth \$1.5 million, had been left out of the will as a result of a dispute between him and the testator. The Court referred to the previous authorities which characterised “moral duty” as a “gloss”<sup>153</sup> on the statutory wording. Gleeson CJ agreed that “moral obligations” were a gloss on the statutory text in the sense that “gloss” meant references which are not to be used as a substitute for the text.<sup>154</sup> On the other hand, if “gloss” was taken to mean that such words are never to be of assistance to the court in exposition of the legislative purpose, Gleeson CJ stated that he could not agree with this position. Gleeson CJ argued that moral obligations could be used to decide the “value laden” elements in each limb of the two-stage test.<sup>155</sup> Although the Court warned against losing sight of the statutory text, the discussion of the moral duty was seen as a commentary which assisted the judiciary in deciding what amounted to proper provision. Dissenting on this point, Hayne and Gummow JJ argued that the utility

<sup>150</sup> [1956] HCA 23, (1956) 95 CLR 494.

<sup>151</sup> (1994) 181 CLR 201.

<sup>152</sup> [2005] HCA 11.

<sup>153</sup> *Singer v Berghouse* (1994) 181 CLR 201, *Coates v National Trustees Executors & Agency Co Ltd* [1956] HCA 23, (1956) 95 CLR 494, *Bosch v Perpetual Trustee* [1938] AC 463.

<sup>154</sup> *Vigolo v Bostin* [2005] HCA 11, paragraph 21.

<sup>155</sup> *Ibid* paragraph 6.

of “moral claim” as a convenient shorthand for statutory interpretation was outweighed by the fact that it had often eclipsed the statutory test.<sup>156</sup> They concluded that strict adherence to the statutory language would be preferable in order to avoid this problem.<sup>157</sup>

- 2.106 In 1995, the Australian National Committee for Uniform Succession Laws was established to review succession law with the goal of ensuring that succession law was harmonised in the Australian states and territories.<sup>158</sup> The Commission identified divergences in approach between jurisdictions on issues relating to family provision; such as adequacy of provision, eligibility and the factors to be considered.<sup>159</sup> Between 1997 and 2009 the National Committee published a series of reports on succession law, many of which influenced the enactment of reforming succession legislation in the states and territories. In 1997, the Committee published its *Report on Family Provision*.<sup>160</sup> As noted below, elements of this Report have since been implemented, while others have been expressly rejected.
- 2.107 As to those eligible to apply for family provision, the 1997 Report recommended that non-adult children and spouses of the deceased should automatically be eligible to apply, on the ground that there will often be a moral or legal duty to provide for these two categories of person, and that they are easy to define and prove.<sup>161</sup> As to all other persons, including adult children, the 1997 Report recommended that their eligibility to apply for an order should be restricted to cases where the deceased owed the applicant a “special responsibility” to provide for his or her maintenance.<sup>162</sup> The Report favoured such an open-ended category of potentially eligible persons, derived from the Victorian *Administration and Probate Act 1958*, on the basis that this would strike the right balance between allowing deserving applications and having proceedings disposed of in a timely manner.<sup>163</sup> As noted below, this open-ended approach has not been adopted in any Australian State or territory; indeed, in 2014 Victoria legislated to repeal and replace section 91 of the 1958 Act on which this approach was based.

<sup>156</sup> *Ibid* paragraph 73.

<sup>157</sup> *Ibid* paragraph 51. They agreed with the majority that a potential claimant who was financially well off can still make a successful claim.

<sup>158</sup> In 1991 the Standing Committee of Attorneys General in Australia identified a need to review Australian State and territorial succession laws and to propose model national uniform laws. As a result, the National Committee for Uniform Succession Laws was established in 1995 to review succession law, including family provision legislation. The Queensland Law Reform Commission, in conjunction with other Australian Law Reform Commissions, co-ordinated the work of the National Committee for Uniform Succession Laws, whose work led to the publication of a number of Reports concerning succession law, including draft Uniform Bills, between 1997 and 2009.

<sup>159</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories*, Issues Paper Number 2, QLRC WP 47 (1995)

<sup>160</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (1997).

<sup>161</sup> *Ibid* Appendix 1, at 2-3.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid* at 20. This open-ended category of applicants was inserted into the 1958 Act by section 55 of the *Wills Act 1997* (Victoria).



- 2.108 As to the criteria to determine whether such a “special responsibility” existed, the 1997 Report recommended that the court should have regard to any or all of the following criteria, also derived from those in the Victorian *Administration and Probate Act 1958*.<sup>164</sup>
- (a) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and where relevant, the length of the relationship;
  - (b) the nature and the extent of any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;
  - (c) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;
  - (d) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;
  - (e) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;
  - (f) the age of the applicant;
  - (g) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased person or the family of the deceased person (adequate consideration not to include payment of a carer’s pension);
  - (h) the provision (if any) made in favour of the applicant by the deceased person either during the person’s lifetime or out of the person’s estate;
  - (i) the date of any will of the deceased person and the circumstances under which the will was made;
  - (j) whether the applicant was being maintained by the deceased person before the deceased person’s death either wholly or partly and, where the court considers it relevant, the extent to which and the basis on which the deceased person had assumed the responsibility;
  - (k) the liability of any other person to maintain the applicant;
  - (l) the character and conduct of the applicant or any other person both before and after the death of the deceased person;
  - (m) any other matter the court considers relevant.<sup>165</sup>

<sup>164</sup> *Ibid* Appendix 1, at 3–4. The criteria were based on those in section 91(4) of the *Administration and Probate Act 1958* (Victoria).

<sup>165</sup> The list of criteria also included “any relevant Aboriginal or Torres Strait customary law or any other customary law.”

- 2.109 The 1997 Report emphasised that not all these factors would need to be taken into account and that the court should be given a wide discretion in that respect, reinforced by the final “catch-all” provision to allow the court to consider any other relevant matter.<sup>166</sup> The Report also noted that the “catch-all” provision was a feature of all state and territory legislation, such as the 1958 Victorian Act from which it was derived. Similar “catch-all” provisions are also a feature of comparable legislation in Ireland, such as the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996*, discussed in Part B, above, and in the comparable family provision legislation in England and Northern Ireland: this is not surprising given their New Zealand origins. While the precise content of the list of criteria varies between jurisdictions, the listing approach used in the 1997 Report remains the basis for subsequent Australian state and territory legislative reforms.
- 2.110 The 1997 Report recommended that, once it is established that a particular applicant is eligible, either automatically or by reference to any special responsibility on the part of the deceased, a two-stage enquiry should apply, similar to the approach already applied by Australian state and territory courts<sup>167</sup> and, as already noted, in Ireland under section 117 of the 1965 Act. In the first stage, the court would have to be of the opinion that the distribution of the estate “does not make adequate provision for the proper maintenance, education or advancement in life of the person.”<sup>168</sup> At the second stage, the Court could then make a financial provision order to remedy the failure to make adequate provision identified in the first stage. In deciding whether or not there had been adequate provision and, accordingly, what provision if any should be made, the Report recommended that the court have regard to as many of the same criteria for special provision (listed above) that the court would consider relevant.
- 2.111 Although “moral duty” is not referred to in the model legislation, the criteria listed above broadly reflected the “moral duty” factors used by Australian courts in exercising their discretion to determine whether a special responsibility arose, whether adequate provision had been made and what, if any, family provision should be ordered. The Report observed that it would be unwise to set out an exhaustive list of criteria on which to establish a moral claim as each case will be different and the attitudes of society will change over time.<sup>169</sup>
- 2.112 As already noted, while the various Reports of the National Committee, including the 1997 Report, have influenced subsequent reforms of Australian state and territory succession laws, a number of elements in the 1997 Report have not been followed. Thus, the open-ended approach proposed concerning those eligible to apply (other than the

<sup>166</sup> *Ibid* at 20, where the Report noted that the list of factors was intended to prevent appeals against orders solely on the ground that a court had not considered one of the criteria.

<sup>167</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (1997), Appendix 1, at 2.

<sup>168</sup> In the interests of harmonisation the National Committee included the “advancement in life” element which had been absent in the legislation in some jurisdictions.

<sup>169</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (1997), Appendix 1, at 12.

two “automatic” categories of non-adult child and spouse) has not been adopted in any Australian state or territory because of the risk that it would give rise to speculative and unmeritorious claims. Indeed, when the Victorian Law Reform Commission reviewed this area in 2013,<sup>170</sup> it recommended that the open-ended approach in its 1958 Act, favoured in the 1997 Report, should be repealed and replaced with a list of specific categories of potential applicants, as provided for in all other Australian states and territories. The Victorian Law Reform Commission also recommended retention of the criteria set out in the 1958 Act to be applied by the courts when determining whether adequate provision had been made by the deceased. Since these criteria had been adopted in the 1997 Report of the National Committee, above, that aspect of the 1997 Report remains a reference point for the Australian states and territories. The recommendations in the 2013 Report concerning amendments to family provision in the 1958 Act were implemented in Part 2 of the *Victoria Justice Legislation Amendment (Succession and Surrogacy) Act 2014*.<sup>171</sup>

- 2.113 A similarly selective approach to the 1997 Report of the National Committee was applied when New South Wales examined family provision. The Law Reform Commission of New South Wales, in its 2005 Report on family provision,<sup>172</sup> adopted most, though not all, of the recommendations of the 1997 Report in relation to eligibility, adequacy of provision and the extent of the order which the courts should make.<sup>173</sup> The New South Wales Law Reform Commission also adopted the 1997 Report’s list of criteria (albeit with slightly different wording) for all 3 determinations.
- 2.114 Most of the recommendations in the 2005 Report were, in turn, implemented in the amendments made to the New South Wales *Succession Act 2006* by the *Succession Amendment (Family Provision) Act 2008*. As with all other Australian states and territories, the 2008 Act did not adopt the proposed open-ended eligibility provisions because of concerns that they might open the floodgates to undeserving applicants and that it placed an excessive burden on deserving adult children to establish their entitlement.<sup>174</sup> Instead, section 57 of the 2006 Act, as amended by the 2008 Act, sets out a list of potentially eligible persons that includes children, adult children, spouses and dependants of the deceased. Where the applicant is neither a spouse or a child<sup>175</sup> of the deceased, the

<sup>170</sup> Law Reform Commission of Victoria, *Report on Succession Laws* (2013), Chapter 6.

<sup>171</sup> Section 91A of the 1958 Act, as inserted by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014*, largely reproduces the same list of factors previously contained in section 91 of the 1958 Act, with the exception of 91A(l) under which the court may have regard to “the effects a family provision order would have on the amounts received from the deceased’s estate by other beneficiaries.”

<sup>172</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005).

<sup>173</sup> Croucher, “Towards Uniform Succession in Australia” (2009) ALJ 728, at 738 commented that *de facto* spouses (broadly equivalent to cohabitants in this jurisdiction) were included as automatically eligible because the issue had become less sensitive by the time the 2005 Report was written.

<sup>174</sup> Parliament of New South Wales *Hansard* 26 June 2008, at 9422. The Hon. John Hatzistergos, Attorney-General and Minister for Justice, second reading speech on the *Succession Amendment (Family Provision) Bill 2008*.

<sup>175</sup> Section 57 of the *Succession Act 2006* (New South Wales). This category of persons who are automatically entitled to apply includes *de facto* spouses and, in contrast to the recommendations of the Law Reform Commission of New South Wales or the National Committee for Uniform Succession Laws, adult children.

2006 Act, as amended, provides that in order to establish their eligibility they must satisfy the court that "having regard to all the circumstances of the case... there are factors which warrant the making of an application."<sup>176</sup> The 2006 Act, as amended, contains a list of matters to be considered by the courts in determining applications and, as recommended in the 2005 Report of the New South Wales Law Reform Commission,<sup>177</sup> these retain the established term "adequacy."<sup>178</sup> The list of matters is:

- (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship;
- (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate;
- (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered;
- (d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate;
- (e) if the applicant is cohabiting with another person-the financial circumstances of the other person;
- (f) any physical; intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated;
- (g) the age of the applicant when the application is being considered;
- (h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant;
- (i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate;

<sup>176</sup> Section 59(1)(b) *Succession Act 2006* (New South Wales).

<sup>177</sup> Section 60(2) *Succession Act 2006* (New South Wales).

<sup>178</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005), at 23: "adequacy" was used because of the large body of case-law in New South Wales that had developed around the term "inadequate."

- (j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person;
- (k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so;
- (l) whether any other person is liable to support the applicant;
- (m) the character and conduct of the applicant before and after the date of the death of the deceased person;
- (n) the conduct of any other person before and after the date of the death of the deceased person;
- (o) any relevant Aboriginal or Torres Strait Islander customary law;
- (p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

2.115 The New South Wales courts have viewed the list of criteria as a "valuable prompt"<sup>179</sup> or guideline to assist in establishing the meaning and legislative objective of the 2006 Act; and they have also retained the non-statutory term "moral duty" by reference to (p): "any other matter the Court considers relevant."<sup>180</sup>

2.116 Regarding the appropriate time to consider parental duties, in *Coates v National Trustees Executors & Agency Co Ltd*,<sup>181</sup> the High Court of Australia held that the court may take account of facts which would be available or reasonably foreseeable at the date of death. In *White v Barron*,<sup>182</sup> the High Court of Australia held that the primary focus should be the date of death. The first stage jurisdictional question should be assessed at the date of death. While the second stage discretionary question, as to what provision is made out of the estate at the date of hearing, the nature and extent of the order should primarily be based on the situation at the testator's death. If the estate at death is inadequate to provide proper maintenance but subsequently the estate increases in value, the courts can use this increase to provide adequate maintenance. The court, however, must decide what is adequate at the date of death.

2.117 In *Panozzo v Worland*,<sup>183</sup> the Supreme Court of Victoria held that the appropriate time to consider the financial resources and needs of the applicant as required by section 91(4)(h) of the 2006 Act, was at the time of the hearing of the case. This is because it expressly provides that this matter is to be assessed "at the time of hearing and for the foreseeable

<sup>179</sup> *Verzar v Verzar* [2012] NSWSC 1380, paragraphs 121-123.

<sup>180</sup> In *Newman v Newman* [2015] NSWSC 1207, paragraph 128, criterion (b) of the 2006 Act was taken to include the moral duty.

<sup>181</sup> [1956] HCA 23, (1956) 95 CLR 494.

<sup>182</sup> [1980] HCA 14.

<sup>183</sup> [2009] VSC 206.

future.”<sup>184</sup> Furthermore, the Court held that every other factor specified in section 91, all of which were silent on the timing, was to be assessed at the time of death. This is because the Victorian Parliament’s silence on the matter, by contrast with what was expressly stated in section 91(4)(h), indicated an intention for the date of assessment to remain the date of death as it had been in the previous legislation. The Court accepted that in *Coates v National Trustees Executors & Agency Co Ltd*,<sup>185</sup> the High Court of Australia had held that the court may only take account of circumstances which were reasonably foreseeable at the time of death. However, the Court in *Panozzo v Worland* held that this reasoning did not apply to the Victorian legislation because it expressly stated the time at which the factors were to be considered. As noted above, the criteria in the New South Wales 2006 Act have their origins in the largely identical Victorian list of factors.<sup>186</sup> Therefore, it is arguable that this reasoning also applies to the New South Wales 2006 Act.

- 2.118 Writing since these reforms came into effect, some commentators have continued to suggest that family provision laws are a product of the values of the early 20<sup>th</sup> century and that the courts have been interpreting the “moral duty” in this context.<sup>187</sup> As discussed in Chapter 1 of this Report, any previous expectation of an obligation, whether moral or otherwise, to transfer property at death may no longer be appropriate if demographic changes mean that parents live longer, and that surviving spouses and children are older if and when they inherit. Parental gifts of money or property, if and when they occur in the remainder of the 21<sup>st</sup> Century, are more likely to happen while the parents are alive, and additional transfers on death are likely to become less common, and to be seen as a form of double provision. Family provision legislation, they argue, was designed to provide adequately for non-adult or dependent adult children, and widows, rather than for all adult children. The authors conclude that the movement towards reform in Australia and New Zealand is caused by the fact that “the pendulum has swung too far in favour of family provision applicants.”<sup>188</sup>

#### 4. Civil law jurisdictions

- 2.119 Unlike the common law jurisdictions discussed above which, for the most part, operate systems of discretionary provision for children, civil law jurisdictions, including virtually all the states of Continental Europe, largely operate a system of fixed shares for children.
- 2.120 In civil law jurisdictions, a fixed part of the estate is reserved for the children, and the testator may not freely distribute it. This is often referred to as “forced heirship.” The

<sup>184</sup> This is reproduced in almost identical terms in section 91A(d) of the *Administration and Probate Act 1958* inserted by the subsequent amendment. The wording of this factor is also very similar to Section 60(2)(d) of the New South Wales *Succession Act 2006* which includes the words “both present and future” in relation to the financial needs and resources of the applicant.

<sup>185</sup> [1956] HCA 23, (1956) 95 CLR 494.

<sup>186</sup> See section 91A of the *Administration and Probate Act 1958* and the previous section 91 of the *Administration and Probate Act 1958*.

<sup>187</sup> McGregor-Lowndes and Hannah, “Reforming Australian Inheritance Law: Tyrannical Testators v Greying Heirs?” [2009] APLJ 62, at 70.

<sup>188</sup> *Ibid* at 71.



precise mechanism by which this is achieved varies between different jurisdictions. Countries differ on a range of matters, such as: whether the right extends only to children or other beneficiaries; the percentage of the estate reserved for beneficiaries; whether the entitlement is a property right or a claim for value against the estate; and whether the share can be renounced by the beneficiary or overridden by the testator.<sup>189</sup> Despite variation in detail, these systems all have one common feature: children, irrespective of age, are entitled to a portion of the estate by virtue of their relationship with the deceased, rather than need of maintenance or the quality of their relationship. This represents a greater emphasis on family entitlements, rather than the testamentary freedom that is more influential in common law jurisdictions.

- 2.121 In France, for example, the *réserve héréditaire* is the minimum share of the deceased estate to which the heirs are entitled.<sup>190</sup> Gifts made to the heirs during life are also offset against the calculation of the share. The amount of the *réserve héréditaire* varies depending on the number of children of the deceased (as opposed to the total number of heirs, which includes all descendants), although children may renounce their entitlement, affecting the amount of the *réserve*. If there is one child, the *réserve* is one-half of the estate; if there are 2 children the *réserve* is two-thirds of the estate; if there are 3 or more children the *réserve* is three-quarters.<sup>191</sup> Children of the deceased who elect to take their portion of the *réserve* receive equal portions of this share. If a child of the deceased dies leaving any child, the children of that child share the child's portion equally.<sup>192</sup> The disposable portion that is left over after the *réserve* is called the *quotité disponible*. Testators are free to dispose of this property as they wish. Spouses are not heirs under the *réserve* unless the deceased had no children, in which case spouses are entitled to one-quarter of the estate. Spouses also receive protection under a separate system of community property, whereby certain shared property automatically transfers to them on the death of the other spouse.
- 2.122 In Austria, there is a similar system of compulsory shares known as the *Pflichtteil*. The starting point of calculation of automatic entitlements is the intestacy shares. On intestacy, the children of the deceased receive the whole estate shared equally between them if there is no surviving spouse or registered partner.<sup>193</sup> If there is a surviving spouse or registered partner on intestacy, the children receive a two-thirds share equally between them and the surviving spouse or registered partner receives the remaining one-third.<sup>194</sup> Where there is a will, the compulsory share reserved for the children is one-half of the intestacy entitlement, that is, one-half of the estate or, if there is a spouse or registered partner, one-third of the estate.<sup>195</sup> Similarly to France, gifts made during the

<sup>189</sup> See Marquès "We Are Not Born Alone and We Do Not Die Alone: Protecting Intergenerational Solidarity and Refraining Cain-ism Through Forced Heirship." *Oñati Socio-Legal Series* (2014) 264.

<sup>190</sup> Code Civil (France) Articles 912-913.

<sup>191</sup> Code Civil (France) Article 913.

<sup>192</sup> This is known as *per stirpes* distribution, as opposed to *per capita* distribution.

<sup>193</sup> § 732 ABGB.

<sup>194</sup> § 744(1) ABGB.

<sup>195</sup> § 759 ABGB.



lifetime of the deceased can be included in the calculation of the compulsory shares.<sup>196</sup> The testator may reduce the compulsory portion for a descendant by half, if he or she had no close relationship with the deceased.<sup>197</sup> The testator may also exclude a descendant from the compulsory share for specific reasons set out in the civil code, such as the commission of criminal offences, causing mental distress to the testator or otherwise neglecting his or her obligations to the testator.<sup>198</sup>

- 2.123 Inheritance regimes in these civil law jurisdictions primarily base entitlements on the fact of the parent-child relationship, rather than on the quality of that relationship or the needs of the children. This suggests that principles of family or kinship and solidarity between generations are the predominant legal values which govern the parent-child relationship.<sup>199</sup> In contrast however, child maintenance obligations are usually based on a combination of the ability of the parent to pay and the needs of the child. One striking example of this difference is legal provision in Austria for an upper limit on maintenance payments that go beyond the needs of a child where the parent is particularly wealthy.<sup>200</sup> This is known as the *luxusgrenze* or “luxury threshold.” However, the explanation for the different approaches to child maintenance and inheritance is, of course, that the parent is still alive and requires the money for their own needs.

## 5. Scotland and the civil law influence

- 2.124 Scottish succession law is of particular relevance because it was the model on which the *Succession Act 1965* was based. In Scotland, the *Succession (Scotland) Act 1964*, which codified the pre-1964 Scottish law of succession, provided that where the deceased has written a will, the spouse<sup>201</sup> and issue are entitled to a sum of money equal to a fixed proportion of the relevant part<sup>202</sup> of the estate.<sup>203</sup> The existence of such fixed shares reflects the civil law tradition in Scottish law. These entitlements are referred to as “legal rights” in the Scottish 1964 Act, and this was followed in Ireland in sections 66 and 111 of the *Succession Act 1965*. The legal rights for spouses in the Scottish 1964 Act are known as “the Wife’s Part,” *jus relictæ* (for widows) or *jus relictī* (for widowers). The legal rights for children (issue) are known as “the Bairn’s Part,” *legitim*.<sup>204</sup> Whatever remains after the satisfaction of legal rights is known as “the Dead’s Part.” If there are both a spouse and

<sup>196</sup> § 783 ABGB.

<sup>197</sup> § 776 ABGB.

<sup>198</sup> § 770 ABGB.

<sup>199</sup> See for example: Amayuelas and Amoros, “Kinship Bonds and Emotional Ties: Lack of Family Relationship as a Ground for Disinheritance” (2016) *European Review of Private Law* 203.

<sup>200</sup> OGH 12.04.1994 5 Ob 526/94.

<sup>201</sup> This may be a spouse or civil partner: see section 4(1) of the *Marriage and Civil Partnership (Scotland) Act 2014*.

<sup>202</sup> The relevant part of the estate is the “net moveable estate.” Legal rights do not apply to the rest of the estate which is “heritage.” The distinction between heritage and moveable assets and liabilities is technical and the Scottish Law Commission has recommended that this distinction be removed for the purposes of succession so that the entire estate is subject to legal rights. See Scottish Law Commission, *Report on Succession*, Scot Law Com No. 215 (2009), at 12.

<sup>203</sup> See *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 25, paragraph 772. Section 11 of the *Succession (Scotland) Act 1964* also contains some modifications to the system of *legitim*.

<sup>204</sup> Note the similarities to Roman law restrictions on testamentary freedom discussed at paragraph 1.15.

children, the spouse receives a sum of money equal to one-third of the relevant estate and the children as a group receive a sum equal to one-third. If there is a spouse but no children the spouse receives a sum equal to one-half of the relevant part of the estate. If there are children and no surviving spouse the children receive a sum equal to one-half of the relevant part of the estate. For further subdivision, if the children of the deceased have themselves already died, the grandchildren of the deceased share the entitlement of their parent.<sup>205</sup> The remaining share, “the Dead’s Part” left over after the legal rights have been satisfied, is distributed in accordance with the testator’s wishes. Legal rights apply whether or not the deceased has left a valid will (the application of legal rights to intestacy is discussed further below).

- 2.125 As already noted, the Scottish system of fixed legal shares greatly influenced the *Succession Act 1965*. The *Succession Bill 1964* had initially proposed to include fixed legal shares for children as well as spouses but the 1965 Act ultimately provided for a fixed “legal right share” for spouses only, while a “half way house” was enacted for children, in which fixed legal shares apply on intestacy, which can be “trumped” by a will, but this in turn is subject to section 117 which provides for an application to court where it can be determined whether “proper provision” has been made.<sup>206</sup>
- 2.126 Distribution, as part of the will, in favour of the spouse or children is presumed to be in satisfaction of their legal rights unless the will states otherwise. If a beneficiary under the will is entitled to a legal right share they must choose either the provision under the will or take the legal right share. In *Hutton’s Trustees v Hutton’s Trustees*<sup>207</sup> the Scottish Court of Session described the policy behind the Scottish system of legal rights for children, which was later codified in the *Succession (Scotland) Act 1964*, as follows:

“the right which our law gives to children in their father’s estate, in common with the laws of most civilised countries except England, is a very important check on capricious or unjust testaments.”

- 2.127 The Scottish Law Commission has reviewed a number of options for reform in this area. In its 2007 Discussion Paper it provisionally recommended that non-dependent children should no longer be entitled to a fixed share of the parent’s estate.<sup>208</sup> A number of reasons were given to support this. First, the maintenance obligation ceases at the age of majority, 18, and if parents did have an obligation to support adult children that duty would be enforceable whether or not the parent has died. Second, it emphasised the importance of testamentary freedom over family property: people should be free to dispose of their assets, subject only to the needs of a surviving spouse. Third, changes in demographics mean that children are usually middle aged when their parents die and no longer in need of substantial assets, compared with other potential beneficiaries. Fourth,

<sup>205</sup> Known as *per stirpes* distribution: see section 11(2) of the *Succession (Scotland) Act 1964*.

<sup>206</sup> During the Dáil debates in 1964 the Minister for Justice referred to the then recently enacted *Succession (Scotland) Act 1964* and the system of fixed shares. The Minister used this as an example of a country where complete “testamentary freedom” was not permitted: see Vol 213 No. 3 Dáil Éireann Debates (2 December 1964).

<sup>207</sup> 1916 SC 860 at 870, 1916 2 SLT 74, at 77.

<sup>208</sup> Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com (2007).

it is primarily the State's, rather than the family's, obligation to protect non-dependants. Fifth, legal rights are rarely enforced perhaps because children are usually provided for in their parents' wills. The Scottish Law Commission also noted from the responses it had received that there was no support for a court-based discretionary scheme.<sup>209</sup>

- 2.128 Based on the responses to the 2007 Discussion Paper the Scottish Law Commission concluded in its 2009 Report that the abolition of fixed shares for children was a question of social policy. The Commission therefore decided not to recommend one option over the other and left this question to the Scottish Parliament. The first option proposed by the Commission was that the fixed legal share should be 25 per cent of the amount that the deceased's children would inherit had the deceased died intestate, and that this would also have regard to the Commission's recommendations on distribution on intestacy discussed below. This option for reform would apply to both adult children and dependants. The second option proposed by the Commission would create the right of a dependent child to a capital sum payment from the deceased to replace the system of legal shares. The second option is based on "aliment," that is, maintenance, and the Scottish Law Commission proposed that the amount awarded should reflect "what is reasonable in all the circumstances" in the same manner as it is for maintenance by living persons. Recommendation 30 in 2009 Report proposed as follows:

"(1) The capital sum payment award should represent the sum required to produce the total aliment due from the deceased's date of death to the date when the child's dependency is likely to terminate (taking into account the likelihood of the child undergoing further education or training after 18). The award should be what is reasonable for the liable portion of the estate to provide having regard only to:

- (a) the needs, resources and earning capacity of the child;
- (b) the existence of any other person owing the child an obligation of aliment and the needs, resources and earning capacity of that obligor; and
- (c) if the liable beneficiary is the deceased's spouse or civil partner, his or her needs, resources and earning capacity; and

(2) Regard may be had to conduct of the child or of any other person if it would be manifestly inequitable not to do so."<sup>210</sup>

- 2.129 At the time of writing (May 2017) neither of the proposed options has been implemented. The *Succession (Scotland) Act 2016* dealt with many preliminary technical aspects of the reform of the law of succession. The more contentious issues of reform of the system of

<sup>209</sup> Scottish Law Commission, *Report on Succession*, Scot Law Com No. 215 (2009), at 43.  
<sup>210</sup> *Ibid* at 61.

family provision, as addressed by the Scottish Law Commission, have been reserved for later legislation.<sup>211</sup>

## 6. United States of America

- 2.130 In the United States of America, testamentary freedom is the pre-eminent underpinning of succession law. There is scant legal protection for children, even children under 18, from the failure of their parents to provide for them. This is in stark contrast to the civil law jurisdictions that provide automatic entitlements for children of the deceased, as discussed above. Indeed, the US is also an outlier among common law jurisdictions. While other common law jurisdictions discussed above, including Ireland, have qualified the principle of testamentary freedom by providing for obligations to children, the US gives almost absolute priority to principles of testamentary freedom at the expense of family property and children. One commentator has stated that the US gives its citizens greater control over their property after death than any other country.<sup>212</sup>
- 2.131 In the US, there are no laws, state or federal, that require testators to make provision for adult children on death. Even minor or dependent children have no claim on the estates of their parents, the sole exception being Louisiana which, bearing in mind its civil law origins, does provide protection for this category. Even where failure to provide for a child would leave them reliant on State benefits, there is no legally enforceable obligation on their parents to provide for them after death.
- 2.132 Despite the importance of testamentary freedom, spouses are generally given much greater protection from disinheritance than children. With the exception of Georgia, all states provide surviving spouses with some sort of entitlement to some of the estate of the deceased. Some states provide for an elective share that is similar to the legal right share in Ireland. The surviving spouse may elect to take his or her statutory share if it is greater than the amount of the bequest in the will of the testator. The method of calculation of this share varies by state. In states that have not adopted the 1990 revisions to the Uniform Law Commission's *Uniform Probate Code*,<sup>213</sup> the elective share is usually one-third. The fixed shares were considered by some to be too arbitrary because they were fixed irrespective of the length of the marriage. Under the 1990 revisions to the *Uniform Probate Code*,<sup>214</sup> the surviving spouse may elect to take a percentage of the estate. That percentage increases with the length of the marriage up to a maximum of one-half of the value of the estate. Some other states operate a system whereby each spouse's property is classified as "community property", giving them an automatic entitlement to one-half of the property upon the death of the spouse.

<sup>211</sup> The Scottish Government, in its official initial response to the 2009 Report, acknowledged the controversial nature of this debate and expressed a desire to reflect further and consult before making a decision as to whether it will accept either of the options proposed. See [http://www.scotlawcom.gov.uk/files/6312/8015/6902/minresp\\_rep215.pdf](http://www.scotlawcom.gov.uk/files/6312/8015/6902/minresp_rep215.pdf).

<sup>212</sup> Madoff, *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press, 2010).

<sup>213</sup> Uniform Probate Code § 2-202 (1990).

<sup>214</sup> *Ibid.*

- 2.133 Some commentators have noted that this system provides indirect protection for children because of the “conduit theory” that surviving spouses will ultimately be expected to pass on inheritance to their children. However, this often breaks down in a modern context where the surviving spouse is less likely to be the parent of the child. One commentator has noted that this protection for surviving spouses provides an exception to the usual notions of individualism and testamentary freedom, suggesting that US inheritance law cannot be entirely explained by reference to notions of personal liberty.<sup>215</sup>
- 2.134 While there are few direct protections for children of testators in the US, there are some indirect protections. “Conduit theory”, discussed above, provides one such example of an indirect, albeit imperfect protection for vulnerable children. Intestacy rules may also serve to protect vulnerable children. As one commentator notes, the law of intestacy in US states usually provides the child of the deceased with a share of the estate.<sup>216</sup> This may be less likely to conflict with freedom of testation because, almost by definition, intestacy arises where the deceased has not exercised free will. Similarly, “pretermitted heir” statutes protect children, born after the execution of the will, who are unintentionally disinherited.<sup>217</sup> New York legislation, for example, provides that children born after the execution of the will shall receive the intestacy share.<sup>218</sup> Finally, although freedom is highly valued, there are also strong social norms that mean that the vast majority of testators provide for dependants in their will.<sup>219</sup>
- 2.135 While the common law provides some explanation for the US esteem for testamentary freedom, the commentary also suggests there are also cultural reasons for this phenomenon.<sup>220</sup> “Freedom” is a common slogan in US political discourse, and as such a pervasive concept in policy discussions generally it is perhaps unsurprising that it is also such a dominant principle underlying US succession law. Because of this individualist, rather than communitarian, perspective the starting point is that an individual is free to deal with property as they wish, even after death.<sup>221</sup> One commentator observes that freedom to dispose of property after death is “central to the American psyche.”<sup>222</sup> There is also constitutional support for testamentary freedom. In *Hodel v Irving*,<sup>223</sup> the US Supreme Court held that the right to transfer property at death was inherent in the

<sup>215</sup> Tate, “Caregiving and the Case for Testamentary Freedom” (2008) *UC Davis Law Review* 129, at 159. The author refers to “an undeniable tendency toward individualism in American society.”

<sup>216</sup> Chester, “Disinheritance and the American Child: An Alternative from British Columbia” (1998) *Utah Law Review* 15.

<sup>217</sup> Brashier, “Disinheritance and the Modern Family” (1994) *Case Western Reserve Law Review* 84, at 113.

<sup>218</sup> *NY CLS EPTL* § 5-3.2.

<sup>219</sup> Chester, “Disinheritance and the American Child: An Alternative from British Columbia” (1998) *Utah Law Review* 15.

<sup>220</sup> Brashier, “Disinheritance and the Modern Family” (1994) *Case Western Reserve Law Review* 84, at 122. The author refers to a “near reverence for testamentary freedom.”

<sup>221</sup> Chester, “Disinheritance and the American Child: An Alternative from British Columbia” (1998) *Utah Law Review* 15. The author notes that “America’s resistance to protecting children via inheritance is rooted in its extreme individualism: the right of disinheritance stems from the protection of individual free will.” See also Madoff, “A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems” (2014) *Boston College International & Comparative Law Review* 333.

<sup>222</sup> Madoff, “A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems” (2014) *Boston College International & Comparative Law Review* 333, at 335.

<sup>223</sup> 481 US 704 (1987).

concept of private property. The commentary has also noted, however, that, while commitment to testamentary freedom is used as a justification for allowing parents to leave their children nothing, it has not prevented legislatures from providing protection for surviving spouses.<sup>224</sup>

- 2.136 The US approach may be contrasted with other jurisdictions such as France, Ireland and Scotland, which place comparatively less emphasis on freedom and more emphasis on obligations and ties to the community. The commentary suggests that this explains why testators are at large to disinherit children in the US, whereas in France and Scotland they are required to leave a fixed portion to their children, and in Ireland the issue of “proper provision” is a live question under section 117.
- 2.137 It is also noteworthy that Louisiana, as the US jurisdiction with the greatest civil law influence, is the only state that provides for an obligation of parents to provide for children after death.<sup>225</sup> The 2009 *Louisiana Civil Code* provides that children of the testator are entitled to a fixed share of the estate if they fall into one of the following two classes. First, children of any age who were dependent on the testator because of their “mental incapacity or physical infirmity.” Second, those who are under the age of 24. This is often referred to as “forced heirship”, and it is somewhat similar to the automatic entitlements found in other civil law jurisdictions, with the important difference that it only protects the vulnerable. In contrast, purely civil law jurisdictions and other mixed jurisdictions (such as Scotland as noted above) usually provide an automatic entitlement to inherit for all children. As already noted, Ireland provides an unusual example of a “half-way house.”
- 2.138 Louisiana previously had a strong automatic entitlement for all children, an approach typical of most civil law systems, as discussed above. This was repealed and replaced with a weaker protection for the vulnerable only, similar to the current regime. In the *Succession of Lauga*<sup>226</sup> the Supreme Court of Louisiana held that this new statute reducing the protection for children was unconstitutional as it violated a prohibition in the Louisiana Constitution against the abolition of forced heirship. Louisiana subsequently amended<sup>227</sup> its Constitution to remove this prohibition and the legislation<sup>228</sup> was then re-enacted. Arguably in Louisiana, Anglo-American cultural and legal influences have contributed to a movement towards testamentary freedom as the default position, qualified only by a parent’s obligation to maintain dependants.
- 2.139 Although some of the academic commentary<sup>229</sup> has lamented the lack of protection for children, state legislatures do not appear to share these concerns and remain committed

<sup>224</sup> Brashier, “Disinheritance and the Modern Family” (1994) *Case Western Reserve Law Review* 84, at 85.

<sup>225</sup> Madoff, “A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems” (2014) *Boston College International & Comparative Law Review* 333 observes that it is also of note that Texas also formerly employed a similar system until 1856, owing to its Spanish law influence. (1993) 624 So 2d.

<sup>226</sup> Louisiana Constitution, Article XII, § 5.

<sup>227</sup> *La Civ Code* Articles 1493, 1495 and 1496 (1996).

<sup>228</sup> Chester, “Disinheritance and the American Child: An Alternative from British Columbia” (1998) *Utah Law Review* 15.



to testamentary freedom. Louisiana's moderation of its automatic entitlements is viewed by some as symptomatic of a general trend towards testamentary freedom. In 1965 the Bennett Report<sup>230</sup> recommended that New York adopt a "family provision" regime similar to the New Zealand model which, as noted above, later spread to much of the common law world, including Ireland. The Bennett Report noted that this system allowed the judge to exercise broad discretion in varying the will or laws of intestacy in order to best fulfil the testator's moral or legal obligations to a child. It preferred this system over a forced share since it would take into consideration the needs of the child and may not interfere with the testator's intent as much as a forced share would. The Bennett Report also addressed concerns regarding the restriction of testamentary freedom and an increase in litigation. It stated that in the common law jurisdictions that had enacted family provision legislation, their courts had, in general, acted conservatively in applying the law and that litigation had not increased to any significant extent. Nonetheless, the New York legislature did not enact any type of family provision legislation, and testamentary freedom was preserved.<sup>231</sup>

- 2.14.0 Although notions of testamentary freedom are often invoked in discussions of the principled basis for succession law, some have questioned the true influence of such ideas. Some commentators have pointed out that, although lip service is paid to testamentary freedom, the courts sometimes use covert methods to enforce the moral obligations of testators, such as undue influence or technical defects in the execution of the will.<sup>232</sup> It is argued that the courts are more willing to identify procedural problems with wills where the testator has failed to provide for his or her children. While US succession law appears to be at an extreme end of the spectrum of testamentary freedom, the difference with the other jurisdictions is less pronounced on closer examination.

## D. The nature of the moral duty

### 1. A moral duty or a legal duty?

- 2.14.1 One of the unusual features of section 117 is the use of the phrase "moral duty" in the text of the legislation itself. As noted above, section 117(1) provides as follows:

"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."

<sup>230</sup> Bennett Commission, *Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates*, NY Legis Doc No.19 (1965).

<sup>231</sup> Chester, "Disinheritance and the American Child: An Alternative from British Columbia" (1998) *Utah Law Review* 15, at 19.

<sup>232</sup> Madoff, "A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems" (2014) *Boston College International & Comparative Law Review* 333.



- 2.142 Moral duties are usually contrasted with legal duties. Although there is some overlap, moral duties do not always coincide perfectly with legal duties. Certain things that are immoral are not illegal.<sup>233</sup> Similarly, certain things are illegal but are not immoral.<sup>234</sup> Certainly there is a relationship between legality and morality, and laws are often enacted to enforce moral norms. As some commentators observe, however, if the legislature wishes to support the observance of a moral code, it does not necessarily follow that it should be enacted into law.<sup>235</sup> Moral obligations may be so commonly observed that there is no need to legislate for them, or legislation may be seen as an unwarranted interference in the private moral sphere. Often however, legislation will seek to capture a particular moral obligation with a legal rule as is the case with section 117.
- 2.143 The moral duty that parents owe their children is not something which can be created, or indeed removed, by legislation. Parents owe their children certain obligations, one of which is to provide for them materially, subject to the important proviso that the parents have the economic means to do so. As well as this, parents must also provide for their child's emotional welfare, again to the extent of the parents' capacity to do so. Although it is common to refer to section 117 as "creating a moral duty," in a certain sense section 117 is not the source of the moral duty, but the text of the section recognises that there is a moral duty and makes it legally enforceable. Before the enactment of the *Succession Act 1965*, it is easy to think of circumstances in which it would be immoral for a testator with economic means to fail to provide for their children, despite the fact that there was no law preventing it. In section 117, the Oireachtas sought to capture the content of that moral duty in legislation and, as the majority of people comply with their moral obligations to their children the Oireachtas considered that the wisest course of action was to restrict testamentary freedom only to the extent that it conflicts with parental obligations, rather than, for example, creating an entitlement to a specific fraction of the parent's estate.
- 2.144 In support of this view of the moral duty, testators may owe moral duties to other persons, which may be considered when assessing a plaintiff's claim under section 117. However, only children of the testator may bring a claim under section 117, so it is only the moral duty that a parent owes to his or her child which is enshrined in the 1965 Act. The decision in *L v L*,<sup>236</sup> clearly outlines the distinction between moral and legal duties. At the time, it was not possible for children born to parents who were not married to each other to make a claim under section 117 or where, as in that case, there was uncertainty over the validity of a second marriage. The High Court (Costello J) held that the issue of whether the children of the second marriage were owed a moral duty was not dependent on whether they were entitled to make a claim under section 117. However, the court

<sup>233</sup> It is generally not illegal, except in specific circumstances (such as where a person is under oath or has made a statutory declaration) to tell lies for example although many people might agree that it is usually immoral to do so.

<sup>234</sup> Such as, for example, driving on the right hand side of the road. Besides the fact that the law prohibits it, there is nothing inherently immoral about driving on the right hand side of the road.

<sup>235</sup> Peart "Testamentary Claims by Adult Children – the Agony of the Wise and Just Testator" [2003] OtaLawRw 6.

<sup>236</sup> [1978] IR 288. This case is discussed in more detail in Appendix C.

ultimately held that their position did not need to be considered as they were not capable of being affected by an order under section 117 in favour of the children of the testator's first marriage.

- 2.145 Although in some earlier cases the courts at times questioned at a preliminary stage whether a moral duty in fact arises,<sup>237</sup> Spierin suggests that the better view is that there is a general moral duty but it may be discharged by provision in a will or during the life of the children.<sup>238</sup> The nature of the court's enquiry, therefore, is not whether there is a moral duty, which is presupposed, but whether the testator has failed to satisfy the duty. The text of section 117 contains the implicit assumption that, in general, parents owe their children a moral duty and creates a remedy in cases where this duty has not been discharged. This reading of section 117 suggests that parents owe their children moral duties throughout their lives but this duty only becomes enforceable after death. In *PMcD v MN*,<sup>239</sup> the High Court (McCracken J) expressed support for this interpretation:

"I think the wording of s.117 would support the view that there is an assumption in the Act that a moral duty exists in general for a testator to make proper provision for his children."

- 2.146 On appeal, the Supreme Court, although allowing the appeal for other reasons, upheld this interpretation of section 117. The Court held that, in general, there is an obligation that a parent owes to his or her child.<sup>240</sup> This obligation is continuous from the date of birth of the child to the date of death of the parent, unless the obligation has been discharged by the parent making proper provision for the child or extinguished by the conduct of the child. This is consistent with the case law, discussed in Appendix C, below, that prior provision may discharge the moral duty a parent owes to his or her child.
- 2.147 It is also clear that both parents owe their children a joint moral duty,<sup>241</sup> as section 117(3) prevents interference with the legal right share or devises or bequests of the spouse of the testator, unless he or she is not the parent of the plaintiff. The logic behind this restriction is that the second parent may provide for the child with the proceeds of the estate of the deceased spouse during the lifetime of the second parent or in a will. Failing that, the estate may be the subject of a section 117 application when the second parent dies.<sup>242</sup> This reading of the 1965 Act may help explain the apparent discrepancy that, where the parent leaves everything in his or her will to the other surviving spouse, children cannot make a claim until after the death of the second parent (where their parents are married), which, at first glance, may appear anomalous.

<sup>237</sup> For example *Re HD (No. 2)*, *W v Allied Irish Banks Ltd* High Court, 2 March 1977.

<sup>238</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 788.

<sup>239</sup> [1998] IEHC 183, [1999] 4 IR 301.

<sup>240</sup> [2000] 1 ILRM 382.

<sup>241</sup> *In re JLW Deceased*, *CW v LW* [2005] IEHC 325, [2005] 4 IR 439. The High Court (O'Sullivan J) held that section 117 implicitly envisaged that the parents owed a shared moral duty to their children, discussed further in Appendix C.

<sup>242</sup> As noted in the case law discussed in Appendix C below, a parent's duty may be discharged by prior provision.

## 2. The practical difficulties with the phrase “moral duty”

- 2.148 A number of submissions received by the Commission praised the flexibility that section 117 brings. Section 117 as it currently stands, it is argued, is invaluable as it affords a court freedom to distil coherent criteria from the case law to uphold the principle that parents should not act in breach of their moral duty to their children.<sup>243</sup>
- 2.149 One of the arguable advantages of the phrase “moral duty” is that it allows the courts to ensure that important constitutional principles, such as those of social justice on which Article 43 expressly envisages restrictions on property rights, are preserved by providing a check on potentially unconscionable actions of a parent. Similarly, because Article 41 recognises the family as a “moral institution”, it is appropriate that the courts perform their constitutional role to safeguard it by interpreting the rights and obligations inherent in the family. Indeed, as was seen in the Oireachtas debates on what became the 1965 Act, this was one of the motivations behind the introduction of section 117. Nonetheless, it is not clear that the use of the phrase “moral duty” in legislation is required to give effect to these constitutional principles.
- 2.150 Another suggested advantage of the words “moral duty” is that they are broad enough to allow considerable judicial discretion. Rather than having a rigid system of fixed legal shares or complete testamentary freedom, section 117 represents a compromise between these extremes which allows justice to be done on the facts of an individual case. The phrase moral duty is flexible enough to give the courts a wide discretion to prevent injustice if and when it arises. Although setting out the factors in legislation may be of assistance, it can be suggested such an approach may unduly restrict the courts from the proper exercise of their discretion.
- 2.151 Under section 117 applications, the courts are given discretion to take account of a number of different factors, including diverse family structures and arrangements. Even from early cases under section 117, when the traditional nuclear family was more typical, the courts have been able to balance the obligations owed to children on the one hand and the testator’s new partner on the other.<sup>244</sup> Similarly, the High Court decision in *DC v DR*<sup>245</sup> shows that the key elements of section 117 can be of assistance by way of analogy in an application for provision out of the estate of a deceased former cohabitant under the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. In addition, the gender neutral language of section 117 means that it remains relevant even though societal gender roles may have changed since 1965. Some submissions received by the Commission in response to the Issues Paper argued that this flexibility means that no reform is necessary and the courts can adequately take account of the change of social or demographic factors.

<sup>243</sup> This case law is discussed in greater detail in paragraphs 2.28 to 2.42, above.

<sup>244</sup> *L v L* [1978] IR 288 the High Court held that in determining what provision was appropriate for the testator’s children the court could not ignore the moral duty owed to the testator’s second wife, notwithstanding the uncertainty over the validity of the testator’s second marriage in Irish law. In *In re VC* [2007] IEHC 399 the High Court recognised the need to consider the partner of the deceased, even though there was no legal obligation to provide for her.

<sup>245</sup> [2015] IEHC 309, [2016] 1 ILRM 178.

- 2.152 The use of the phrase moral duty has a number of drawbacks, however. As many practising lawyers and mediators submitted, litigation between family members over the estate of the deceased can be particularly acrimonious. *Falvey v Falvey*<sup>246</sup> provides an example of how family disputes can become contentious out of all proportion to the alleged incident. The High Court (Barron J) noted that the original source of the family dispute had been forgotten and it was, no doubt, a trivial incident which ultimately resulted in a firmly entrenched dispute.
- 2.153 A number of submissions suggested reforms to resolve this problem, including mediation as a way of avoiding the animosity and bitterness that can accompany section 117 applications. The adversarial system of litigation can at times be ill-suited to resolve disputes and merely serves to set parties against each other in the hope that one is declared the winner. Mediation, where appropriate, can be a valuable alternative as it is less confrontational and seeks to reach an agreeable compromise between the conflicting aims of both parties. This approach echoes the Commission's recommendation to that effect in the *Report on Alternative Dispute Resolution: Mediation and Conciliation*.<sup>247</sup>
- 2.154 Section 23 of the *Mediation Bill 2017*, which is currently (May 2017) before the Oireachtas, proposes to implement the thrust of this recommendation by providing that the Minister for Justice and Equality would be empowered to prepare and publish a scheme for the delivery of mediation information sessions in respect of certain proceedings, including proceedings under section 117 of the *Succession Act 1965*. The Commission commends this proposed development, and the general content of the 2017 Bill.
- 2.155 Legislative measures such as those in the 2017 Bill that promote mediation can lessen the divisive effect that section 117 applications can have on families. However, as some submissions have suggested, the wording of section 117 itself can have an alienating effect. The use of the phrase "moral duty" can be quite divisive as it sometimes gives the impression that the court is passing judgement on the virtues or otherwise of a family member or their actions. There are connotations of moral blameworthiness in the current text of section 117 and some submissions have said that this can exacerbate disputes. One of the primary purposes of section 117 is to ensure that family members are properly provided for, rather than to assign blame. Additionally section 117 has an important social objective of preventing a testator from ignoring his or her obligations. It would be counter-productive for section 117, which aims to support and reinforce family relationships, if it served to create division among families. Furthermore, it is not necessary to refer to a moral duty when creating a legal obligation to provide for a child, as demonstrated by the discussion of the law in other jurisdictions. Some submissions suggested that alternative language could be just as flexible without suffering from the disadvantage of divisiveness.
- 2.156 As well as being potentially divisive, the words "moral duty" are somewhat imprecise and could support a number of different interpretations. Although flexibility is useful in cases

<sup>246</sup> [1985] ILRM 169.

<sup>247</sup> *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) at paragraph 6.89.

of judicial discretion such as section 117, one of the main disadvantages of the phrase “moral duty” is that it means different things to different people. The Commission understands that it can be hard to anticipate in advance what a court will decide, which in turn makes it hard for a testator to have confidence in their will or a plaintiff to predict their chances of a successful challenge. In cases of judicial discretion such as this, it would not be possible or wise to confine section 117 to a rigid formula. As noted, the flexibility of section 117 was praised in a number of submissions, noting its ability to address a wide variety of factual circumstances and complex family relationships. Nonetheless, the uncertain nature of the phrase “moral duty” means that section 117 applications may result in more litigation than would otherwise be the case. Parents should be able to behave with full awareness of what legal duties they owe to their children and recourse to the courts should only take place in rare or exceptional cases. The advantages of flexibility may be outweighed by the disadvantages of uncertainty. Alternative wording could maintain the judicial discretion while providing greater guidance to parties regarding the likely outcome in the event of an application under section 117.

### 3. The influence of “moral duty” on the case law

#### The phrase “moral duty” in other jurisdictions

- 2.157 The use of the phrase “moral duty” in section 117(1) of the 1965 Act is not typical of legislative language. As noted above, the phrase has its origin in New Zealand case law and did not originally appear in the text of the New Zealand family provision legislation.<sup>248</sup>
- 2.158 Generally speaking most other common law jurisdictions use more neutral language in their family provision legislation. New Zealand uses the wording “adequate provision” for “proper maintenance.”<sup>249</sup> The phrase “reasonable provision... for maintenance” is used in England and Wales.<sup>250</sup> The various Australian jurisdictions employ broadly similar wording, with minor variations.<sup>251</sup> In general, Australian state legislation provides that if the applicant is left with “inadequate provision” for “proper maintenance and support,” the court may provide for the applicant “such provision as it thinks fit” out of the estate of the deceased. In Ireland, family provision legislation such as the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996* (discussed further below), whose purpose is similar to

<sup>248</sup> However, as noted above section 3(2) of the New Zealand *Family Protection Act 1955*, inserted by section 3 of the *Family Protection Amendment Act 1967*, sets out the factors the court should refer to in “considering the moral duty of the deceased.” This section is limited to claims by grandchildren of the deceased.

<sup>249</sup> Section 4 of the *Family Protection Act 1955*. The position in New Zealand is discussed in greater detail in paragraphs 2.52 to 2.73, above.

<sup>250</sup> Section 1(1) of the *Inheritance (Provision for Family and Dependents) Act 1975*. The position in England and Wales is discussed in greater detail in paragraphs 2.74 to 2.100, above.

<sup>251</sup> Section 3(1) of the *Testator’s Family Maintenance Act 1912* (Tasmania); section 41(1) of the *Succession Act 1981* (Queensland); section 91A of the *Administration and Probate Act 1958* (Victoria); section 59(2) of the *Succession Act 2006* (New South Wales); section 7(1) of the *Inheritance (Family Provision) Act 1972* (South Australia); section 6(1) of the *Family Provision Act 1972* (Western Australia); section 8(2) of the *Family Provision Act 1969* (Australian Capital Territory); section 8(1) of the *Family Provision Act 1970* (Northern Territory). The position in Australia is discussed in greater detail in paragraphs 2.101 to 2.118, above.

section 117, also use this wording, as does section 117, but without the additional reference to “moral duty” found in section 117.

- 2.159 The English text Williams, Mortimer and Sunnucks explores the meaning of moral obligations as assessed by the courts:

“The obligation to provide may derive from a sentiment that family and dependants ought to be left money to live on or it may derive from a sentiment that they have a primary right to the deceased’s property.”<sup>252</sup>

- 2.160 The text goes on to say that these sentiments will point the court in divergent directions. Greater emphasis on the first sentiment, that family and dependants ought to be left money to live on, will point towards restrictive exercise of the jurisdiction, focusing on maintenance. Greater emphasis on the second sentiment, that family and dependants have a primary right to the deceased’s property, will point towards generous exercise of jurisdiction, focusing on “family property.” Because of the scope for subjective interpretation of the phrase “moral duty”, its meaning could, of course, be limited to a duty to maintain dependants. However, case law in Ireland and elsewhere reflects a broader interpretation of the phrase.
- 2.161 Case law from other common law jurisdictions has extensively considered the nature of the obligations that the legislation imposes on parents. Although, as noted above, outside of Ireland, the phrase “moral duty” is not usually employed in the actual text of family provision legislation, it is a phrase which employed by courts in family provision cases in other common law jurisdictions.<sup>253</sup>
- 2.162 The English *Inheritance (Provision for Family and Dependants) Act 1975* makes maintenance and dependency the guiding principles of family provision for children. Section 1 of the 1975 Act provides that certain applicants may apply for “reasonable financial provision.” Regarding children, the phrase is defined as being such provision as would be “reasonable in all the circumstances of the case for the applicant to receive for his maintenance.” Provision for children (including adult children) is limited to what is required for their material needs, compared with that of spouses which entails more of an entitlement to the assets of the deceased.<sup>254</sup>
- 2.163 This distinction reflects the recommendations of the Law Commission of England and Wales in its 1974 Report. Initially the Commission was of the view that all family provision should be limited to maintenance to avoid uncertainty, increased volume of litigation and the difficulty courts would face in adjudicating what a fair share of an estate would be. However, following consultation, the Commission ultimately recommended that family

<sup>252</sup> Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 58-08.

<sup>253</sup> In New Zealand for example, discussed at paragraph 2.57, above

<sup>254</sup> For spouses, under section 1(2)(a) of the *Inheritance (Provision for Family and Dependants) Act 1975*, the courts may order the estate to make such provision as would be “reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance.”



provision for spouses should assume a wider role than maintenance.<sup>255</sup> In contrast, the Commission recommended that the objective of family provision for children should remain to secure their maintenance.<sup>256</sup>

- 2.164 Under the 1975 Act a child with limited capacity or otherwise unable to earn a living is likely to have a strong claim. It was previously assumed that an adult child capable of supporting themselves would have to demonstrate some special circumstance or moral obligation in order to succeed in a claim under the 1975 Act.<sup>257</sup> However, more recent case law has suggested that this is not necessarily the case.<sup>258</sup> In *re Christie*,<sup>259</sup> the English High Court held that there was no requirement that the applicant be destitute in order for their claim to succeed. The Court, using the word “maintenance” in a broad sense meaning maintenance of health and well-being, effected a more “fair” distribution of the estate. Williams, Mortimer and Sunnucks criticised the decision in *Christie* stating that the more restrictive approach reflected in the other authorities is the correct one.<sup>260</sup> This decision has also been heavily criticised elsewhere.<sup>261</sup> In *Ilott v Mitson*<sup>262</sup> the English Court of Appeal held that usually some ethical considerations or special circumstances are likely to be required, in addition to the requirement to show necessitous circumstances, but that it is not an absolute prerequisite.<sup>263</sup>
- 2.165 However, in a later decision concerning the amount of the award in *Ilott*, the Court of Appeal<sup>264</sup> placed some uncertainty on the importance of maintenance. The Court specifically structured the award so as to not interfere with state benefits, in effect shifting the primary burden to provide for the plaintiff from the family to the state. Although there was some uncertainty as to whether this decision extended the scope of family provision in England, one commentator suggested that the Court of Appeal decision in *Ilott* had made it easier for adult children to bring claims.<sup>265</sup> The decision went beyond mere maintenance because the plaintiff was living within her extremely limited means. The Court was influenced by the absence of luxuries and considered it relevant that she “ought” to be able to buy new clothes or go on the occasional holiday. However

<sup>255</sup> Law Commission of England and Wales, *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974), paragraph 14.

<sup>256</sup> *Ibid* paragraph 80.

<sup>257</sup> Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 59-19.

<sup>258</sup> For example in *Re Hancock* [1998] 2 FLR 346, the Court of Appeal held that there does not necessarily have to be special circumstances for a claim to succeed.

<sup>259</sup> [1979] Ch. 168.

<sup>260</sup> Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 58-09.

<sup>261</sup> *Ibid* paragraph 58-05.

<sup>262</sup> [2011] EWCA Civ 346. This was the first appeal on the “threshold” issue, as opposed to the second appeal on the amount of the award, heard by the English Court of Appeal and subsequently the UK Supreme Court in: *Ilott v Mitson* [2015] EWCA Civ 797, [2016] 1 All ER 932; *sub nom Ilott v Blue Cross and Ors* [2017] UKSC 17.

<sup>263</sup> Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013) paragraph 59-19.

<sup>264</sup> *Ilott v Mitson* [2015] EWCA Civ 797, [2016] 1 All ER 932; *sub nom Ilott v Blue Cross and Ors* [2017] UKSC 17.

<sup>265</sup> Douglas, “Estranged Children and Their Inheritance” [2016] LQR 20.



it has been noted<sup>266</sup> that the unusual facts in *Ilott* (the entirety of the estate was left to charity and the claimant was reliant on State benefits) mean that mere impecuniosity is unlikely to justify an award in the absence of other special circumstances.<sup>267</sup>

- 2.166 In any event, on appeal from the Court of Appeal decision in *Ilott*, the UK Supreme Court removed much of this uncertainty by reaffirming the importance of maintenance.<sup>268</sup> The Court reduced the award to the claimant, partially on the basis that the Court of Appeal had been incorrect to state that a more modest award could not satisfy her needs of maintenance. The English case law is discussed in further detail in Part C, above.
- 2.167 Maintenance thus remains the touchstone of family provision in England and Wales. In 2011, the Law Commission of England and Wales reviewed the issue of whether to remove the entitlement of adult children to bring a claim. The Commission ultimately recommended that the current position should be retained on the basis that “maintenance” placed a practical limitation on the ability of adults to bring a claim as many will be supporting themselves.<sup>269</sup> For adult children, there should be no “forced heirship” or entitlement to inherit based on a blood link. The Commission recommended that testamentary freedom should remain the norm in English law, unless some unusual circumstances justify departure from this position.
- 2.168 Other jurisdictions in the common law world are more generous to adult children.<sup>270</sup> Legislation in Australia and New Zealand recognises that parents have a duty to make provision for their children which is not merely “adequate” but also “proper”. This requirement of propriety has been generally interpreted as importing moral considerations into the assessment of what provision should have been made.<sup>271</sup> Parental obligations to adult children, therefore, go beyond mere adequate maintenance or need towards somewhat of an obligation to leave them something in a will.
- 2.169 The Commonwealth Privy Council decision in *Bosch v Perpetual Trustee*<sup>272</sup> addressed the distinction between proper provision and adequate provision. This decision has been subsequently endorsed in both Australia and New Zealand. In *Bosch* the Privy Council held that adequacy refers to need or requirement of maintenance of the applicant whereas propriety looks at all the circumstances of the case including the size of the estate, provision for others and ethical obligations. For example, a small sum may be sufficient for adequate maintenance of a child but it may not be proper having regard to

<sup>266</sup> *Ibid.*

<sup>267</sup> In *Ames v Jones* [2016] EW Misc B67 (CC), the English County Court considered the claimant’s unemployment to be a “lifestyle choice” and that there were no special circumstances justifying provision. This case was decided after the Court of Appeal decision in *Ilott* but before the UK Supreme Court decision in that case.

<sup>268</sup> *Ilott v Blue Cross and Ors* [2017] UKSC 17.

<sup>269</sup> Law Commission of England and Wales, *Report on Intestacy and Family Provision Claims on Death* Law Com. No. 331 (2011), paragraph 6.6.

<sup>270</sup> See McGregor-Lowndes and Hannah, “Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?” [2009] APLJ 62, at 75.

<sup>271</sup> The difference between the words “adequate” and “proper” in the Australian case law is discussed in greater detail at paragraph 2.102.

<sup>272</sup> [1938] AC 463; [1938] 2 All ER 14.

the child's station in life and the large estate left behind by his or her father. Similarly, a small sum may be sufficient for proper provision but it may not be sufficient for adequate provision, having regard to the small estate left behind and the large number of obligations the testator owes to other children.

- 2.170 In *Williams v Aucutt*,<sup>273</sup> the New Zealand Court of Appeal, citing *Bosch* among other cases, re-asserted the importance of moral obligations and proper provision rather than mere maintenance of children. The Court explicitly rejected the New Zealand Law Commission's criticism of the continued emphasis on moral duty. In doing so the Court held that there was no requirement that an adult child demonstrate need of maintenance and that so called "support claims"<sup>274</sup> were valid, although they may result in lower awards than was previously the case, which amounts to a partial acknowledgement of the Law Commission's criticism. The Law Commission had previously recommended that the *Family Protection Act 1955* should be amended to align testamentary duties with duties a parent would owe to a child during their life.<sup>275</sup> The Commission made this recommendation as a result of what it viewed as excessive generosity of the courts in family provision claims, particularly to those of adult children.
- 2.171 The effect of the decision in *Williams v Aucutt*, reflected in subsequent case law,<sup>276</sup> is that the concept of a "moral duty" remains firmly entrenched in New Zealand family provision law. As already noted, *Williams v Aucutt* arguably represents a more "conservative approach" as the courts have subsequently been more restrained in their awards. It would appear that in recent years New Zealand courts have taken into account the changes from the traditional generational contract to the "adapted generational contract." Because older people have a responsibility to maintain themselves for longer than was the case in the past, their children have reduced expectations of inheritance compared with previous generations.<sup>277</sup>
- 2.172 Some have questioned this characterisation however, arguing that *Williams* merely confirms the excessive focus on moral duty.<sup>278</sup> Other commentators have observed that it is somewhat disingenuous for the courts to suggest that testamentary freedom is the starting point, when there is something close to an entitlement of adult children to share in the estate of their parents, albeit with a smaller award than might previously been the case.<sup>279</sup> This is, perhaps, a surprising development because the original 1900 New Zealand legislation was largely motivated by the desire to ensure families were maintained after

<sup>273</sup> [1999] BCL 948 (NZHC), [2000] 2 NZLR 479 (NZCA).

<sup>274</sup> "Support claims" in the literature and case law in New Zealand refer to claims by children of the testator, not made on the basis of need but rather seeking recognition of belonging and contribution to the family. See for example Caldwell, "Family Protection Claims by Adult Children: What's going on?" [2008] 6 NZFLJ 4.

<sup>275</sup> New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (1997).

<sup>276</sup> *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640.

<sup>277</sup> The position in New Zealand is discussed in greater detail in paragraphs 2.52 to 2.73, above.

<sup>278</sup> Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 CLWR 356.

<sup>279</sup> See Caldwell "Where There is a Will...Family Protection Claims in the Court of Appeal" (2003) Fam LJ 155.

the death of the principal wage earner, rather than become a financial burden on the community.<sup>280</sup>

- 2.173 Family provision in New Zealand remains governed by section 4 of the *Family Protection Act 1955* and the New Zealand Law Commission's recommendations, that obligations to adult children should be limited, have not at the time of writing (May 2017) been implemented.
- 2.174 In *Vigolo v Bostin*,<sup>281</sup> discussed above,<sup>282</sup> the High Court of Australia explored the meaning of the phrase "moral duty" and its relevance to the related statutory words "proper", "adequate" and "maintenance". The plaintiff, who was an able bodied man of "substantial means", failed in his claim, not because moral considerations are irrelevant but because he failed to bring his claim within the statutory text. The Court held that moral obligations were a "gloss" on the statutory text, in the sense that they were of assistance in explaining the legislative purpose. This confirmed the importance of moral considerations in Australian family provision law when they had previously been questioned.<sup>283</sup> However, the court also cautioned against the over-reliance on moral considerations and that such considerations were to be used as a guide to but not a substitute for, the meaning of the text. Words such as "proper" and "fit" have normative connotations and cannot be interpreted with the assistance a value system external to the text of the legislation. Even apparently more neutral language cannot be defined in a vacuum or explained without reference to some value judgments. The word "adequate" requires comparison with some benchmark of what is right. "Maintenance" could refer to mere subsistence or the preservation of a certain expected standard of living. The minority in *Vigolo* however rejected this view, however, on the ground that that the utility of this approach was limited and that focus on moral considerations drew focus away from the statutory text.
- 2.175 Nonetheless, commentators in Australia have argued that the focus on moral duty has rendered disinheritance difficult and that moral duty has distorted the original intent and purpose of family provision legislation.<sup>284</sup> This focus on "moral duty" creates a sense of entitlement to a share a deceased parent's estate, which some have suggested is inappropriate in a modern context. Newspaper articles, statements by charities and extra-judicial comments have all expressed disquiet at a family provision regime in

<sup>280</sup> McGregor-Lowndes and Hannah, "Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?" [2009] APLJ 62, at 82. However, see, for example, Hon Justice R Chesterman, "Does Morality Have a Place in Applications for Family Provision Brought Pursuant to s. 41 of the *Succession Act 1981*?" QLS Succession Law Conference, 1 November 2008, who points out that moral duties also played a role in the parliamentary debates that led to the 1900 Act. The author notes that the "ethical" approach has since eclipsed the "economic" approach in family provision legislation.

<sup>281</sup> [2005] HCA 11.

<sup>282</sup> At paragraph 2.105.

<sup>283</sup> For example see *Singer v Berghouse* (1994) 181 CLR 201 and Atherton, "Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding?" [1999] Aust J Leg Hist 5.

<sup>284</sup> McGregor-Lowndes and Hannah, "Reforming Australian Inheritance Law: Tyrannical Testators v Greying Heirs?" [2009] APLJ 62.

Australia which is seen as increasingly generous to applicants.<sup>285</sup> Some Australian law reform bodies have also recommended that applications by adult children should be restricted to those to whom the deceased owed a special responsibility,<sup>286</sup> while others have not made such recommendations.<sup>287</sup> To date no Australian jurisdiction has restricted applications by adult children in this manner.

- 2.176 The weight of authority in England and Wales favours a maintenance standard for family provision, with some leanings towards a more family property oriented approach. Despite criticism, family provision regimes in other jurisdictions employ a more interventionist approach, which almost resembles a familial entitlement to a share in the estate.
- 2.177 Perhaps the lesson from New Zealand and Australia is that, even in the absence of references to morality in the legislation itself, moral considerations can still be central to family provision cases. For a more restrained approach, particularly regarding adult children, England and Wales prefers the less loaded language of “maintenance”. This wording encompasses a more limited obligation that parents owe to their children, emphasising the needs of the applicant rather than a moral entitlement to share in the estate of his or her parents. As the English case law demonstrates, moral considerations are not irrelevant, but they do not take the central role that they do in other jurisdictions.

#### The phrase “Moral duty” in Ireland

- 2.178 In Ireland, legislation (other than section 117) that empowers the court to make provision for one person out of the estate of another, avoids using the term “moral duty.” Section 15A of the *Family Law Act 1995* and section 18 of the *Family Law (Divorce) Act 1996* permit the court to make provision for a spouse out of the estate of a deceased spouse, or former spouse, respectively. Similarly, sections 127 and 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* permit the court to order provision from the estate of a deceased civil partner and cohabitant respectively. All of these provisions empower the court to “make such provision... as it considers appropriate... if it is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased.”<sup>288</sup>
- 2.179 These provisions are not identical in purpose to section 117; different considerations apply to provision for children who generally enjoy obligations of support from their parents. However, the decision of the Oireachtas to avoid “moral duty” in these Acts is of some relevance to any discussion on the reform of section 117. As noted above these provisions are phrased very similarly to family provision legislation in Australia and New Zealand.

<sup>285</sup> See Hon Justice R Chesterman “Does Morality Have a Place in Applications for Family Provision Brought Pursuant to s. 41 of the *Succession Act 1981*?” QLS Succession Law Conference, 1 November 2008.

<sup>286</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (1997), Appendix 1, at 2, and New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005), both took this view.

<sup>287</sup> Law Reform Commission of Victoria, *Report on Succession Laws* (2013).

<sup>288</sup> The various other pieces of family provision legislation are discussed in greater detail at paragraphs 2.44 to 2.51, above.

- 2.180 In Ireland, section 117 does, of course, contain the phrase “moral duty”. In *L v L*,<sup>289</sup> the High Court (Costello J) provided a good description of the approach taken by the Irish courts in interpreting this moral duty:

“The Court must make an order that is just. The Court is required by s. 117 subs. 2, to consider the application from the point of view of a prudent and just parent; it is required to take 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 or children who are claimants under the section and to the other children. A parent, in acting prudently and justly, must weigh up carefully all his moral obligations. In doing so, he may be required to make greater provision for one of his children than for others. For example, one child may have a long illness for which provision must be made; or one child may have an exceptional talent which it would be morally wrong not to foster.”

- 2.181 Although other decisions noted above set out the criteria to be considered more exhaustively, this is a good summary of the approach the courts take in section 117 applications. Costello J employs terms like “fair”, “just” and “obligations” placing the focus much more squarely on the duty of parents (that is, parents with economic means) to leave something to their children, rather than dependency or maintenance. Because the term “moral duty” appears in the legislation in Ireland, it is not open to the courts to address whether it remains an appropriate standard. In other jurisdictions, by contrast, where “moral duty” is not in the text of the legislation itself, the Courts have explored whether this phrase is a useful guide, or should be dispensed with.
- 2.182 In *DC v DR*,<sup>290</sup> the High Court (Baker J) discussed the similarities between the “proper provision” standard in section 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* and the “moral duty to make proper provision” in section 117 of the *Succession Act 1965*. Although acknowledging that there were important differences between applications by cohabitants and those by children, the Court held that some assistance could nonetheless be derived from the jurisprudence under section 117. As with section 117 applications, the court must decide what provision would be appropriate in all the circumstances of each case and no rule of thumb could be usefully employed to apply to the majority of cases.
- 2.183 As the case law discussed above and in Appendix C, below, illustrates, many section 117 applicants are not necessarily in need of maintenance. The majority of the submissions received by the Commission in response to the Issues Paper were critical of the courts’ willingness to interfere with testamentary freedom, particularly when adult children were involved. Some of the submissions viewed the decided cases as representative of a tendency of the courts to indulge the disgruntlement of plaintiffs to a certain extent. It was suggested that, although the Supreme Court has been more restrained in its awards,

<sup>289</sup> [1978] IR 288.

<sup>290</sup> [2015] IEHC 309, [2016] 1 ILRM 178.

this conservatism has not filtered down to the High Court. Although the courts have stated that there is a “relatively high onus to discharge”,<sup>291</sup> particularly when it comes to adult children, the case law and submissions suggest that applications by adult children are often successful in obtaining some provision from the estate, whether by court order or via settlement. In *In re SF*,<sup>292</sup> the decision of the Court to give the plaintiff additional provision, over and above what was needed to give effect to the loan guarantee, was influenced by the large estate and the generous prior provision to the other children, more than any specific need of the plaintiff.

- 2.184 It has also been suggested in the submissions that it was not the intention of the Oireachtas to create such a generous system of family maintenance and that the Oireachtas would have been surprised by the willingness of the courts to interfere where the plaintiff is capable of providing for themselves.<sup>293</sup>
- 2.185 As discussed above, the flexibility of section 117 is useful as it gives the courts wide discretion to address complex and competing claims. While the flexibility of section 117 is invaluable, there is concern that the phrase “moral duty” has contributed to the readiness of the courts to intervene. At times the courts have been willing to accede to the wishes of plaintiffs who feel they are entitled to a share in the estate. This was arguably not the intention of the Oireachtas in 1965. Furthermore, an interventionist approach is arguably less appropriate in the modern context, where the main transfer of assets takes place earlier on in life. Again demonstrating the flexibility of section 117, the courts have recognised that a parent’s moral duty may be satisfied by testamentary disposition but it may equally be satisfied earlier on in life by provision for education.<sup>294</sup> Commentators in Australia and New Zealand have argued that one of the justifications for a more restricted family provision regime is that the courts have failed to keep pace with the changing social values and that a more restrictive regime should be enshrined in legislation.<sup>295</sup> As noted in Chapter 1, in deciding whether to amend section 117, regard must be had to the courts’ capacity to accommodate modern social and demographic developments.

#### 4. Section 117 and other parental duties

- 2.186 Because claims only arise in specific circumstances under section 117, it must be questioned whether section 117 accurately reflects the general moral duty parents owe to their children. Section 117 gives rise to an apparent anomaly in that it is a moral obligation owed only by parents once they are dead.

<sup>291</sup> *XC v RT* [2003] IEHC 6, [2003] 2 IR 250. See also *In re estate of IAC decd* [1990] 2 IR 143.

<sup>292</sup> [2015] IEHC 851.

<sup>293</sup> Although the “problem of the inofficious will”, “moral duty” and Influences from the early New Zealand case law did play a role in the Oireachtas debates in 1965, so too did the need for maintenance and the issue of adult children.

<sup>294</sup> *In re GM; FM v TAM* (1970) 106 ILTR 82, at 87, the High Court (Kenny J) held that provision of expensive education may discharge the moral duty.

<sup>295</sup> See for example McGregor-Lowndes and Hannah, “Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?” [2009] APLJ 62.



- 2.187 A number of reasons could be proposed to explain why the parent's moral duty only becomes actionable once the parent has died. First, while testamentary freedom is an important exercise of individual autonomy, it is less of a restriction of freedom to circumscribe a person's ability to deal with their property once dead, because at that point that property can no longer be applied for their own benefit. If the property is by necessity going to be distributed to others, this distribution should not ignore the obligations which the parent owes to his or her children. Second, the legal system should be reluctant to interfere with how a person manages his or her property. This is particularly important in Ireland in light of the constitutional right to property (albeit subject to limits based on social justice and the common good) and to the protection afforded to the family. However, where the parent has died, these considerations are arguably less weighty. The discretionary regime under section 117 only to intervene in cases where there has been a "positive failure of moral duty" and only after death is arguably the minimal interference necessary to ensure that a parent's obligations to their children are met while respecting property rights and family autonomy. Third, the legal right to seek provision from a parent only "crystallises"<sup>296</sup> at death, because there is no more opportunity to remedy past wrongs without the intervention of the court. Indeed, many families organise their affairs in such a way that wealth is transferred between generations on death, rather than earlier. Prior provision during life is a relevant factor as to whether the testator has failed his or her moral duty.<sup>297</sup> A will is said to "speak from death", so it would be premature for the court to adjudicate on the discharge of the duty until the parent has died. Only then can a parent's provision for their children be assessed in totality.
- 2.188 On the other hand, as already noted in Chapter 1, as Mill and Locke argued, many of the moral and economic justifications in favour of private property rights would seem to equally apply to wills. Freedom to deal with property is part of personal autonomy and restrictions on testamentary freedom can be oppressive, particularly if people are aware their testamentary wishes may not be respected. Moreover, the economic argument that private property rights encourage productivity can also apply to testamentary freedom. Often people are, at least partially, motivated by the knowledge that their assets will be distributed in accordance with their wishes.
- 2.189 Most importantly, however, the inescapable difficulty remains that section 117 seems to give legal effect to a stronger moral duty than most parents feel they owe to their children. As noted, experience both in Ireland and abroad suggests that the phrase "moral duty" contributes to the readiness of the courts to make an order in favour of a child. The phrase "moral duty" may suggest more of a presumptive moral entitlement of children to a share in their parent's estate rather than a rarely invoked protection against obvious dereliction of parental duty. Arguably, part of the difficulty is that section 117 recognises a general moral obligation which all parents must discharge and disappointment on the part of the applicant often suggests to the court that this obligation has not been fulfilled. Many submissions received by the Commission in response to the Issues Paper strongly

<sup>296</sup> *In re VC* [2007] IEHC 399 uses this language.

<sup>297</sup> This is discussed further below at Appendix C.



rejected a responsibility to provide for children who have established themselves financially. Most of these submissions went further than simply suggesting that a parent's moral obligations were a private matter that should not be enforced by the courts, but that section 117 as it is currently constituted is an outdated characterisation of parental duties.

- 2.190 Early cases such as *In re NSM deceased*<sup>298</sup> and *Re HD (No. 2)*, *W v Allied Irish Banks Ltd*,<sup>299</sup> in which financially comfortable adult children were given generous awards, seem to be at odds with modern parental obligations. In the Supreme Court decision in *In re estate of IAC decd*,<sup>300</sup> the Court held that there should be a "positive failure of moral duty" and that the courts have consistently stated that there is no obligation to provide for each child. However, the courts still, at times, indulge disappointed applicants. Later cases such as *In re SF*<sup>301</sup> show that the interpretation of the text of section 117 retains some presumptive entitlement of children to be generously provided for, if their parents have the means (in that case, the Court ordered an additional €500,000 under section 117). In addition, there are examples from the case law of relatively generous settlements made by the estate such as occurred in *de B v de B*.<sup>302</sup> The Commission understands that challenges under section 117 are relatively common and they are often settled in advance of trial. Because of the high likelihood of success of the plaintiff, the likely value of the award, as well as the costs of proceedings, are taken into account by the personal representatives in their decision to settle a case. It would appear that parties contesting a will often do so in the confidence that the courts are likely to award them something out of the estate.
- 2.191 In the UK Supreme Court decision *Iltott v Blue Cross and Ors*,<sup>303</sup> Lady Hale referred to this apparent discrepancy in the legislation in England and Wales. In criticising the lack of legislative guidance provided for the courts in dealing with claims of adult children, Lady Hale also observed that an entitlement of adult children to inherit would be inconsistent with the lifetime obligations of parents.
- 2.192 Many submissions suggested that an adult child should only have an entitlement or expectation of provision from his or her parents in unusual cases of dependency or particular need. This argument applies whether or not the parents are still alive. If there was a legally enforceable duty for parents to provide for their financially comfortable adult children this would, quite understandably, be controversial. There is no legal prohibition for example, on a living parent donating money to a worthy charity rather than giving some of their wealth to their adult children.<sup>304</sup> Equally, many people would probably feel that it is not immoral for parents to spend their money as they see fit rather

<sup>298</sup> (1973) 107 ILTR 1.

<sup>299</sup> High Court, 2 March 1977. This case is discussed in greater detail in Appendix C, at the end of this Report.

<sup>300</sup> [1990] 2 IR 143.

<sup>301</sup> [2015] IEHC 851.

<sup>302</sup> [1991] 2 IR 105.

<sup>303</sup> [2017] UKSC 17, paragraph 62.

<sup>304</sup> With the exception of section 121 of the *Succession Act 1965*, which provides that, where someone has disposed of their property within 3 years of death with the intention of diminishing the inheritance of their spouse or children, that disposition of property is deemed to be a devise under a will. This share can then be included in the value of the estate.

than give it to their children, provided their children are not in need. Indeed, in cases of judicial separation and divorce, the parents are only considered to owe their children maintenance obligations during the parent's lifetime. Arguably, the submissions reflect a preference for personal autonomy over family property. Once parents die, however, section 117 creates almost a presumptive legal obligation on a parent with means to distribute their estate to their children. On the evidence of the submissions received in response to the Issues Paper, this does not accurately reflect a parent's moral obligations.

- 2.193 It is incongruous therefore that a parent's legal responsibilities to their children can be changed so dramatically by the fact of their death.<sup>305</sup> Certainly testamentary freedom is not entirely identical to freedom to deal with property while alive, but many of the same moral and economic underpinnings apply. Nonetheless, if the justification for section 117 was a moral entitlement of children to share in their parent's assets then this justification could also apply while their parents were alive. Such a suggestion is, for the reasons already mentioned, not supportable. This is especially relevant in the context of recent social and demographic changes that intergenerational wealth transfer may take place while the parents are still alive. It is the Commission's view that section 117 goes further than is necessary to give legal effect to the obligations that a parent owes to their children.

## 5. Conclusions and recommendations: proper provision and a needs based approach to section 117

- 2.194 As the case law above illustrates, there has been a significant amount of judicial consideration of the meaning of section 117 of the *Succession Act 1965*. The courts' ability to distil an extensive body of principles from the wording of section 117 has attracted much praise in the submissions received by the Commission in response to the Issues Paper and in academic commentary. Nonetheless, just as individual applications under section 117 often prove contentious, more broadly section 117 itself has attracted controversy and many of the submissions felt that it was an unwarranted interference with testamentary freedom. Although there are problematic elements of the current wording of section 117, such as the phrase "moral duty" and its wide provision for adult children, the Commission is of the opinion that section 117 is based on a fundamentally sound primary principle that parents should be free to dispose of their property in accordance with their wishes, subject to the secondary principle that their wishes can be limited, notably by reference to principles of social justice as set out in Article 43, where there is a clear breach of their obligations to their children. Although the Commission has some reservations as to the precise characterisation of parental obligations, discussed further below, the Commission recommends that section 117 should be retained. The Commission acknowledges the importance of testamentary freedom, but also

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This argument has also been advanced in favour of reform of the law in both Australia (see McGregor-Lowndes and Hannah, "Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?" [2009] APLJ 62) and New Zealand (see New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (August 1997)).

acknowledges that this important value is not unlimited and can be restricted in certain circumstances.

- 2.195 **The Commission recommends that, in approaching the reform of section 117 of the *Succession Act 1965*, it should have regard to the principle that a parent should be free to dispose of his or her property after death in accordance with his or her wishes provided that there is no clear breach of his or her parental obligations to a child.**
- 2.196 Notwithstanding the above, it is the Commission's view that the legal duty in section 117 imposes a more onerous obligation on parents than is appropriate in a modern context. The wording "moral duty" can be divisive, leads to uncertainty and is partially out of line with other duties the law imposes on parents. Furthermore, the valuable judicial flexibility afforded by section 117 could also be achieved by alternative language. While the courts have exercised their discretion, the phrase "moral duty" unduly emphasises the obligation of parents rather than the needs of children.
- 2.197 **The Commission recommends that, having regard to the principle that parental obligations to a child should primarily be concerned with the circumstances of the child rather than any entitlement to inherit, whether moral or otherwise, section 117 of the *Succession Act 1965* should be amended by the removal of the reference to "moral duty."**
- 2.198 Given the Commission's view that section 117 does not accurately reflect parental obligations to children, it must be considered how it could be amended to better capture the appropriate parental duty. One of the options presented in the Issues Paper was the possibility that the factors which the court should consider should be specified in legislation. If the Oireachtas specified the factors that the court should consider, then it would arguably articulate more concisely the obligations that a parent owes to their children.
- 2.199 Many of the submissions, in supporting the flexibility of section 117, opposed the suggestion that the criteria that the court should consider should be specified exhaustively in legislation. Of the submissions that addressed this question, a significant majority responded that the criteria should not be specified in legislation. To do so would restrict the discretion of the court unduly. As discussed under the various headings above, the courts have regard to a wide variety of factors and each case depends on its own particular circumstances. An attempt to anticipate all potentially relevant factors in advance could make the legislation unwieldy. Additionally a general "catch-all" factor granting the courts greater flexibility, as is the case in some of the Australian jurisdictions, would not be significantly different from having a general principled standard giving the courts broad discretion. An attempt to specify what weight the courts should attach to each factor would be similarly difficult and the courts would be able to broaden the scope of the legislation freely by adjusting the weight to be attached to a particular fact in a particular case. That is not to say that affording the courts discretion is inadvisable, but that a concise section 117 would be a better way of doing so. The Commission has concluded that a general standard, albeit without the phrase "moral duty", should

continue to be specified. The approach of the courts to distil relevant principles from the decided cases is preferable, subject to the changes that the Commission proposes to the text of section 117. This would allow the courts to continue to develop a coherent body of principles and apply these principles to the facts of each case, without overly rigid prescriptions which may lead to injustice in complex cases.

- 2.200 Although “moral duty” does provide great flexibility which was supported in many of the submissions, the Commission has considered whether an alternative phrase would retain the flexibility of section 117 without suffering from the disadvantages discussed above. In light of the experience from family provision legislation in other jurisdictions it would be wise to allow judicial discretion without overstating the obligation that parents owe to their children. The Commission is of the opinion that section 117, with the removal of “moral duty” already recommended, should still enable the courts to make provision in cases of genuine hardship or need, while removing the occasional tendency for generosity. The Commission considers that the language of “proper provision,” which is already found in section 117, is appropriate for this purpose. This view is also supported by its inclusion in other family provision legislation in Ireland – notably the *Family law Act 1995*, the *Family Law (Divorce) Act 1996* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* – as well as by the experience in other jurisdictions that use the phrase “proper provision.” This wording retains the advantage of flexibility while placing the focus more directly on the need rather than entitlement of the applicant, while still allowing moral considerations where relevant.
- 2.201 **The Commission recommends that section 117 of the *Succession Act 1965* should continue to provide that the court is to consider whether “proper provision” has been made by the deceased for his or her children, and that, subject to the specific matters referred to in subsequent recommendations, the factors which the court should consider when deciding cases under section 117 should not be further specified and should continue to remain for the court to determine.**
- 2.202 The Commission is also of the view that, where adult children are concerned in particular, it should only be in specific exceptional cases that they are awarded something out of the estate of their parents. The case law discussed in the Report demonstrates that many applications are brought by adult children. Although the case law requires applicants to discharge a heavy onus of proof, the Commission understands from its consultations leading to the preparation of this Report that there may remain a residual tendency to indulge the disgruntlement of children, and that proceedings are often settled with this tendency in the background.
- 2.203 Analysis of the case law in Ireland and abroad suggest that, to rely solely on the interpretation of “proper provision” could still incorporate parental obligations that would be at odds with the view that, in the case of adult children in particular, provision should focus on those in need rather than on financially comfortable adult children whose parents had substantial means. An assessment of “proper provision” that incorporates some sort of proportion between the means of parents and the appropriate provision can lead to excessively large awards in these cases, especially where there is no actual need.

The Commission has therefore concluded that section 117 should be reformed to reflect a different approach to minor children (those under 18 or, if the child is in full time education up to 23 years of age) on the one hand and adult children on the other.

- 2.204 **The Commission recommends that, having regard to the principles that parental obligations should primarily be concerned with the circumstances of the applicant rather than a moral entitlement to inherit and that a deceased parent is presumed to be best placed to decide the most effective method of complying with his or her obligations, section 117 *Succession Act 1965* should be amended to specify that a parent is presumed to have properly provided for children aged 18 years of age or older (or 23 if in full time education) at the time of the deceased parent's death.**
- 2.205 The Commission considers that there are specific cases in which the parent can be said to owe their adult children an obligation to provide for them. The Commission recommends that these circumstances should be outlined in a reformed section 117, and that a key aspect of this should be the focus on the need of the adult applicant. In this respect the Commission has concluded that the type of claims proposed by the New Zealand Law Commission in its 1997 Report, discussed in Part C, above, provides a suitable basis for reform of section 117. Thus, the Commission considers that, in the case of applications by children 18 years of age or older (or 23 if in full time education), the presumption that the deceased parent has made proper provision for the child may only be rebutted by the establishment of one or more of the following matters, which are based on need: (a) that the applicant has a particular financial need, including such need by reason of the applicant's health or decision-making capacity; (b) that the estate contains an object of particular sentimental value to the applicant; or (c) that the applicant has relinquished or, as the case may be, had foregone the opportunity of remunerative activity in order to provide support or care for the deceased parent during the parent's lifetime.
- 2.206 While each of these situations derives in general terms from the proposals made by the New Zealand Law Commission, the Commission has consciously based the wording of the third matter, (c), on the comparable provision concerning claims against a deceased's estate in section 16(2)(g) of the *Family Law Act 1995*. Section 16(2)(g) of the 1995 Act sets out the matters to which the courts should have regard in making orders under certain sections of the 1995 Act, including section 15A, which provides for orders for provision out of the estate of a surviving spouse following a grant of a decree of judicial separation. Although different relationships are involved in each of the pieces of legislation that allow the courts to make provision out of the estate of a deceased person, some common themes arise. In *DC v DR*,<sup>306</sup> as discussed above, the High Court (Baker J), in discussing similar provisions in the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, expressly referred to the commonalities between such provisions. In that respect, the use of similar language in the Commission's proposed reform of section 117 may provide opportunities for further consideration of those commonalities in any future case involving section 117.

<sup>306</sup>

[2015] IEHC 309, [2016] 1 ILRM 178.

- 2.207 The Commission also considers that the age of the applicant for the purposes of this presumption should be the date of death of the parent. The choice of this date, rather than the date of the hearing of the case, would avoid a situation in which parents could fail to provide properly for some minor children. If the date of the hearing was chosen, by contrast, young children might be prevented from making an application if they reached the age of majority after their parent's death but before the date of hearing. This issue, and the issue of the date of the assessment of the duty more broadly, are discussed in more detail in Part E, below.
- 2.208 **The Commission recommends that in the case of applications under section 117 of the *Succession Act 1965* by children 18 years of age or older (or 23 if in full time education) at the time of death of the deceased parent, the deceased parent will be presumed to have made proper provision for the child. The presumption may only be rebutted by the establishment of one or more of the following matters**
- (a) The applicant has a particular financial need, including such need by reason of the applicant's health or decision-making capacity;
  - (b) The estate contains an object of particular sentimental value to the applicant; or
  - (c) The applicant has relinquished or, as the case may be, had foregone the opportunity of remunerative activity in order to provide support or care for the testator or intestate during the testator's or the intestate's lifetime.
- 2.209 In general, the courts have held that, in the second stage of the test the courts should only order such provision necessary to remedy the breach identified in the first stage of the enquiry.<sup>307</sup> The Commission considers that it is particularly important in the case of adult children that relief is only limited to the specific ground that was raised successfully by the applicant. The Commission has included this recommendation in order to make it clear that, once the presumption has been rebutted on one of the above grounds, the courts will only consider that ground when making an order under the second stage.
- 2.210 **The Commission recommends that section 117 of the *Succession Act 1965* should be amended to provide that, in all cases where the court makes an order for proper provision, including in the cases referred to in the recommendation in paragraph 2.208, above, the court may order that such provision should be made out of the estate of the deceased parent only to the extent necessary to remedy the specific failure of duty identified in the proceedings.**

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<sup>307</sup>

See *EB v SS* [1998] 4 IR 527.



## E. The relevant dates for assessing the duty under section 117

### 1. The current position

- 2.211 It is important to determine the time at which the duty is assessed because, despite the relatively short time limits, the value of the estate or the financial position of the plaintiff can change significantly between the date of death of the testator and the date of hearing of the case. The 6 month time limit only refers to how soon the court documents must be lodged, the hearing date can be a number of years after the death of the testator. This point is particularly relevant in Ireland where people's fortunes and property values have fluctuated dramatically over a short period during the Celtic Tiger and post Celtic Tiger years. The time at which the moral duty is assessed, therefore, can have a significant impact on the outcome of the case.
- 2.212 As discussed above, at the first stage of the test under section 117, the court decides whether the testator has failed in his or her moral duty to make proper provision for the applicant. Then, if the court is of the view that the testator has failed to make proper provision, it considers what provision would be appropriate to remedy the breach of duty. The approach that the Irish courts have taken on what time the facts are to be assessed differs between the two-stages of the test which is applied under section 117. At the first stage, when considering whether the testator had failed their moral duty, the court assesses the position at the date of death, at the second stage when considering what provision to be made, if any, the court assesses the position at the date of hearing.
- 2.213 In *EB v SS*,<sup>308</sup> the Supreme Court confirmed that, in considering whether the testator had failed in her moral duty (the first stage of the test), the Court was not entitled to take into account matters which arose after the testator's death. In *EB v SS*, the plaintiff's addiction problems were relevant to understanding why the testator had not provided for him in her will. Although the plaintiff overcame his problems after the testator's death, this did not mean that she should have provided for him. The testator was entitled to conclude that providing for the plaintiff in her will was not in his interest, because of his addiction problems at time of her death. Therefore the testator did not fail in her duty to him. The Court could not take account of his subsequent recovery in deciding whether the testator had failed to properly provide for him. The Court could only have taken account of this if it had reached the second stage of the test to consider what provision was appropriate.
- 2.214 Spierin has stated that, while the weight of authority is against taking account of factors after death, the testator is deemed to have considerable powers of foresight.<sup>309</sup> The Supreme Court in *EB v SS*<sup>310</sup> was silent on the issue of what foreknowledge to attribute to the testator, merely stating that the date of death is the appropriate time at which to

<sup>308</sup> [1998] 4 IR 527.

<sup>309</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 822.

<sup>310</sup> [1998] 4 IR 527.



assess the failure of moral duty, if any. Other cases, both before and afterwards, have suggested that factors subsequent to the death of the testator can be considered in the first stage of the test.

- 2.215 In *In re GM; FM v TAM*,<sup>311</sup> the High Court (Kenny J), acknowledging that it was unrealistic, nonetheless ascribed, to the testator, the foreknowledge of how much estate duty would be payable and the litigation costs which would fall on the estate.
- 2.216 In *In re NSM deceased*,<sup>312</sup> the High Court permitted developments after the testator's death to be considered. Although the testator had sought to make provision for his children, the effect of unforeseen estate duty and litigation costs would erode provision for one of the plaintiffs. The High Court (Kenny J) held that while the satisfaction of the moral duty is judged at the date of death, the testator is credited with "a remarkable capacity to anticipate the costs of litigation which follow his death."<sup>313</sup> The Court held that it was not sufficient that the testator had attempted to provide for the plaintiff; the moral duty depends on whether the will actually provides for the child. Whether the deceased has fulfilled his or her moral duty can depend on events after his or her death because the courts attribute the deceased with extraordinary prescience even beyond reasonable foreseeability.
- 2.217 In *PD v MD*,<sup>314</sup> the High Court (Carroll J) confirmed the different treatment of the first and second stages of the test. The Court stated that if the provision made was proper, then subsequent fluctuations in the value of the estate were irrelevant. If, however, the testator had failed in his moral duty to make proper provision for the plaintiff, then the court could consider subsequent fluctuations.
- 2.218 In *re JLW Deceased, CW v LW*,<sup>315</sup> one of the issues the High Court had to consider was whether the Court was to attribute to the testator such prescient foreknowledge that the plaintiff would inherit a large amount from her mother in due course. The testator had a belief that his spouse would never claim her legal right share, however she was made a ward of court<sup>316</sup> after the death of the testator and her committee elected to claim her legal right share. Referring to the decision in *In re GM; FM v TAM*<sup>317</sup> the Court held that it could attribute the foreknowledge to the testator that his wife would in fact claim her legal right share and that the plaintiff would therefore, eventually, inherit a significant sum from her. The Court considered that this was consistent with the objective standard in section 117. If there was a subjective standard, the testator would only be attributed with his actual knowledge or foresight, however the objective standard considers the position of the hypothetical just and reasonable testator with remarkable foreknowledge.

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<sup>311</sup> (1970) 106 ILTR 82.

<sup>312</sup> (1973) 107 ILTR 1.

<sup>313</sup> *Ibid* at 5.

<sup>314</sup> [1981] ILRM 179.

<sup>315</sup> [2005] IEHC 325, [2005] 4 IR 439.

<sup>316</sup> The wardship jurisdiction will be replaced when Part 6 of the *Assisted Decision-Making (Capacity) Act 2015* is brought into force.

<sup>317</sup> (1970) 106 ILTR 82.

- 2.219 In *In re SF*,<sup>318</sup> which was subsequent to *EB*, the High Court (White J) confirmed that the breach of moral duty is judged by objective standards at the date of death but that the court may consider the value of the estate at the date of hearing, and that the deceased is considered to be almost clairvoyant.
- 2.220 These decisions may appear to be inconsistent with *EB*, however, of crucial importance is that in all cases the failure of moral duty was still assessed at the date of death, but the testator was attributed with exceptional foresight. Spierin has questioned whether this “fiction of foresight” would extend to factors other than litigation costs or estate duty, such as where the child’s decision-making capacity<sup>319</sup> may be in question.<sup>320</sup> He notes that selecting the date of death as the appropriate date has the advantages that it is certain and convenient but the disadvantage that it can cause injustice. He argues that choosing the date of hearing would be equally consistent with the 1965 Act and would not require the unreal gloss of perfect foresight. Spierin argues that this would be preferable to the current system under which “the admissibility of events occurring after the date of the testator’s death depends...on no better criterion than the whim of the individual judge.”<sup>321</sup>
- 2.221 As for the second stage of the test, that is what order would be appropriate to remedy the breach of moral duty, the courts have taken a different approach. Once it has been established that the testator has failed in his or her moral duty to make proper provision in accordance with his or her means, what provision would be proper is assessed at the date of hearing. In *A v C*,<sup>322</sup> the High Court (Laffoy J) held that the inclusion of “just” in section 117(2), is the basis for considering events after the death of the testator because failure to do so might be unjust.
- 2.222 In *PD v MD*,<sup>323</sup> although ultimately ruling that the plaintiff failed because the application was made outside the statutory time limit, the High Court (Carroll J) considered what the appropriate order would have been in the case. The Court stated that the appropriate time to consider the second stage of the test was the date of hearing. The Court, in deciding what provision is “just,” must do so at the time of hearing.
- 2.223 As noted above in *EB v SS*,<sup>324</sup> the Supreme Court confirmed different approaches regarding the time of assessment over the first and second stages.

<sup>318</sup> [2015] IEHC 851.

<sup>319</sup> See generally the *Assisted Decision-Making (Capacity) Act 2015*.

<sup>320</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011), paragraph 696.

<sup>321</sup> *Ibid* paragraph 822.

<sup>322</sup> [2007] IEHC 120.

<sup>323</sup> [1981] ILRM 179.

<sup>324</sup> [1998] 4 IR 527.

## 2. Conclusions and recommendations in relation to the time at which the duty is assessed

- 2.224 As is evident from the jurisdictions considered above there are divergent approaches to the time at which the duty is assessed. In England and Wales, the date of hearing is the date at which both the failure of duty and the appropriate remedy are assessed. In Australia, the courts are primarily concerned with what would have been reasonably foreseeable at the date of death, for both stages of the test. There are exceptions, however, as the courts in Australia have permitted some subsequent developments to be considered and the date of hearing is expressly provided for in some pieces of legislation.
- 2.225 One of the responses to the Issues Paper on this point argued that the time of death was the appropriate date to consider the first question, whereas the appropriate date to consider the second question was the time of hearing. It was argued that this was consistent with the position that the will speaks from death but also allows the court to take account of the fluctuations of asset values or the changing fortunes of parties between the time of death and the time of hearing.
- 2.226 Regarding the first stage of the test in Ireland, that is whether the testator has failed in his or her duty, it is arguably unfair that a parent can be considered to fail in his or her obligations as a result of events that happen after his or her death that could not have been foreseen. It would not accord with the ordinary understanding of parental obligations to say that a parent has an obligation to prevent any unforeseeable misfortune of a child, however regrettable this misfortune might be. However, failure to take account of actual events that have occurred could lead to injustice. Furthermore, without the ability to consider changed circumstances, cases could involve artificial scenarios which no longer represent the true situation of the parties to the dispute. This might remove section 117 of its potency as a remedy.
- 2.227 In Ireland, the case law reaches a compromise between these two arguments, in the first stage of the two-stage test, the first argument prevails, that is whether the testator has failed his or her duty is assessed at death (albeit with the "fiction of foresight"). In the second stage, however, the second argument prevails, that is, the time of hearing is the appropriate time to assess what provision is necessary. This is a sensible balance to strike, it means that the testator will not be held to an unfair standard, but if they do fail their duty as judged by this standard the courts will be free to take account of the result of that failure and make the appropriate order. However, the fiction of foresight does weaken the logic of this position somewhat. It also creates uncertainty, currently it would be difficult to say whether a will discharged a parent's obligations until any potential hearing arises.
- 2.228 This unrealistic standard to which the testator is held can result in a more interventionist approach by the courts, if unanticipated developments subsequent to the testator's death result in a failure of moral duty. On the other hand, this may seem inconsistent with the above stated approach of the Commission that section 117 should be primarily concerned with need of provision rather than judicial pronouncement on parental obligations.

Ultimately, although the Commission has argued above that section 117 has at times focused excessively on obligations at the expense of considerations of need, both require consideration. It would be hard to argue that a parent had failed in his or her obligations if a child has no need of maintenance. Equally, the mere fact that a child needs provision does not create an obligation on a particular person to provide for them. The date of death is the appropriate date at which to measure whether the parent has failed his or her obligations, without the unreasonable standard of foreseeability, so that the obligations imposed on parents are not unrealistic and uncertain. The date at which the court decides the amount of provision should remain the date of hearing. This permits the court to take account of the circumstances or needs of the applicant, rather than merely adjudicate on the moral virtue of the actions of the testator.

- 2.229 In light of these considerations the Commission is of the view that the two-stage test is a helpful tool for the courts to separate the related, but distinct, questions raised. The Commission agrees that it is a useful compromise between fair parental obligations and providing for the actual needs of the child that the first stage of the test is judged at the date of death and the second stage at the date of hearing. However, the Commission considers that the “fiction of foresight” places an unjust burden on the deceased to provide for contingencies that he or she could not have foreseen. The Commission therefore recommends that section 117 should be amended to specify that, at the first stage of the test the testator is considered to only be held to the standard of reasonable foreseeability, rather than the perfect powers of foresight that have previously been attributed to them.
- 2.230 If this recommendation were to be adopted by the Oireachtas, the result would be that in cases like *In re SF*,<sup>325</sup> discussed above, the court would not be able to take account of the fluctuations in property values that could not have been foreseen by the testator in deciding whether the testator had failed in his moral duty (first stage). The court could, however, still consider such fluctuations if it reached the second stage of the test.
- 2.231 **The Commission recommends that, in order to achieve a suitable balance between the competing principles of fair parental obligations on the one hand and providing for the actual needs of children on the other, section 117 of the *Succession Act 1965* should continue to provide for a two-stage test subject to an amendment that specifies that:**
- (a) **Whether the deceased parent had failed to make proper provision for his or her child should be decided on the basis of facts that were known to the deceased parent or reasonably foreseeable to the deceased parent immediately before his or her death; and**
  - (b) **Where the court finds that there has been a failure to make proper provision for the child, the court should order provision to be made on the basis of facts available to the court at the time of the hearing of the case.**

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<sup>325</sup> [2015] IEHC 851.

- 2.232 The Commission has also recommended above (at paragraph 2.204) that the age of the applicant for the purposes of this presumption that proper provision has been made for them should be considered at the date of the death of the testator (or intestate as the case may be).
- 2.233 It is consistent with the recommendation at paragraph 2.204 that the age of the applicant should be assessed at the date of the death. This is because the presumption in that recommendation operates at the first limb of the test. If the age of the applicant was taken from the date of hearing, minor children, deserving of provision for their day-to-day upkeep might miss out on such provision if they reached the age of 18 (or 23) subsequent to the death of the testator but prior to the hearing. Given that a significant amount of time can elapse between the date of death and the date of hearing, this is a very real possibility. The issue of foreseeability would not arise here because the age of the child would be known to the testator.
- 2.234 Where the court does find that the presumption that provision has been made for the applicant has been rebutted, the court will move on to the second stage of the test. This second stage should be assessed at the date of hearing. This would allow the court to consider the actual needs of the child at the time of hearing. This is particularly important in cases of adult children who may have a particular need owing to a lack of decision making capacity, for example.

## CHAPTER 3

### EXTENDING SECTION 117 TO INTESTACY

#### A. Section 117 is limited to claims under a will and does not apply to intestacy

- 3.01 Section 117 of the *Succession Act 1965* provides for applications by children for provision out of the estate of their deceased parent where the deceased parent has made a will. Section 117 does not provide for applications by children of parents who die intestate, that is, without having made a will.
- 3.02 Section 67A(3) of the 1965 Act (inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*)<sup>1</sup> allows for children of parents in a civil partnership who die intestate to apply for a share in the estate of their parent if they have a need. However, this does not extend to children of parents outside of a civil partnership who cannot apply to the court for increased provision beyond the statutory share provided for them in section 67 of the 1965 Act.<sup>2</sup> It has been observed that this “anomaly” results in a “perceived flaw in the intestacy rules” because of the inability to vary provision in the appropriate case.<sup>3</sup>
- 3.03 Section 109(1) of the 1965 Act provides that the jurisdiction of the court to make orders under Part 9 of the Act, which includes orders under section 117, arises where the person dies wholly or partly testate. Section 74 of the 1965 Act makes it clear that under partial testacy the undisposed portion of an estate (that is, the portion of the estate not referred to in the will) is distributed as if the testator died intestate and left no other estate. However, Section 117 permits distribution out of the “estate” which does not limit it to the portion of the estate which is distributed by the will of the deceased. Where the court is asked to make proper provision under section 117 this would include taking into account the undisposed estate as well.<sup>4</sup> In cases of partial intestacy under section 117, the court may even distribute the portion of the estate that would otherwise be governed by the rules of intestacy, except where the portion to which the surviving spouse who is also the parent of the applicant is entitled.<sup>5</sup>
- 3.04 In *RG v PSG*,<sup>6</sup> the High Court (Carroll J) examined the meaning of the terms “testator” and “partial intestacy” under the 1965 Act. The Court held that it was possible to make an order under section 117 even where a will failed to dispose of any property. Although the plaintiff argued that such a manifest failure of a will amounted to intestacy in effect, the High Court held that a person who makes a will in accordance with the statutory

<sup>1</sup> The effect of the *Marriage Act 2015* is that the specific provisions concerning succession in the context of civil partnership are likely to have very limited practical application in the future.

<sup>2</sup> Section 67 of the *Succession Act 1965* provides that the children of a parent who dies intestate are entitled to an equal share of one-third of the estate if there is a surviving spouse, or the whole of the estate where there is no surviving spouse.

<sup>3</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 447.

<sup>4</sup> Keating, *Succession Law in Ireland* (Clarus Press, 2015) at 93.

<sup>5</sup> Section 117(3) of the 1965 Act prohibits the court from making orders that reduce the share on intestacy of the surviving spouse (if the surviving spouse is the parent of the child) or the legal right share of the surviving spouse.

<sup>6</sup> [1980] ILRM 225.

requirements is a testator even if the will is partially or even wholly ineffective in disposing of his or her property. The state of testacy, therefore, does not depend on the effectiveness of the will but rather the effective execution of the will. If the will disposes of all of the deceased's property the testator is said to have died wholly testate, in all other cases the testator is said to have died partially testate. Spierin has commented that this decision was clearly motivated by the Court's desire to make provision for the children under section 117.<sup>7</sup>

- 3.05 Section 121 of the *Succession Act 1965* is also relevant to situations of partial testacy or even where the deceased would otherwise be considered to have died wholly intestate. Section 121 operates to invalidate dispositions of property made within 3 years of death of the testator and with the purpose of defeating or substantially diminishing the share of the deceased's spouse or intestate share of any children. If the court is satisfied that a particular disposition is one to which section 121 applies, the court may order that the disposition is to be deemed a devise or bequest made as part of a will. This disposition is, therefore, part of the estate of the deceased. Where the parent of a child has died wholly intestate, the child may still make an application under section 117 coupled with an application under section 121. While it may appear that complete intestacy would be a barrier to an application under section 117, the courts have held that if the application under section 121 is successful it has the effect of bringing the estate of the deceased within the ambit of section 117. This is because once an order is made by the court under section 121, it treats any dispositions as part of a will, which has the effect of rendering the deceased a "testator" within the meaning of the Act. In *LC v HS*,<sup>8</sup> the High Court (Clark J) left open the possibility that the Court could invoke its inherent jurisdiction to provide just relief under section 121 even where no claim was made by the applicant under section 117. However, the Court also stated that where no claim was made under section 121 it would be unconscionable to make such an order if the case was one of pure intestacy, that is, where the deceased had not made any will.

## B. Claims by children on intestacy in other jurisdictions

### 1. England, Wales and Northern Ireland

- 3.06 As already discussed above at paragraph 2.74, the first piece of family provision legislation in England and Wales, the *Inheritance (Family Provision) Act 1938*, only permitted claims where the deceased had died leaving a will. Section 1 of the 1938 Act provided that certain persons<sup>9</sup> could apply for relief where a testator had failed to make "reasonable provision" for them out of his or her will. As occurred in other jurisdictions, the 1938 Act was amended by the *Intestates Estates Act 1952* to extend its application to intestacies.

<sup>7</sup> Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 696.

<sup>8</sup> [2014] IEHC 32.

<sup>9</sup> The spouse, unmarried daughter, infant son, and an adult child who is "by reason of some mental or physical disability, incapable of maintaining" himself or herself.



- 3.07 The 1952 Act implemented the recommendations of the 1951 *Report of the Committee on the Law of Intestate Succession*.<sup>10</sup> The Committee had been established to consider an increase in the value of statutory legacies for spouses on intestacy, as the value had been eroded by inflation and the number of intestacies was quite high. As a corollary of this proposed increase in spousal protection the Committee also considered the issue of extending family provision for children to intestacies. This was because increasing automatic entitlements for spouses could have the effect of causing hardship to children. The Report highlighted what it perceived to be an inconsistency between on the one hand the treatment of partial intestacy, for which family provision orders were possible, and on the other hand total intestacy, for which they were not. The Report went on to consider the arguments against extension of family provision to situations of total intestacy. Some commentators had suggested that this was tantamount to stating that the intestacy rules that Parliament had laid down were unreasonable. The Report argued that there was no inconsistency in stating that intestacy rules were generally reasonable but a residual judicial discretion was desirable to avoid hardship in special circumstances. It had also been suggested that some new principle was needed to govern the application of family provision to intestacy. In response to this the Report stated that the overriding principle of reasonable provision could be applied as easily to intestacy as it could to a will. The Report acknowledged that judicial discretion of this kind would introduce an element of uncertainty but concluded that, on balance, the courts should be permitted to remedy injustice, particularly where such a discretion already applied to wills. In light of the need for certainty the Report suggested that the courts might exercise their jurisdiction to intervene sparingly. The Report ultimately recommended an increase in the statutory legacy and the extension of the application of the 1938 Act to intestacy.
- 3.08 The Parliamentary debates on the *Intestates Estates Act 1952* focused on the fact that the 1938 Act had not given adequate protection to surviving spouses on intestacy and that the 1952 Act therefore sought to remedy some of the hardship that could arise out of the application of the rules of intestacy.<sup>11</sup> Weight was also placed on the unexpectedly high numbers of estates that were being distributed at that time by means of the intestacy rules. These estates were outside the scope of the 1938 Act and this was also used as a justification for ensuring proper provision for families of the deceased where there was no will. Commenting on the significance of the 1952 Act, Cretney noted that no general code for intestate distribution could achieve fairness in every case, and that residual judicial discretion may therefore be necessary.<sup>12</sup>
- 3.09 The *Inheritance (Provision for Family and Dependants Act) 1975*, which replaced the 1938 Act, widened the powers available to the courts to give effect to orders for family provision. As noted above, the 1975 Act also widened the class of persons who were eligible to bring claims.<sup>13</sup> The application of family provision to intestacy was retained. Under the 1975 Act, the court must assess the reasonableness of provision by reference to “the disposition of the deceased’s estate effected by his will or the law relating to

<sup>10</sup> Committee on the Law of Intestate Succession, *Report of the Committee on the Law of Intestate Succession* CMD. 8310 (1951). This Committee was chaired by Lord Morton. The Committee and the Report were also informally referred to as the “Morton Committee” and the “Morton Report” respectively.

<sup>11</sup> House of Commons, *Hansard* 28 March 1952, at 1091: Second Reading speech on the *Intestates Estates Bill 1952* by the Hon. Eric Fletcher MP, who made it clear that he had been initially against a residual judicial discretion but had been persuaded of its necessity in rare hard cases that arise when strict rules of intestacy are laid down by Parliament.

<sup>12</sup> Cretney, “Intestacy Reforms - The Way Things Were, 1952” (1994) *Denning Law Journal* 35.

<sup>13</sup> Including adult children: see section 1(c) of the *Inheritance (Provision for Family and Dependants) Act 1975*.

intestacy, or the combination of his will and that law.”<sup>14</sup> It is clear that this applies to all estates and claims may be brought where there is a valid will, partial or even total intestacy.

- 3.10 The English courts have considered whether different factors apply to family provision claims on intestacy. In *Re Coventry*,<sup>15</sup> the applicant (ultimately unsuccessfully) argued that moral obligations are less relevant where the deceased has died intestate and the wishes of the testator are not a factor. The English Court of Appeal held that it was wrong to suggest that intestacies could not be deliberate but that in any case “the problem must be exactly the same whether one is dealing with a will or an intestacy, or with a combination of both.”<sup>16</sup>
- 3.11 Under the current rules of intestacy in England and Wales, if the deceased dies intestate leaving a spouse and children, the spouse of the deceased is entitled to: personal chattels, a statutory legacy of up to £250,000 and a life interest in one-half of anything which remains.<sup>17</sup> Children<sup>18</sup> are entitled to one-half of what remains after the payment of the statutory legacy and the other half of the life estate once the spouse’s interest comes to an end. This is in contrast to the rules on intestacy in Ireland under the 1965 Act, which sets out fixed shares on intestacy and, as noted above, these may not be varied by way of family provision unless the surviving spouse is not the parent of the applicant.<sup>19</sup>

## 2. Scotland

- 3.12 As noted above at paragraph 2.124, legal right shares in Scotland also apply where the deceased has died intestate. On intestacy, the spouse of the deceased has certain “prior rights” under the *Succession (Scotland) Act 1964*, which do not apply where there is a valid will. The spouse<sup>20</sup> is entitled to 3 prior rights: dwelling house right,<sup>21</sup> furniture and plenishings,<sup>22</sup> and a cash sum.<sup>23</sup> The “dwelling house right” entitles the surviving spouse to receive the deceased’s interest in any dwelling house in which the spouse was ordinarily resident at the time of the deceased’s death. The “furniture and plenishings right” entitles the surviving spouse to the furnishings of the dwelling house up to the value of £24,000. Once the previous two rights are satisfied, the “cash sum right” entitles the surviving spouse to a fixed sum of £42,000 if the deceased was survived by issue or £75,000 if there are no surviving issue. Unlike legal rights, prior rights apply to the whole estate rather than the “net moveable estate.”<sup>24</sup>
- 3.13 Once the prior rights have been satisfied, the legal rights apply to the net moveable estate in the same way they do when there is a valid will, as discussed above. Where there is a spouse and issue, the “Spouse’s Part” is one-third of the relevant part of the estate

<sup>14</sup> Section 1 of the *Inheritance (Provision for Family and Dependents) Act 1975*.

<sup>15</sup> [1980] Ch 461.

<sup>16</sup> *Ibid* at 488.

<sup>17</sup> Section 46(1) of the *Administration of Estates Act 1925*. The sum is now index linked, the Lord Chancellor and Secretary of State for Justice must make an order under Schedule 1A of the *Administration of Estates Act 1925* once the consumer price index rises by more than 15 per cent.

<sup>18</sup> Or their descendants, if the child has already died they are entitled to take that child’s claim by substitution.

<sup>19</sup> Law Commission, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011).

<sup>20</sup> Spouse here includes “civil partner” as discussed above.

<sup>21</sup> Section 8 of the *Succession (Scotland) Act 1964*.

<sup>22</sup> *Ibid*.

<sup>23</sup> Section 9 of the *Succession (Scotland) Act 1964*.

<sup>24</sup> Discussed further at footnote 202 in Chapter 2.

and another third is distributed among the issue as the “Bairn’s Part” (*legitim*). When there is a surviving spouse but no issue the “Spouse’s Part” is one-half of the relevant part of the estate. Where there is surviving issue but no surviving spouse, the *legitim* is one-half of the relevant part of the estate.

- 3.14 Once the prior rights and legal rights have been satisfied, the remaining estate<sup>25</sup> is distributed in accordance with section 2 of the 1964 Act, which sets out who is entitled to succeed in order of preference.<sup>26</sup>
- 3.15 The Scottish Law Commission has recommended that these rules be simplified.<sup>27</sup> It has recommended that, where there is a surviving spouse and no issue, the surviving spouse should inherit the whole estate. Similarly, the Commission has recommended that, where there is surviving issue but no surviving spouse, the surviving issue should inherit the estate. Where there is surviving spouse and issue, the Commission has recommended that the spouse inherit the entire estate up to the threshold sum of £300,000, any remainder after that value should be shared equally between the spouse and issue. The Scottish Law Commission has also recommended that the estate should be the whole net estate and should not be calculated with reference to heritage or movables. As with the reforms to testate succession discussed above, these recommendations have not been implemented at the time of writing (May 2017).
- 3.16 Scotland does not have a discretionary system for family provision akin to section 117 of the 1965 Act. While the Scottish Law Commission has recommended reforms in this area, it has not recommended any system of discretionary family provision. In the 2007 Discussion Paper the Commission stated that the rules of intestacy should be framed to provide a fair distribution without the need for litigation.<sup>28</sup>

### 3. New Zealand

- 3.17 The *Testator’s Family Maintenance Act 1900* (subsequently incorporated into the consolidated New Zealand statutes in 1908) which, as noted above<sup>29</sup>, first provided for family protection in New Zealand, did not provide for such orders in cases of intestacy.<sup>30</sup> A valid will was required for an order to be made under the 1908 Act and even in situations of partial intestacy the portion of the deceased estate which was not distributed under the will could not be subject to an order under the Act.<sup>31</sup> The 1908 Act was amended by the *Statutes Amendment Act 1939* to extend its application to intestacies and partial intestacies.<sup>32</sup>
- 3.18 The court was therefore empowered to proceed as though the deceased had left a valid will which had distributed assets along the lines of the shares under intestacy. As a pioneer of family provision legislation, New Zealand was also the first jurisdiction to

<sup>25</sup> This refers to the whole estate including both heritage and movables.

<sup>26</sup> The order of succession is as follows: children, parents and siblings equally, surviving spouse or civil partner.

<sup>27</sup> Scottish Law Commission, *Report on Succession*, Scot Law Com No. 215 (2009), at 11-12.

<sup>28</sup> Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com (2007), at 19.

<sup>29</sup> See paragraph 2.52, Chapter 1.

<sup>30</sup> Section 33(1) of the *Family Maintenance Act 1908*.

<sup>31</sup> *Yuill v Tripe* [1925] NZLR 196.

<sup>32</sup> Section 22(2) also applied the section to situations of partial intestacy. Section 22(3) applied the section to persons who died after the 1939 Act was passed. Section 22(3) was added during the parliamentary debates to address concerns that it would not be prudent to apply such an amendment retrospectively.

extend it to intestacy.<sup>33</sup> One of the submissions in response to the Issues Paper argued that the reason for this change was that it became apparent that the intestacy rules could also result in a breach of moral duty.

- 3.19 As already noted, the *Family Protection Act 1955* repealed the 1908 Act. The 1955 Act continued the application of family provision legislation to situations where any person dies whether testate or intestate and where there was inadequate provision in terms of his or her will or as a result of his or her intestacy.
- 3.20 Like the position in England and Wales, discussed above, New Zealand legislation provides that, on intestacy, where the deceased leaves a spouse or partner<sup>34</sup> and children or other issue, the surviving spouse is entitled to personal chattels and payment of a prescribed amount.<sup>35</sup> After these deductions the residue is held on trust in the following shares: one-third for the spouse absolutely, two-thirds for the children or other issue. Although spouses may also bring applications for family provision (whether on intestacy or where there is a will), unlike in Ireland, in New Zealand the whole estate may be subject to family provision claims, including the spouses intestacy share. The extension of New Zealand family provision legislation to cases of intestacy must be considered in the context of these limited default rules of intestacy distribution.
- 3.21 The 1997 Report of the New Zealand Law Commission, referred to above, retained references to intestacy in the draft Bill although the merits of retaining or abolishing such references were not discussed in the Report.<sup>36</sup>

#### 4. Australia

- 3.22 Initially in Australia, as in other jurisdictions, family provision legislation was only concerned with the failure of a testator to make adequate provision for maintenance and support of surviving family members in his or her will.
- 3.23 In Western Australia, for example, when debating the *Inheritance (Family and Dependents Provision) Act 1972* the Attorney General of Western Australia spoke in support of the proposition to extend the scope of family provision orders so as to include situations of total or partial intestacy:

“The decision to extend the right of application against intestacies or partial intestacies is a logical one. The terms of a will may be irrational or indeed immoral; but the same can apply where distributions of estates are made under a rule of law. For example, a wife who deserted her husband and children could take the whole of a small estate at the expense of children maintained by the deceased, this being pursuant to the present law found in the Administration Act. Such a case is not uncommon and the same redress should be available to deserving claimants in an intestacy as is given to claimants under a will.”<sup>37</sup>

<sup>33</sup> As noted above, this approach was followed in England and Wales in the *Intestates Estates Act 1952*.

<sup>34</sup> Husband, wife, civil union partner or surviving *de facto* partner.

<sup>35</sup> Set at \$121,000 in section 82A(3)(a) of the *Administration Act 1969* but subject to change by way of regulations.

<sup>36</sup> New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (1997) at 45.

<sup>37</sup> Parliament of Western Australia, *Hansard*, 23 March, 1972, at 272: the Hon. Mr TD Evans MLC, Attorney General of Western Australia, Second Reading.

- 3.24 Similarly, the New South Wales Law Reform Commission has argued that the possibility of family provision claims is an important check on the strictness of the intestacy rules, which as a matter of practicality must be concerned with statistical averages rather than individual cases.<sup>38</sup>
- 3.25 In family provision cases, no Australian jurisdiction currently draws a distinction between situations where the deceased has left a will or situations which are governed by the rules of intestacy.
- 3.26 For example, in New South Wales section 59(1)(c) of the *Succession Act 2006* provides that the court may make a family provision order if:

“at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.”

- 3.27 Family provision orders may be made therefore, in respect of estates that are to be distributed by way of testacy or total or partial intestacy.
- 3.28 Case law on the extent of the moral duty owed by the deceased does not draw a distinction between situations of testacy or intestacy. In *Vigolo v Bostin*<sup>39</sup> the High Court of Australia commented:

“That the idea of a “moral claim” may have been introduced as an aid to judicial deliberation before it was enacted that claims could be made upon intestate estates, does not, in our opinion render it less relevant or useful now that such claims may be made. In principle, there is no reason why effect should not be given to a moral claim upon the estate of an intestate estate in the same way as it would have been, had the deceased left a duly attested will.”<sup>40</sup>

- 3.29 The majority of Australian jurisdictions operate a system of statutory legacies for spouses which resemble the rules in the other, non-Australian jurisdictions already discussed.<sup>41</sup> Although there are slight variations, the rules on intestacy are broadly similar in most Australian states and territories. Where there is a surviving spouse and children or other issue the spouse is entitled to personal chattels, a statutory legacy and a proportion of the balance of the estate. If the statutory legacy exceeds the value of the estate then the spouse is entitled to the whole estate. If there is some residue after the application of the statutory legacy the spouse will be entitled to a portion of the residue. The exceptions to this are New South Wales and Tasmania which operate different intestacy systems depending on whether the surviving spouse is also the parent of the child.<sup>42</sup> As in England

<sup>38</sup> New South Wales Law Reform Commission, *Issues Paper* 1996, at 9.

<sup>39</sup> [2005] HCA 11.

<sup>40</sup> *Ibid* paragraph 115.

<sup>41</sup> Section 49 of the *Administration and Probate Act 1929* (Australian Capital Territory); section 66 of the *Administration and Probate Act 1969* (Northern Territory); section 35 of the *Succession Act 1981* (Queensland); section 72G of the *Administration and Probate Act 1919* (South Australia); section 51 of the *Administration and Probate Act 1958* (Victoria); section 14 of the *Administration and Probate Act 1903* (Western Australia).

<sup>42</sup> In New South Wales, sections 112 and 113 of the *Succession Act 2006* and in Tasmania, sections 13 and 14 of the *Intestacy Act 2010* provide that where there are a spouse and issue the spouse is entitled to the whole estate unless the children of the deceased are not also the children of the surviving spouse, in

and Wales, but in contrast to Ireland,<sup>43</sup> none of the Australian jurisdictions stipulate that the spouse's intestacy share is immune from distribution under family provision. As noted above however, in the Australian jurisdictions, spouses of the deceased are entitled to make family provision applications whether the deceased died testate or intestate.

- 3.30 In Australia, like England and Wales and New Zealand, the availability of family provision orders for children on intestacy may reflect the potential injustices that could arise from the limited default intestacy rules.

## C. Extending section 117 to intestacy cases

### 1. Previous analysis in Ireland on extending 117 to intestacy

- 3.31 Fixed intestacy shares provide some portion of the estate to all children. Every child receives something so inadequate provision, therefore, may be less likely. Additionally, the intestacy shares treat children of the deceased equally. Both of these factors mean that the argument in favour of having a discretionary court provision is less persuasive for intestacy than it is for testacy. On the other hand, these very reasons also lessen the disadvantages of discretionary provision as cases may be brought more rarely under intestacy than would be the case under section 117.<sup>44</sup> While intestacy is different from testate succession, in both it is possible for the deceased to inadequately provide for their children, although it may be rarer in intestacy. The Commission must consider, therefore, whether section 117 should be extended to intestacy to prevent this potential difficulty.
- 3.32 During the Oireachtas debates on the *Status of Children Act 1987*, an amendment was proposed to extend the application of section 117 of the *Succession Act 1965* to intestacies. At Committee Stage, the Minister for Justice explained that the rules for distribution on intestacy were designed to apply a fair distribution of a person's estate among his or her surviving family. He observed that "the rules of distribution on intestacy guarantee a fair and equitable share to each child where no will has been made." The Minister's primary concern regarding the proposed extension of section 117 to intestacies was that "it contemplates unnecessarily introducing scope for legal proceedings in the area of intestates' estates and that this would be a retrograde step as it would increase the prospects of estates being whittled away on legal costs."
- 3.33 In its 1989 *Report on Land Law and Conveyancing: General Proposals*,<sup>45</sup> having considered the arguments advanced by the Minister, the Commission nonetheless recommended that section 117 of the *Succession Act 1965* be extended to include applications on intestacy. The Commission noted that the policy underlying section 117 is that persons with the means to do so should make proper provision for their dependants. The Commission concluded that "justice and logic both require that this policy should apply whether the person concerned dies testate or intestate."

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which case a statutory legacy system operates, which is similar to the other Australian jurisdictions discussed above.

<sup>43</sup> See Section 117(3) of the *Succession Act 1965*, where the surviving spouse is also the parent of the applicant.

<sup>44</sup> The Commission understands from the submissions that such cases are rare in New Zealand.

<sup>45</sup> Law Reform Commission, *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), paragraph 45.



- 3.34 The Commission observed that it was difficult to justify a situation in which the child of a testate parent who had been unjustly treated had a means of redress whereas the child of an intestate parent had none. For example, where a farmer or a business person dies intestate, predeceased by his or her spouse, all of the children are entitled to an equal share in the estate. If one of the children has worked in the farm or business in the expectation of inheriting the farm or business, while the rest of the children did not, such a child is unable to bring an application on the grounds that their parent “failed in his or her moral duty.” On the other hand, if the parent in this instance had made a will excluding that child from inheritance, he or she could seek redress under section 117. In a similar vein, Spierin has said that “it is arguably a deficiency that the power of the court to make provision for children does not extend to intestacy.”<sup>46</sup> Another commentator described the failure of the Oireachtas to include intestacy within section 117 as appearing to be “on little more than a legislator’s whim, unsupported by any firm logic.”<sup>47</sup>
- 3.35 Some commentators and respondents to the Issues Paper have argued that there are other common law or statutory remedies that prevent children from being treated unfairly and the extension of section 117 to intestacy is unnecessary. One submission argued that existing remedies, such as the presumption of advancement, are sufficient to address any concerns of unfairness and the extension of section 117 would increase the amount of litigation unnecessarily. Section 63 of the 1965 Act provides that any advancement (that is, a gift during the life of the deceased which makes provision for them)<sup>48</sup> made to the child of the testator shall be presumed to be in satisfaction of their entitlements under a will or intestacy, unless the contrary is proven. The practical implication of this section is that the court may consider provision made for the children during the life of the deceased for the purposes of calculating the size of the estate for intestacy shares, and indeed testamentary entitlements. Although the presumption of advancement can remedy some of the issues that may be raised on applications under section 117, it does not address all potential injustices caused by the strictness of the intestacy rules. For example, one of the potential problems with the current law identified by the Commission in the Issues Paper is children with a particular need over and above the intestacy shares, such as health care needs. Similarly, one child in particular supporting a parent during illness or a period of impaired physical capacity might go unrewarded by the fixed intestacy shares. Unless significant advancements had been made to the other children, a court could not make additional provision for these children under the presumption of advancement.
- 3.36 Although there is some overlap between the presumption of advancement and section 117, they have different aims which might explain why they are not perfectly interchangeable. The presumption of advancement is arguably intended to prevent injustice arising where a parent provided for a one child with the intention of providing for the others in his or her will but never doing so. As the case law makes clear, section 117 on the other hand, is not intended to ensure equal provision for all siblings or to give effect to the testator’s unrealised intention; but to ensure that each child is properly provided for. While the presumption of advancement can take account of provision which has been

<sup>46</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 696.

<sup>47</sup> Storan “Section 117 of the Succession Act 1965: Another Means for the Courts to Rewrite a Will?” *Conveyancing and Property Law Journal* 2006, 11(4), at 82-90.

<sup>48</sup> Section 63(6) defines advancement as a “gift intended to make permanent provision for the child” and includes the transfer of property or gifts intended to establish the child in a profession or career.



made, it is often the provision that has not been made which causes disputes under section 117.

- 3.37 Keating also suggested alternative mechanisms for mitigating against the strictness of the intestacy shares. In discussing the possible extension of section 117 to intestacies, Keating points out the differences between testate and intestate succession. He observes that while a will may distribute property arbitrarily or unjustly, intestate succession is based on the principle of equality among children. He notes that the problem of unfulfilled promises, highlighted by the Commission in its 1989 Report, "can be dealt with under existing equitable, contractual and tortious principles, fortified, if needs be, by a specific statutory remedy."<sup>49</sup>
- 3.38 One of the submissions in response to the Issues Paper suggested an amendment to section 67A to include all children of intestates, not just children of parents in a civil partnership, rather than amendment of section 117. This would provide a limited extension of similar principles to intestacy with a restriction to protect surviving spouses who are not the parent of the applicant. This point is discussed further in the next section.
- 3.39 Brady also noted that the child who foregoes a career and stays at home to care for his or her parents may not be entirely without legal redress given the developments in relation to the constructive trust and the principle of proprietary estoppel.<sup>50</sup> Nevertheless, he concluded that the recommendation by the Commission to extend section 117 of the *Succession Act 1965* to intestacies would "give the court a more positive role in the distribution of an intestate's estate."
- 3.40 A further issue that has been highlighted in relation to the restriction of section 117 of the *Succession Act 1965* to cases of testate succession is that of children with special needs. Pilkington notes that if one of the primary purposes of section 117 is to ensure that children are protected, then the court cannot make additional provision in an intestate estate where a child with special needs is entitled to the same proportionate share as his or her siblings.<sup>51</sup> The Law Commission of England and Wales noted, in its consideration of the law of intestacy, that "particular needs" of one child might justify an application on intestacy.<sup>52</sup>

## 2. Comparison with other jurisdictions

- 3.41 As discussed in the previous section, in the other jurisdictions that had family provision legislation, it initially only applied where the deceased has left a valid will, but was subsequently extended to also include intestacies. Scotland is, of course, the exception as it has no discretionary provision regime. In all of these jurisdictions, once they had established family provision, it began to seem anomalous that the courts were only empowered to intervene where the deceased had died testate. This is not a reason for Ireland to adopt the same course, in and of itself, although these same arguments have been made in Ireland, as outlined above.
- 3.42 While the position elsewhere must be considered, Ireland is not perfectly analogous to these other jurisdictions and the reasoning applied in other jurisdictions may only be

<sup>49</sup> Keating in Byrne and Binchy, *Annual Review of Law 1989* (Round Hall, 1990) at 294.

<sup>50</sup> Brady, *Succession Law in Ireland* 2nd ed (Butterworths, 1995) paragraph 8.24.

<sup>51</sup> Pilkington, "Section 117 of the Succession Act 1965" (1999) 2 *Bar Review* 89.

<sup>52</sup> Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com No. 331 (2011), paragraph 6.4.

persuasive insofar as those jurisdictions resemble our own. One submission argued that the logic of extending family provision to intestacy cases seemed clear in New Zealand, however it was also noted that family provision legislation was social in nature and depends on the values of the society in question. Furthermore, it may be relevant to consider that the default rules on intestacy under the 1965 Act differ from other common law jurisdictions, discussed above. The 1965 Act provides for an automatic share of the estate for children where the deceased has died without making a will.<sup>53</sup> This arrangement may be less likely to cause hardship to children than legislation elsewhere that provides for a statutory legacy up to a certain value which might result in the entire estate being transferred to the spouse at the expense of the children. Although the other jurisdictions considered above (with the exception of Scotland), all extend their discretionary provision regimes to include intestacy, their intestacy regimes differ greatly from Ireland's. Accordingly, the argument that family provision legislation may be necessary to mitigate the harshness of intestacy rules for children may be less relevant in this jurisdiction than in other jurisdictions which do not have automatic legal right shares on intestacy and have instead extended family provision legislation to cases of intestacy.

### 3. Responses to the Issues Paper

- 3.43 Most, although not all, submissions received by the Commission that addressed this issue argued that section 117 should be extended to situations where the deceased has died wholly intestate. There was general agreement that section 117's application to testacy only is anomalous, can lead to unusual outcomes and that the rules of intestacy can equally fail to make proper provision for a child. A minority of submissions, however, argued that section 117 should not be extended to intestacy on the basis that the current fixed shares are fair.
- 3.44 While many submissions expressed general opposition to the courts' interference with testamentary freedom, most of these submissions did not address the issue of intestacy specifically. It is unclear, therefore, if this opposition extends to interference with the automatic intestacy shares; issues of testamentary freedom are arguably not engaged where no will has been written.
- 3.45 One of the submissions proposed amending section 67 of the *Succession Act 1965* to provide for a claim under that section against the estate of a parent who has died wholly intestate, in a similar nature to section 67A of the 1965 Act. This was proposed as an alternative to the general extension of section 117 to intestacy cases. Section 67A currently allows limited applications by the children of parents in a civil partnership. Section 67A(4) currently restricts awards made by providing that issue of the deceased will always receive their intestacy share at a minimum, and the share they would have received had the parent died without a spouse or civil partner as a maximum. If this recommendation was adopted, this would result in greater protection for the surviving spouse, where the deceased left a spouse who was not the parent of the applicant.
- 3.46 Ultimately however, this proposed solution would give rise to several difficulties. A maximum award for applicants would provide some protection for spouses (discussed further below) in some cases, but where all children of the deceased brought applications it would still be possible to entirely deprive the surviving spouse of inheritance. Furthermore, this approach would give rise to inconsistencies between pure intestacy and

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Section 67 of the *Succession Act 1965*.

partial intestacy, as the maximum awards for children would not apply on partial intestacy. Finally, restricting the shares of children could frustrate the purpose of extending discretionary provision to children if one child had a particular need beyond their absolute maximum entitlement.

- 3.47 Some respondents, while recommending that the scope of section 117 should be narrowed, recommended section 117 should be extended to intestacy in this more restricted form. Some other submissions stated that, although they agree that there should be some discretionary element akin to section 117 to counteract the rigidity of the fixed intestacy shares, there should not be a blanket extension of section 117 to intestacy and that a more restrictive version of the section should apply to intestacy. Because all children of the deceased will receive something where the deceased dies intestate, there is likely to be less need for provision and the estate should not be unnecessarily burdened with the prospect of costly litigation.
- 3.48 Furthermore, as noted above, the common objection to section 117, that it interferes with testamentary freedom, is arguably less relevant because intestacy is usually the very absence of any intention expressed by the testator. A common explanation for the rules of intestacy is the desire to reflect what the deceased would have done if he or she had thought about what provision each child should receive. While the intestacy rules are a good default position, a strict rule is unlikely to fully reflect the deceased's intentions in each case. Although section 117 is not principally concerned with the intention of the testator, it is presumed that parents would make proper provision for their children if they wrote a will. The courts, if they succeed in doing what a "wise and just" testator would have done may correspond more closely with the testator's wishes than the default rules would. Judicial discretion in this area would arguably improve the accuracy of intestacy rules in reflecting the unexpressed wishes of the testator. The Commission does, however, understand that sometimes the deceased may deliberately fail to write a will to avoid causing controversy over the estate.

#### 4. Conclusions and recommendations regarding intestacy

- 3.49 The Commission agrees that the principles of section 117 should be extended to situations of intestacy. The Commission does not propose to extend the principles of section 67A to include all children, as was proposed in one of the submissions. Section 67A also has rigid restrictions on the estate that the court is free to dispose of, which could cause injustice. The reservations about the scope of section 117, expressed in the submissions have merit, and the Commission has made recommendations to restrict this scope in the previous chapter. However, the Commission is still of the view that section 117, albeit in a more limited form, is still a worthwhile protection for children. Insofar as section 117 remains appropriate, its principles should also be extended to intestacy. It has been pointed out that intestate succession serves a different purpose to testate succession, as default rules rather than an expression of the testator's intention, however the Commission is of the view that these rules can still suffer from the same shortcomings.
- 3.50 The Commission, therefore, reiterates its recommendation from the 1989 Report that section 117 should be extended to situations of intestacy. In the previous chapter, the Commission considered whether section 117 should be repealed. As discussed above, the Commission concluded that section 117, albeit in amended form, should be retained as a proportionate restriction on testamentary freedom, which gives effect to the obligations

that parents owe to their children. Furthermore as noted in the 1989 Report, section 117 is based on the principle that parents should make provision for their children in certain circumstances. As noted above, the purpose of section 117 is to ensure that no child is provided for inadequately, rather than to pass judgment on the conduct of the deceased. The Commission is of the view that these principles are equally applicable to intestacy, especially where intestacy is the result of inadvertence. A parent's obligations vary from case to case and on intestacy each child will receive something so it is less likely that a parent will fail in their obligations to their children. Nonetheless the fixed shares can result in injustice and a parental obligation should not be capable of circumvention by virtue of the failure to make a will. Additionally, a court order in such cases is less intrusive as the intestacy shares usually do not reflect the intention of the testator, merely the default rules.

- 3.51 The Commission acknowledges the objection that court discretion can result in unnecessary and costly litigation in certain circumstances. However the Commission is of the view that it is beneficial to grant the courts the power to remedy injustice caused by the fixed nature of the intestacy shares, and that this benefit outweighs the disadvantage of possible increased litigation. Furthermore, the Commission is of the view that this problem is mitigated if the discretion of the court is set out so that it corresponds precisely to the parent's obligations, as the Commission has recommended in Chapter 2.
- 3.52 **The Commission recommends that section 117 of the *Succession Act 1965* should be extended to include claims by children of deceased parents who die wholly intestate.**
- 3.53 As noted above section 67A of the 1965 Act currently provides for applications by children of civil partners who die intestate. If the recommendation in paragraph 3.52, above, is implemented then section 67A(3) to (7), which provide for this cause of action, would be redundant because every potential applicant under section 67A would also be covered by section 117, as amended. Accordingly, they should be repealed
- 3.54 **The Commission recommends that section 67A(3) to (7) of the *Succession Act 1965* should be repealed.**

## D. Implications for other affected parties

- 3.55 Section 117(3) of the 1965 Act provides, as noted above, that
  - "An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy."
- 3.56 As a result, the surviving spouse has greater protection from the redistribution of the estate under section 117 if he or she is the parent of the applicant children.
- 3.57 In light of the recommendation in paragraph 3.52 that section 117 should be extended to intestacy, the Commission must consider the implications of this reform for other interested parties. Section 67 of the *Succession Act 1965* sets out the automatic shares to which the spouses and issue of the deceased are entitled on intestacy. If the intestate dies leaving children but no spouse then the children shall share the whole estate equally, under the proposed reforms each of them would be able to bring an application under

section 117. Where there is no issue, then section 117 does not arise as there is no one capable of bringing a claim.

- 3.58 Potential for difficulty arises where there is a spouse and issue.<sup>54</sup> Where there is both a spouse and issue the spouse is entitled to two-thirds of the estate and the remaining one-third shall be distributed equally between the remaining issue.
- 3.59 As noted above one of the submissions recommended the amendment of section 67 to provide for a discretionary provision regime similar to section 117, but with maximum shares for children on intestacy. This would provide some protection for surviving spouses, but where every child of the deceased brought a claim there would be no such protection. Furthermore, this proposal did not afford the courts enough scope to redistribute the estate in favour of children with a particular need above the maximum share. As noted above the Commission did not recommend this proposal.
- 3.60 As noted by O'Sullivan,<sup>55</sup> an amendment to section 117 extending it to intestacy would create a potential difficulty for surviving spouses as they would not be entitled to bring an application for discretionary provision themselves. This difficulty is particularly evident in cases where the surviving spouse is not the parent of the applicant. Currently, under partial intestacy (and under the Commission's proposed reforms, under total intestacy) where the surviving spouse is the parent of the applicant child, any court order may not affect the spouse's intestacy entitlement or entitlement under the will of the deceased. This protection does not extend to spouses who are not parents of the applicant child.<sup>56</sup> Although this applies to partial intestacy, where orders under section 117 may currently be made, the problem is more acute on total intestacy, because the surviving spouse will not have a legal right share to rely upon, as there is no valid will.
- 3.61 In response to this potential difficulty, O'Sullivan suggests that, at a minimum, surviving spouses should also be entitled to apply to courts for "discretionary provision" along the lines of section 117. In this Report, the Commission does not express a view as to the entitlements of spouses under the 1965 Act because this is outside the scope of the current project inquiry, although the Commission accepts that such a review of the 1965 Act would be worthy of discussion.
- 3.62 Nonetheless, the Commission must consider how the proposed extension of section 117 to intestacy fit within the general scheme of the *Succession Act 1965* in order to ensure that the protection recommended for children of intestates does not unduly disadvantage other members of the family. In addition to considering extending the right of application to spouses, O'Sullivan also suggests that consideration be given to the question whether the distinction between different categories of spouses remains appropriate.
- 3.63 A possible justification for the different treatment of parents and non-parents of the applicant is that the applicant's parents owe them obligations and they should ultimately

<sup>54</sup> Where an intestate dies leaving a spouse and no issue, the spouse takes the whole estate. In such a case, section 117 applications under the Commission's proposed amendments would not apply. Where an intestate dies leaving issue, but no spouse, each would be able to take an application under section 117 and the courts would be able to consider the parents respective duties to each of them under any applications that arise.

<sup>55</sup> O'Sullivan, "Reform of section 117 of the Succession Act 1965: Implications and Opportunities for the Protection of Surviving Spouses" (2017) *Conveyancing and Property Law Journal* 9.

<sup>56</sup> Although under partial intestacy, usually some provisions of the will remain operative and the legal right share of any spouse may not be effected by an order under section 117.

receive some benefit from the share that their parent receives. O'Sullivan describes this as "conduit theory", that is, that the surviving parent is a conduit through which the applicant child will ultimately receive the proceeds of the other spouse's estate. Step-parents would not be considered conduits in this sense as they are not presumed to owe any moral duties to the children of their spouse. On this basis, one could justify the current broad protection under section 117(3) afforded to surviving spouses, who are parents of the applicant.

- 3.64 On the other hand, the child's interest is not the only consideration, and the needs of the spouse must also be considered. Where the deceased dies partly or wholly testate, the 1965 Act affords step-parents the protection of the legal right share even though they may not ultimately be expected to pass this on to the children of their deceased spouse. It is arguably inconsistent to say that step-parents should not be afforded a reserve, protected, share on intestacy but that they should be afforded such a protection where the deceased has made a will.
- 3.65 The current protections for surviving spouses under section 117(3) strike a reasonable balance between the protection of spouses and children, especially considering that no orders under section 117 are currently possible on pure intestacy. However, the Commission's recommended extension of section 117 to intestacy, without an amendment to section 117(3), would leave surviving spouses more vulnerable. In striking the correct balance between the interests of children and surviving spouses, the Commission is of the view that there should be more protection for surviving spouses who are not the parent of the applicant.
- 3.66 However, there still remains some justification for treating parents of the applicant and non-parents of the applicant differently. Surviving step-parents should not be afforded the complete protection that surviving parents are afforded, as they owe less extensive obligations to the surviving children. The Commission, therefore, recommends that in striking a balance between the needs of children and surviving spouses, section 117(3) should be amended to specify that the surviving spouse should, in all cases, be entitled to an amount equal to the amount to which he or she would have been entitled as a legal right share had the deceased parent died wholly testate.
- 3.67 **The Commission recommends that the court, in making provision for a child of the deceased under section 117 of the *Succession Act 1965*, shall ensure that the amount to which the surviving spouse of the deceased, who is not the parent of the applicant, is entitled shall not be less than the amount to which he or she would have been entitled as a legal right share had the deceased parent died wholly testate.**



## CHAPTER 4

# TIME LIMITS AND OTHER PROCEDURAL ISSUES

## A. Clarifying when the time limit under section 117 begins

### 1. The date the time limit begins in Ireland

- 4.01 Section 117(6) of the *Succession Act 1965* provides:

“An order under this section shall not be made except on an application made within 6 months from the first taking out of representation of the deceased's estate.”

- 4.02 Section 117(6) of the 1965 Act thus provides that the 6 month limitation period begins from the “first taking out of representation of the deceased's estate.” In *In re estate of F deca*,<sup>1</sup> the High Court (Laffoy J) held that this referred to the date when the will is proved either by grant of probate or a grant of letters of administration with the will annexed. In this case the deceased had died on 6 July 2008. The High Court made an order under section 27(4) of the 1965 Act<sup>2</sup> allowing the estate's personal representative to take out limited letters of administration of the estate for the purpose of defending proceedings which a creditor bank intended to bring against the estate, and these letters issued on 15 October 2010.<sup>3</sup> On 28 March 2011 a grant of probate of the testator's will was made but was subsequently revoked. Finally, on 21 November 2011, letters of administration of the estate of the testator with the will annexed issued. The issue in relation to section 117(6) was whether the first taking out of representation of the testator's estate occurred when the limited grant of administration issued on 15 October 2010, in which case the application would be outside the 6 month limitation period, or when the grant of probate with the will annexed issued on 28 March 2011, in which case the application would be within the 6 month limitation period. The High Court held that the key event was the issue of the grant of probate with the will annexed so that the application in that case was within the time limit.

<sup>1</sup> [2013] IEHC 407.

<sup>2</sup> Section 27(4) of the *Succession Act 1965* provides that “where by reason of any special circumstances it appears to the High Court... to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.”

<sup>3</sup> Grants issued on foot of a court order where a proposed plaintiff wishes to issue proceedings against the estate of a deceased person and grants that have not been taken out in that estate are generally referred to as grants of administration *ad litem*. This type of grant generally states on its face that it is limited for the purpose of defending named proceedings.



- 4.03 The Court noted that, in interpreting section 117(6), a court should examine the *Succession Act 1965* as a whole as required by both the common law principles of statutory interpretation and under section 5 of the *Interpretation Act 2005* which provides that an “obscure or ambiguous” provision is to be interpreted to reflect the “plain intention of the Oireachtas... where that intention can be ascertained from the Act as a whole.” Using this approach, the Court held that “it becomes obvious that the Oireachtas could not have intended that a grant limited for a purpose, such as a grant of administration *ad litem*, would start time running against a prospective applicant under s. 117.”<sup>4</sup>
- 4.04 The Court noted that, in order for it to form a view under section 117 of the 1965 Act as to what provision had been made by the testator, whether by a will or otherwise, the terms of the last will must have been proved either by grant of probate or a grant of letters of administration with the will annexed. The Court also noted that the estate of the deceased must be identifiable to establish whether he or she had made proper provision for the child in accordance with the deceased’s means. The Court concluded that the limited grant that issued on 15 October 2010 did not fulfil either of these requirements as the testator’s will was not annexed and the extent of the testator’s estate was not established, and it was limited to defending the proceedings which the creditor bank intended to bring against the estate and did not authorise the defence of any potential application under section 117 of the 1965 Act.
- 4.05 The Court therefore concluded that the 6 month period begins to run from the date of the extraction of a grant capable of enabling a section 117 application to be effectively prosecuted. It could not have been the intention of the Oireachtas that the earlier, more limited grant would start the time limit. This is because this grant would not enable potential applicants to prosecute an application, the personal representatives to defend (or settle) such an application, or the courts to adjudicate on it.
- 4.06 It should be noted that there is often a certain amount of time between the date of death and the date of the first taking out of representation. Section 62 of the *Succession Act 1965* provides that, although the personal representatives must not delay in distributing the estate, no proceedings can be brought compelling them to do so without the leave of the court, within 12 months of the date of death of the testator. This is known as the “executor’s year” (although it applies to both executors and administrators) and its purpose is to allow the personal representatives time to ascertain the extent of the deceased’s assets and liabilities. As a result, often the grant of representation is taken out a number of months after the date of the deceased’s death.
- 4.07 Spierin states that where there are executors named in the will of the deceased, it is possible to issue proceedings in advance of the issue of the grant.<sup>5</sup> The proceedings could not, however, be taken any further until the grant of representation is extracted. Spierin cites this as an example of how the jurisdictional nature of the time limit (discussed in the

<sup>4</sup> [2013] IEHC 407, at paragraph 30.

<sup>5</sup> Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 772.

next part) can cause anxiety where there is uncertainty as to the date at which times starts running. Spierin cites an *ex tempore* judgment in which the High Court (Smyth J) held that “such proceedings were good in law and were not invalid by virtue of the provisions of s 117(6).”<sup>6</sup> This reasoning would not apply where there were no executors, but rather an administrator. Unlike executors, administrators do not derive their authority from the will but from the grant of the letters of administration,<sup>7</sup> so where there is no executor to defend the claim no such claim would be available to potential applicants until the grant is issued. This could arise where there was no executor named in the will, where the named executor had died or in a situation of total intestacy where there is no valid will.<sup>8</sup> The issue of intestacy is particularly relevant in light of the Commission’s above recommendation that section 117 should be extended to pure intestacy. In such circumstances a potential claimant would have to wait until the grant of administration before it would be possible to bring a claim, as there would be no one to defend proceedings before that point.<sup>9</sup>

## 2. When the time limit begins in other jurisdictions

### England and Wales

- 4.08 In *In re estate of F decd*,<sup>10</sup> the High Court (Laffoy J) examined the corresponding provision in the English family provision legislation, the *Inheritance (Provision for Family and Dependents) Act 1975*, for guidance. Section 4 of the 1975 Act, as enacted, imposed a 6 month time limit on applications under the 1975 Act from “the date on which representation with respect to the estate of the deceased is first taken out.” Section 23 of the 1975 Act, as enacted, provided that, in determining the date on which representation is first taken out, grants limited to settled land or to trust property and grants limited to real estate or to personal estate were to be disregarded, unless a grant limited to the remainder of the estate had previously been made or was made at the same time. The Court cited with approval the decision of the English High Court (Latey J) in *Re Johnson (decd)*<sup>11</sup> in which it had concluded that a limited grant was not “the first taking out of representation required for time to begin to run under s.4 [of the 1975 Act] as it merely enables a particular thing to be done in relation to the estate and did not enable the distribution to take place.”

<sup>6</sup> *Ibid.*

<sup>7</sup> In *Gaffney v Flanagan* [2005] IEHC 367 the High Court (Laffoy J) described this as “a fundamental principle of law.”

<sup>8</sup> Section 13 of the *Succession Act 1965* provides that where a person dies intestate, or dies testate but leaving no executor surviving him or her, his or her personal and real estate is vested in the President of the High Court until the grant of the letters of administration.

<sup>9</sup> Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 772.

<sup>10</sup> [2013] IEHC 407.

<sup>11</sup> [1987] CLY 3882. A limited grant had been made to the deceased’s estate, limited to pursuing negligence claims in relation to the road accident in which the deceased had died. Probate of his will was subsequently granted. The English High Court considered whether the time limit in section 4 of the 1975 Act began to run on the date of the limited grant or of the full grant of probate. See also Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), at 137.

- 4.09 In its 2011 Report, *Intestacy and Family Provision Claims on Death*, the Law Commission of England and Wales observed that it was unclear whether certain grants of representation started time running under the 1975 Act.<sup>12</sup> The Commission confirmed that there was an inconsistency as the grants listed in section 23 of the 1975 Act, which limited the type of property that could be distributed, were disregarded while grants that were limited to special purposes and did not enable the personal representatives to distribute any property appeared to start the time running.<sup>13</sup> The Commission also noted that it was unclear whether foreign grants of representation started time running under the 1975 Act. The Commission therefore recommended that in considering when representation to the estate of a deceased was first taken out the following should be disregarded:
- (a) those grants excluded under section 23 of the 1975 Act;
  - (b) any other grant which does not permit distribution of at least some of the estate and
  - (c) a grant, or its equivalent, made outside the United Kingdom, with the exception of a grant sealed under section 2 of the Colonial Probates Act 1892 (but only from the date of sealing).
- 4.10 Section 23 of the 1975 Act was amended by the *Inheritance and Trustees' Powers Act 2014* to give effect to this recommendation.<sup>14</sup> Section 23 of the 1975 Act, as amended, now provides that the following grants are to be disregarded when considering when representation with respect to the estate of a deceased person was first taken out for the purposes of the 1975 Act:
- (a) a grant limited to settled land or to trust property,
  - (b) any other grant that does not permit any of the estate to be distributed,
  - (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
  - (d) a grant, or its equivalent, made outside the United Kingdom (a grant sealed under section 2 of the *Colonial Probates Act 1892* is regarded as a grant made in the UK for the purposes of the section).
- 4.11 The Law Commission of England and Wales also considered whether applications for family provision under the 1975 Act could be commenced before a grant of representation had issued. The Commission observed that, although it was generally accepted that an application for family provision could not be commenced until a grant of representation had issued, this could be problematic where an applicant needed prompt relief and might be prejudiced by the inactivity of those entitled to extract the grant.<sup>15</sup>

<sup>12</sup> Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), paragraphs 7.55 - 7.70.

<sup>13</sup> *Ibid.* The Report cited *Re Johnson* [1987] CLY 3882 as authority for the view that a grant *ad litem* should be disregarded in determining the date on which representation is first taken out.

<sup>14</sup> See section 6 and schedule 3 of the *Inheritance and Trustees' Powers Act 2014*.

<sup>15</sup> The Law Commission of England and Wales identified a number of circumstances in which a delay might arise in obtaining a grant of representation in the estate of the deceased. These include inertia, deliberate

The Commission noted that consultees reported that “in some cases the courts had permitted cases to be commenced and even concluded without a grant being issued.”<sup>16</sup> It therefore recommended that the 1975 Act should clarify that nothing prevents the making of an application before a grant of representation has issued in the estate of the deceased.<sup>17</sup> Section 4 of the 1975 Act was amended by the *Inheritance and Trustees’ Powers Act 2014* to give effect to this recommendation. As amended, section 4 of the 1975 Act now provides that “an application for an order under section 2 of this Act shall not, except with the permission of the court, be made after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out (but nothing prevents the making of an application before such representation is first taken out).”<sup>18</sup>

### New Zealand

- 4.12 In New Zealand, the time period prescribed for applications under the *Family Protection Act 1955* begins on the “the date of the grant in New Zealand of administration in the estate.”<sup>19</sup> In the draft *Succession (Adjustment) Act* annexed to the 1997 Report *Succession Law - A Succession (Adjustment) Act*,<sup>20</sup> the New Zealand Law Commission recommended a time limit of 18 months after the date of death or 12 months after the grant of administration, whichever period expires first. These recommendations have not yet been implemented at the time of writing (May 2017).

### Australia

- 4.13 In its 1997 *Report on Family Provision*,<sup>21</sup> the Australian National Committee for Uniform Succession Laws addressed the question whether the time limit for bringing an application for family provision should commence from the date of death of the deceased person or the date of the grant of representation of the estate of the deceased person.<sup>22</sup>

delay, the deceased’s only significant assets might pass outside the estate e.g. an interest in a joint tenancy, the person who intends to make a claim against the estate may also be the person with priority to take out a grant. See Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), at 135.

<sup>16</sup> Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), paragraph 7.49.

<sup>17</sup> The Commission observed, however, that “it would be difficult to proceed to a substantive hearing of the claim until the assets and liabilities of the estate are reasonably clear.” It therefore anticipated that consequential changes would be required to the Civil Procedure Rules and Practice Directions to ensure that, in proceedings that have been commenced before the grant of representation has issued, appropriate directions are given for a grant to be taken out as soon as practicable. See Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), paragraph 7.54.

<sup>18</sup> See section 6 and schedule 2 of the *Inheritance and Trustees’ Powers Act 2014* which provides for the insertion of the words “(but nothing prevents the making of an application before such representation is first taken out)” at the end of section 4 of the *Inheritance (Provision for Family and Dependents) Act 1975*.

<sup>19</sup> Section 2(5)(b) of the *Family Protection Act 1955*.

<sup>20</sup> New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act - Modernising the law on sharing property on death*, Report 39 (1997).

<sup>21</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (1997).

<sup>22</sup> *Ibid*, at 35.

The Report observed that where the personal representatives do not take out a grant, in jurisdictions where the limitation period commences on the date of the grant of representation, a potential applicant for family provision would be able to defer making an application virtually indefinitely. The Report therefore concluded that the time limit for bringing an application for family provision should commence from the date of death of the deceased person. It also noted that “having the time run from the death may also encourage all parties to finalise the deceased person’s affairs and in particular the final distribution of his or her estate.”<sup>23</sup>

### 3. Conclusions and recommendations on clarifying when the time limit begins

- 4.14 Many of the submissions received by the Commission emphasised the importance of clarity. Clarity is an important legal value; the law should be clear to enable members of the public to anticipate its consequences and act accordingly. This enables them comply with their obligations or enforce their entitlements against others. Clarity and predictability are essential for personal representatives, to enable them to carry out their duties. Equally, potential applicants under section 117 should be able to know clearly the time restrictions on making a claim. If there is uncertainty as to whether a particular grant starts the clock running on the time limit, potential claimants may not know whether they are entitled to make a claim. Clarity is particularly important for section 117 because there is no possibility of an extension of the time within which to bring an application. Even where there is an excusable failure to bring an application promptly, for example because the potential claimant was unaware that time had begun running, there is no potential for the extension of time.
- 4.15 As well as being clear, the law should also be accessible. While the decision of the High Court in *In re estate of F decd* has been welcomed as providing greater clarity concerning which grants are covered by section 117, this clarification is not necessarily readily available to the general public. Only by reading section 117 in conjunction with the High Court decision does it become clear. Of course, practical considerations prevent legislation from exhaustively setting out every possible factual scenario. As we have seen in the above discussion on the broad discretion afforded under section 117, novel factual scenarios may arise and some recourse to case law will be necessary to understand how the law applies to a particular set of facts. However, where legislative uncertainty can be readily remedied by concise amendment to clarify how the law applies to a common factual scenario, then this should be done.
- 4.16 The decision in *In re estate of F decd* should be welcomed, in that it provides a clear interpretation of the meaning that the Oireachtas intended to give to an otherwise ambiguous term. For the avoidance of any residual doubt, and to ensure the information is easily accessible to members of the public, it would be preferable if legislation explicitly stated which types of grants are included. Uncertainties will arise in legislation from time

<sup>23</sup>*Ibid.*

to time and it is appropriate in such cases for the courts to resolve those uncertainties by looking at the intention of the legislature, or by reference to the purpose of the legislation. However, the legislature should also expressly clarify such ambiguities where possible. Legislative language that is broad to the point of being vague can reduce clarity but overly detailed legislation can similarly impede understanding if it includes a lot of extraneous detail. In this case however, the ambiguity could be remedied by a relatively concise amendment.

- 4.17 While the respondents to the Issues Paper welcomed the greater clarity provided by *In re estate of F decd*, many also praised this decision for its content. The High Court held that it must have been the intention of the Oireachtas to only include those grants of probate that would enable the court to adjudicate on a section 117 application. This represents a sensible approach. Other more limited grants, would not necessarily enable applicants to make a fully informed decision as to whether to make an application under section 117. If those limited grants were to be included this might encourage parties to initiate applications as a precaution to ensure that initiate any claim within the time limits. This would increase the burden of costs and litigation on the estate, in some cases unnecessarily. Moreover, if the time starts running at a point when parties cannot ascertain the value of the estate or their entitlement under the will or rules of intestacy, then parties, through no fault of their own, may be outside the time limit before they realise that they wish to bring a claim. Although, as stated above, the Commission is of the view the legislation should be amended to provide greater clarity, the clarification should give statutory effect to the decision in *In re estate of F decd*. The issue of whether or not the law should permit applications before the time limit has begun is discussed further below.
- 4.18 The Commission therefore recommends that section 117 should be amended to clarify that the time limit should only start running on the extraction of a grant capable of enabling a section 117 application to be successfully prosecuted. For the avoidance of doubt, the date of “first taking out of representation of the deceased’s estate” referred to in section 117(6) should not be interpreted as the date of the extraction of any other grant of representation that would not enable the personal representatives of the deceased to distribute the estate, such as a grant for some limited purpose.
- 4.19 **The Commission recommends that section 117 of the *Succession Act 1965* should continue to provide that the time limit runs from the date of the first taking out of representation of the deceased’s estate.**
- 4.20 **The Commission recommends that section 117 of the *Succession Act 1965* should be amended to clarify that the date of “first taking out of representation of the deceased’s estate” should be interpreted as:**
- (a) **Where the deceased has died wholly or partly testate:**
    - (i) **the date of the first grant of probate with a valid will annexed or**
    - (ii) **the date of grant of administration with the valid will annexed;**



**(b) Where the deceased has died wholly intestate: the date of the first grant of administration by the person or persons entitled to take out such a grant.**

- 4.21 Although the time limit clearly prevents applications being lodged after time has run out, it would appear from the case law that there is currently nothing that prevents applications being lodged in advance of the beginning of the time limit. As a result, under both the current interpretation of “taking out of representation” and the Commission’s proposed amendment, above, applications could be taken before the time limits start running. Again, legislative uncertainty should be clarified where it is practical to do so. The text of the decision that recognises the possibility of an early application does not appear to be available, further emphasising the point that this issue would benefit from the clarity and accessibility of a legislative amendment.
- 4.22 In England, the relevant legislation explicitly states that it is possible to initiate proceedings before the beginning of the time limit. As noted by the English Commission, in the absence of such a provision it would be possible to frustrate the application of family provision legislation if the personal representatives delayed extracting a grant of probate. However as some submissions in response to the Issues Paper noted, in Ireland there are other methods of compelling a personal representative to act, such as section 62 of the 1965 Act. These submissions argued that early applications are an anomaly and section 117 should be amended to specifically exclude their possibility. It may be sensible to prevent applications being lodged before a full grant is taken out as to do so may be premature and impose additional costs on the estate if it subsequently transpires that the application is unnecessary.
- 4.23 While the above Recommendation regarding the beginning of the time limit should remove any uncertainty as to when time starts running, potential applicants may still wish to lodge applications in advance. The Commission does not anticipate that this will occur very often, in light of the above clarification, because there would be less uncertainty about time limits reducing the number of precautionary applications. The Commission has recommended the above clarification, partially because it may help to prevent some precautionary early applications. Although, the Commission is of the view that it would be preferable for applications to be brought after the beginning of the time limit, the Commission does not consider that early applications should be prohibited. Such early applications can avoid unnecessary delays. The sooner an application is lodged, all things being equal and allowing for the timely extraction of the grant, the earlier the courts will be able to adjudicate on the claim. Restrictions on the enforcement of rights should be reduced, particularly where those restrictions could potentially serve to delay the administration of an estate.
- 4.24 **The Commission recommends that section 117 of the *Succession Act 1965* should be amended to clarify that nothing prevents an application from being initiated before first taking out of representation of the deceased's estate.**

## B. Retaining the 6 month time limit under section 117

### 1. The length of the time limit

- 4.25 Section 117(6) of the *Succession Act 1965* contains a 6 month limitation period, from the first taking out of representation to the deceased's estate, within which such an application must be made. Section 117(6), as enacted, originally provided for a 12 month limitation period. This was reduced to 6 months by section 46 of the *Family Law (Divorce) Act 1996* in order to align the time limit in section 117 with the general 6 month time limit that applies to the comparable family provision claims against deceased persons in both the *Family Law Act 1995* and in the *Family Law (Divorce) Act 1996*.
- 4.26 The 6 month time limit from the date of the grant of representation is shorter than the time limit under section 115 of the 1965 Act within which a surviving spouse must elect to either take their legal right or inheritance under the will. This right of election is exercisable up to 6 months from the date of the notification of the entitlement, or 12 months from the date of the first taking out of representation of the deceased's estate, whichever is later. The Commission understands from the submissions that this can prevent the court from making an order under section 117. Under section 117(3), an order may not affect the legal right of a surviving spouse, but if the surviving spouse has not made his or her election between the legal right share and the will it would be impossible for the court to adjudicate on the section 117 claim. This can delay the administration of the estate, in some cases for a significant amount of time where the surviving spouse is hard to locate or notify. An applicant under section 117 could still bring their claim within the time limit but the adjudication of their claim could not take place until 6 months after the spouse had been notified.

### 2. The time limit under section 117 is mandatory

- 4.27 As well as being relatively short, the time limit under section 117 is also mandatory. This means that there is no possibility of the time limit being extended even with the consent of the court.
- 4.28 Canny, in his text on limitation periods, has stated that the "limitation period" in section 117 is "more properly referred to as a jurisdictional time limit"<sup>24</sup> because making an application within the time limit is a prerequisite to the validity of the claim. This is in contrast to true limitation periods, which are procedural rather than jurisdictional. Purely procedural limitation periods do not prevent an action being taken, nor do they prevent the court granting a remedy to the plaintiff unless the defendant specifically raises the limitation defence. The Supreme Court has also referred to this distinction regarding section 117. In *Clarke v O'Gorman*<sup>25</sup> the Supreme Court (O'Donnell J) referred to section

<sup>24</sup> Canny, *Limitation of Actions* 2nd ed (Round Hall, 2016) at 10, 19.

<sup>25</sup> [2014] IESC 72, [2014] 3 IR 340.

117 of the *Succession Act 1965* as an example of a time limit which is jurisdictional rather than procedural.

- 4.29 In *PD v MD*,<sup>26</sup> the High Court (Carroll J) “reluctantly” concluded that the wording of section 117(6) prohibited the Court from making an order where an application is made outside the limitation period, even if the Court was satisfied that it is an appropriate case to make an order, and that a “serious injustice” would otherwise result for the children. The Court held that section 117(6) “lays down a strict time limit which goes to the jurisdiction of the court and which cannot be ignored even though the defendant did not rely on the time until the last minute...”<sup>27</sup> The Court also examined section 127 of the *Succession Act 1965* which applies section 49 of the *Statute of Limitations 1957* to actions in respect of a claim to the estate of a deceased person or to any share in such estate, whether under a will, on intestacy or as a legal right. Section 49 of the 1957 Statute stops the limitation period running where the person to whom a right of action accrued is under a disability, for example is under 18 years of age or does not have decision-making capacity. The Court concluded that, because an application under section 117 is not a claim under a will, on intestacy or as a legal right, section 127 does not apply to applications under section 117. Therefore, where an application is brought outside the 6 month limitation period in section 117(6), the High Court has no jurisdiction to make an order under section 117 even where the limitation period has not been pleaded by the defendant. Commenting on the merits of this strict limitation period (of 12 months as it was at the time) the Court stated:

“there are compelling reasons why a time limit of twelve months set out in s.117(6) should be mitigated by the application of s.49 of the Statute of Limitations 1957 as amended by s.127 of the Succession Act 1965, or in some other way.”<sup>28</sup>

### 3. Limitation periods and the Constitution

- 4.30 In its 1989 *Report on Land Law and Conveyancing: General Proposals*,<sup>29</sup> the Commission observed that there was a possibility that section 117(6) of the *Succession Act 1965* would not withstand a constitutional challenge. The Commission noted that in *O’Brien v Keogh*<sup>30</sup> the Supreme Court held that the right to litigate is a property right, which is protected against unjust attack under Article 40.3.2° of the Constitution, and that section 49(2)(a)(ii) of the *Statute of Limitations 1957* did not adequately protect or vindicate the right to litigate of an infant in the custody of a parent.<sup>31</sup> The Commission observed that, as the

<sup>26</sup> [1981] ILRM 179.

<sup>27</sup> [1981] ILRM 179, at 182.

<sup>28</sup> *Ibid* at 183. The 12 month period was the relevant period at that time. As noted above, it was subsequently reduced to 6 months by the *Family Law Act 1995*.

<sup>29</sup> Law Reform Commission, *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), paragraph 45.

<sup>30</sup> [1972] IR 144.

<sup>31</sup> Section 49(2)(a) of the *Statute of Limitations 1957* provided that where a person is under a disability (including infancy) on the date when a right of action for damages for negligence (where the damages claimed include damages for personal injuries) accrued to him or her, then the action may be brought at

right of a child to apply under section 117 of the *Succession Act 1965* is a property right, the imposition of a one year time limit in the case of an infant child might be considered an unjust attack on that right. The courts have not yet been called upon to adjudicate on the constitutionality of section 117. Canny has described it as “[t]he limitation period which is perhaps most at risk of a finding of constitutional invalidity”<sup>32</sup>

- 4.31 However, in *Moynihan v Greensmyth*<sup>33</sup> the Supreme Court held that the limitation period of 2 years after the date of the death of the defendant was not to be regarded an “unjust attack” on the constitutional rights of the applicant, even where those applicants were minors. A reasonable limitation on actions against an estate is required as the possibility of claims being brought long after death would cause a serious threat to the rights of beneficiaries.
- 4.32 In its 2011 *Report on Limitation of Actions*,<sup>34</sup> the Commission analysed the competing constitutional interests involved in assessing the law on limitation periods. The Commission concluded that the law governing limitation periods must ensure that a balance is struck between the competing rights of the plaintiff and the defendant, as well as having regard to the public interest. In particular, the Commission recommended that consideration must be given to the right of the plaintiff to access to the courts and the right to litigate, the right of the defendant to a speedy trial and to fair procedures, as well as the public interest in the avoidance of delayed claims and the timely administration of estates.<sup>35</sup> The Commission also noted that in assessing limitation periods the courts will consider whether the balance of interests achieved is “unduly restrictive or unreasonable”<sup>36</sup> or does it “unreasonably or unjustly impose hardship.”<sup>37</sup> Therefore, such limitation periods must be supported by just and reasonable policy reasons.<sup>38</sup> In a number of cases the courts have upheld quite short time limits. For example, in *In Re the Illegal Immigrants (Trafficking) Bill 1999*<sup>39</sup> the Supreme Court upheld a 14 day limitation period for seeking judicial review of certain decisions of the Refugee Applications Commissioner, the Refugee Appeals Tribunal and the Minister for Justice and Equality during the refugee determination process and the deportation process. While the Supreme Court acknowledged that asylum seekers face special problems that may make it particularly difficult for them to seek judicial review of decisions affecting them, the Court was

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any time before the expiration of 3 years from the date when he ceased to be under the disability. Section 49(2)(a)(ii) provided that section 49 of the Act did not apply unless the plaintiff proved that the person under the disability was not in the custody of a parent when the right of action accrued. The infant plaintiff had suffered personal injuries in a collision and had been in the custody of his parents at the time of the collision.

<sup>32</sup> Canny, *Limitation of Actions* 2nd ed (Round Hall, 2016), at 19.

<sup>33</sup> [1977] IR 55.

<sup>34</sup> Law Reform Commission, *Report on Limitation of Actions* (LRC 104 - 2011).

<sup>35</sup> *Ibid* paragraph 1.85.

<sup>36</sup> *O'Dowd v North Western Health Board* [1983] ILRM 186 at 190.

<sup>37</sup> *Tuohy v Courtney* [1994] 3 IR 1, at 48.

<sup>38</sup> *Ibid* at 50.

<sup>39</sup> [2000] IESC 19, [2000] 2 IR 360.

satisfied that the discretion afforded to the courts to extend time was sufficiently wide to enable persons to have access to the courts.<sup>40</sup>

- 4.33 Many of the submissions in response to the Issues Paper expressed concern that section 117 may be repugnant to the Constitution. In the absence of a decision of the courts on the constitutionality of the 6 month limitation period in section 117 of the *Succession Act 1965*, it remains open to question whether it would withstand scrutiny by reference to the factors set out above, particularly having regard to the absence of a judicial discretion to extend that period. However, there is also a competing constitutional interest in the speedy administration of the estates and it could equally be argued that the current 6 month period strikes an appropriate balance between the competing principles.

#### 4. The time limit in section 117 and distribution of the estate

- 4.34 In *In re estate of F decd*,<sup>41</sup> the High Court (Laffoy J) observed that "it is reasonable to infer, that, in this jurisdiction, the primary consideration which informs legislative policy in relation to the strict unextendable time limit for initiating an application under s.117 is the avoidance of delay in the administration and distribution of estates."
- 4.35 In its 1989 *Report on Land Law and Conveyancing: General Proposals*,<sup>42</sup> the Commission considered that the need to enable estates to be distributed without unreasonable delay had been given too great a priority. The Commission stated that "this desirable aim seems to have been given priority over the at least equally laudable object of ensuring that parents cannot opt to fail to provide properly for their children in their wills."<sup>43</sup> The Commission noted that all of the submissions it had received favoured reform of section 117(6). It suggested that the options for reform were either to prescribe a longer period within which applications must be made or to empower the courts to extend the time limit.<sup>44</sup> The Commission concluded that section 117(6) should be amended to give a discretion to the court to extend the one year time limit within which applications may be made.<sup>45</sup>
- 4.36 Section 117(6) was subsequently amended by section 46 of the *Family Law (Divorce) Act 1996* which reduced the time limit for applications under section 117 from 12 months to 6 months. During the Oireachtas debates on the 1996 Act, the Minister for Justice

<sup>40</sup> *Ibid* at 394. See also Law Reform Commission, Consultation Paper on Limitation of Actions (LRC CP 54-2009).

<sup>41</sup> [2013] IEHC 407 at paragraph 22.

<sup>42</sup> Law Reform Commission, *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), paragraph 45.

<sup>43</sup> *Ibid*.

<sup>44</sup> See also Law Reform Commission, *Consultation Paper on Limitation of Actions* (LRC CP 54 - 2009), paragraph 2.157, in which the Commission noted that the vast majority of submissions received in relation to these two options for reform favoured giving the courts discretion to extend the (then 12-month) limitation period under section 117(6).

<sup>45</sup> See also Law Reform Commission, *Consultation Paper on Limitation of Actions* (LRC CP 54 - 2009), paragraph 2.158, in which the Commission concluded that the reduction of the limitation period to 6 months increased the urgency of the Commission's observations and recommendations in its 1989 Report.

explained that the purpose of the amendment was to bring the timescale for applications under section 117 in line with those for family provision under section 15A of the *Family Law Act 1995*<sup>46</sup> and section 18 of the *Family Law (Divorce) Act 1996*.<sup>47</sup>

- 4.37 One commentator has stated that it is regrettable that the Commission's recommendation that the courts should be given discretion to extend the (then 12 month) limitation period under section 117(6) and that the Oireachtas had instead opted to reduce the limitation period even further.<sup>48</sup>
- 4.38 In its 2011 *Report on Limitation of Actions*,<sup>49</sup> the Commission observed that judicial discretion to extend limitation periods brings an element of flexibility to a limitation system as "it allows judges to balance the numerous factors in each unique case, and consider the balance of prejudice between both parties." The Commission concluded that the proposed legislation governing limitations of actions set out in the 2011 Report should include a provision for a narrow statutory discretion to either extend or disapply the proposed ultimate limitation period.<sup>50</sup> The Commission recommended that such a discretion should be restricted to exceptional circumstances and that, to assist the courts in exercising the discretion, a non-exhaustive list of factors to which the court must have regard before exercising the discretion should be included.<sup>51</sup>
- 4.39 There is no specific statutory prohibition against the personal representatives of the deceased distributing the estate prior to the hearing. This is in contrast to other similar provisions that empower the court to make provision for someone out of the estate of the deceased such as section 18 of the *Family Law (Divorce) Act 1996*. Under this section, once the personal representative has notice of the application, they cannot distribute the estate without the permission of the court. Spierin has stated that, despite the silence of section 117 on this issue, it would be "unwise" for a personal representative to distribute an estate where they were aware of a potential claim. In such cases, the personal representative should wait until the time limit has elapsed to distribute the estate, at which time no claim under section 117 is possible under the current law.

<sup>46</sup> Section 15A of the *Family Law Act 1995*, inserted by section 52(g) of the *Family Law (Divorce) Act 1996*, empowers the court to make provision for a spouse out of the estate of his or her deceased spouse where a decree of judicial separation has been granted and succession rights have been extinguished under section 14 of the 1995 Act. Section 15A(1) provides that applications under the section must be made not more than 6 months after representation is first granted in respect of the estate of the deceased spouse under the *Succession Act 1965*.

<sup>47</sup> Section 18 of the *Family Law (Divorce) Act 1996* empowers the court to make orders for provision for a spouse out of the estate of his or her former spouse where a decree of divorce has been granted. Section 18(1) provides that applications under the section must be made not more than 6 months after representation is first granted in respect of the estate of the deceased spouse under the *Succession Act 1965*.

<sup>48</sup> See Pilkington "Section 117 of the Succession Act 1965" (1999) 2 *Bar Review* 89, commenting that it is "regrettable that the only legislative amendment to section 117 was to shorten an already narrow time limit" and that "in light of the decision of *PD v MD* [1981] ILRM 179 additional legislative safeguards may be required to prevent those suffering from a disability being prevented from making an application outside of the statutory time limit."

<sup>49</sup> Law Reform Commission, *Report on Limitation of Actions* (LRC 104 - 2011), paragraph 4.63.

<sup>50</sup> *Ibid* paragraph 4.72.

<sup>51</sup> *Ibid* paragraph 4.81.



- 4.40 If an extension of the time limit was possible, which was one of the issues raised in the Issues Paper, then clarification on the distribution of the estate may be required. In its 1989 Report,<sup>52</sup> the Commission recommended that the courts should have discretion to extend the time in which to bring applications in the appropriate circumstances. The Commission also recommended that the personal representatives should not be liable for distributions made once the default time limit had expired. However, the Commission also recommended that if an extension of the time limit was granted the courts should be able to redistribute distributions already made.

## 5. Time limits in family provision legislation in other jurisdictions

### England and Wales

- 4.41 In *In re estate of F decd*,<sup>53</sup> the High Court (Laffoy J) noted that the law on the corresponding family provision legislation in England and Wales provides some useful guidance. As noted above, the *Inheritance (Provision for Family and Dependents) Act 1975* empowers the court to make orders for financial provision out of the estate of a deceased person for the spouse, former spouse, child or dependant of that person. Section 4 of the 1975 Act provides that such applications “shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.” Section 20 of the 1975 Act provides protection from liability for personal representatives where, no application having been made, they distribute the estate after the expiration of the 6 month time limit.<sup>54</sup> This protection does not, however, preclude the recovery of any part of the estate so distributed.<sup>55</sup> As noted in its 1989 *Report on Land Law and Conveyancing: General Proposals*, the Commission recommended protection for the personal representative similar to that contained in the English legislation.
- 4.42 The 1975 Act was enacted following the 1974 Report of the Law Commission of England and Wales, *Family Provision on Death*.<sup>56</sup> The English Law Commission noted the time limit for applications under the pre-1975 legislation was 6 months from the date on which representation in regard to the estate of the deceased is first taken out, except with the permission of the court.<sup>57</sup> The English Commission observed that a time limit for such

<sup>52</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989).

<sup>53</sup> [2013] IEHC 407.

<sup>54</sup> Section 20(1) of the 1975 Act provides that the Act does not render the personal representative of a deceased liable for having distributed any part of the estate of the deceased after the end of the period of 6 months from the date on which representation is first taken out. This is expressly stated in the 1975 Act to be on the ground that he or she ought to have taken into account the possibility that the court might permit the making of an application for an order under section 2 of the 1975 Act after the end of that period. Section 20 of the 1975 Act also provides that this does not prejudice any power to recover, by reason of the making of an order under the Act, any part of the estate so distributed.

<sup>55</sup> This was noted in the Commission’s *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), paragraph 47.

<sup>56</sup> Law Commission of England and Wales, *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974).

<sup>57</sup> Under the *Inheritance (Family Provision) Act 1938*, there was no power to extend the time limit. The *Intestates’ Estate Act 1952* amended section 2 of the 1938 Act, giving the court power to extend the time

applications “must balance the interest of the possible applicants for family provision against the need for certainty in administering the estate.”<sup>58</sup> The Commission concluded that the existing balance in this regard was fair and therefore made no proposal for change.

- 4.43 The discretionary power of extension in section 4 of the 1975 Act was considered by the English High Court in *Re Salmon decd*,<sup>59</sup> in which it identified a non-exhaustive list of guidelines to assist it in exercising its discretion:<sup>60</sup>
- (a) The discretion is unfettered, to be exercised judicially and in accordance with what is just and proper;
  - (b) The onus is on the plaintiff to establish sufficient grounds for taking the case out of the general six month time limit;
  - (c) It is material to consider whether the plaintiff has acted promptly and the circumstances in which the applicant has sought the permission of the court after the time limit has expired;
  - (d) It is obviously material whether or not negotiations have been commenced within the time limit; if they have, and time has run out while they are proceeding, this is likely to encourage the court to extend the time;
  - (e) It is also relevant to consider whether or not the estate has been distributed before a claim under the Act has been made or notified;
  - (f) It is relevant to consider whether a refusal to extend the time would leave the claimant without redress against anybody.
- 4.44 These 6 guidelines were applied by the English High Court in *Re Dennis decd*,<sup>61</sup> and the Court added another:
- (g) The applicant must show that he or she has an arguable case, a case fit to go to trial; and in approaching that matter the court’s approach is the same as when

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limit if it would operate unfairly in certain specified circumstances, for example, the discovery of a will or codicil involving a substantial change in the disposition of the deceased’s estate. With a view to extending and making uniform the period for making certain applications to the court (under the *Inheritance (Family Provision) Act 1938* and the *Matrimonial Causes Act 1965*), the *Family Provision Act 1966* removed the reference in the 1938 Act to the specified circumstances and substituted a provision similar to that now contained in section 4 of the 1975 Act.

<sup>58</sup> Law Commission; *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974), at 37.

<sup>59</sup> [1981] Ch 167.

<sup>60</sup> The Court noted that the first two guidelines were supported by the decision of the English High Court (Ungoed-Thomas J) in *In re Ruttie* [1970] 1 WLR 89 in which the Court considered the discretion afforded it under a similar provision in the *Inheritance (Family Provision) Act 1938*, which the 1975 Act had repealed and replaced. The Court noted that the limits on the court’s discretion to extend time for an application of a surviving spouse had been abolished in 1966. The Court also confirmed that the onus is on the plaintiff to establish a case for the exercise of the court’s discretion and that the discretion must be exercised judicially.

<sup>61</sup> [1981] 2 All ER 140.

considering whether a defendant ought to have leave to defend in proceedings for summary judgment.<sup>62</sup>

- 4.45 In their commentary on the courts' discretion to extend time under the 1975 Act, Williams, Mortimer and Sunnucks observe that: "[i]n the cases on extension of time which have reached the Court of Appeal, that court has not disputed the usefulness of the various guidelines" but "it has tended to emphasise the unfettered nature of the discretion."<sup>63</sup> Two further matters that they propose the court should consider are:

- (h) the existence of a pending application by another applicant and
- (i) whether the delay in the distribution of the estate will cause hardship to the beneficiaries.

- 4.46 They also note that, in practice, it has become relatively common for parties to enter into agreements that the proposed defendants will not take a point on section 4 of the 1975 Act if proceedings are not issued within the time limit in order that negotiations may be continued. They also note that, in the event of such an agreement, "it is difficult to see on what basis a court would refuse permission to apply out of time."<sup>64</sup> However, following the decision of the High Court in *PD v MD*,<sup>65</sup> a court in Ireland would not have the power to extend the time limit for an application under section 117 of the *Succession Act 1965* even if such an agreement were reached between the parties in relation to the time limit prescribed in section 117(6). Potential claimants are therefore given little opportunity to explore possible settlement of their claim prior to institution of the necessary and – often costly – court proceedings in respect of their claim.<sup>66</sup>

### New Zealand

- 4.47 In New Zealand, the *Family Protection Act 1955* provides for claims for maintenance and support out of a deceased person's estate by spouses, civil union partners, *de facto* partners (that is, cohabitants), children, grandchildren, stepchildren and parents of the deceased. The time limits under the 1955 Act are: (a) 2 years from the date of the grant of administration in the estate in the case of an application by an administrator made on behalf of a person who is not of full age or mental capacity, and (b) 12 months from the date of the grant of administration in the estate in the case of any other application.<sup>67</sup>

<sup>62</sup> The Court noted that the judgment of the English Court of Appeal in *In re Stone decd* (1969) 114 Sol Jo 36 had not been brought to the attention of the court in *Re Salmon decd* [1981] Ch 167. In *Stone*, Lord Denning MR stated that if the applicant had "an arguable case or, as we say in Ord 14 cases, if there is a triable issue, then permission ought to be given."

<sup>63</sup> See Williams, Mortimer and Sunnucks, *Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013), paragraph 58-14.

<sup>64</sup> *Ibid.*

<sup>65</sup> [1981] ILRM 179.

<sup>66</sup> Hourican, "Section 117 Claims: Practice and Procedure and Matters to Bear in Mind" (2001) 3 CPLJ 62, suggests that the short limitation period provided for applications under section 117 may also result in proceedings being issued in the High Court rather than the Circuit Court. In the High Court, proceedings are deemed to be issued in the when they are lodged in the Central Office whereas proceedings are not deemed to have been issued in the Circuit Court until they have been served.

<sup>67</sup> See section 9(2) of the New Zealand *Family Protection Act 1955*.

Section 9(1) of the 1955 Act empowers the court to extend the time for making an application “after hearing such of the parties affected as the court thinks necessary.” It expressly provides that the power granted to the court in this regard extends to cases where the time for applying has already expired. However, no extension can be sought after all of the estate has been distributed and any distribution of any part of the estate made before the personal representatives receive notice of intention to make an application cannot be disturbed. The Commission understands that these other restrictions on the estate have the practical effect of limiting the time limit for claims in New Zealand to approximately 12 months.

- 4.48 In its 1997 Report *Succession Law: A Succession (Adjustment) Act*,<sup>68</sup> the New Zealand Law Commission recommended the enactment of legislation to replace the *Family Protection Act 1955*. In the draft *Succession (Adjustment) Bill* annexed to the Report, the Commission recommended that an application for an award or property division order against the estate of a deceased person be made within 18 months of the death of that person or within 12 months of the grant of administration in the estate of that person, whichever period expires first. This recommendation has not been implemented and the limitation periods in section 9 of the *Family Protection Act 1955* remain in force.

#### Australia

- 4.49 In its 1991 *Report on Family Provision*, the Australian National Committee for Uniform Succession Laws<sup>69</sup> stated that the “imposition of time limits for the bringing of family provision applications is an attempt to ensure that the administration is not unduly delayed but also to ensure that those people who have a genuine claim on the deceased person’s estate do not miss out on the opportunity to have their claim determined.”<sup>70</sup>
- 4.50 In relation to the time limit within which such applications must be made, the Report observed that time limits varied in the states and territories from 6 months to 18 months. Following consideration of these, the Report favoured a 12 month period from the date of the deceased person’s death. This was “considered appropriate both in the context of the efficient administration of the estate and from the point of view of certainty on the part of those with an interest in the distribution of the estate.”<sup>71</sup>
- 4.51 In relation to the extension of the time limit, the Report noted that, while in all states and territories power was given to the court to extend the period, there were differences in the wording and approach taken to such extensions. It concluded that the court should have an unfettered discretion to extend or not to extend the time limit. The Report recommended that the 12 month time limit should apply “unless the court otherwise directs”. The extension of time was again considered by the National Committee in its 2004 *Supplementary Report to on Family Provision*.<sup>72</sup> In an analysis of the relevant case law, the 2004 Report stated that, while the power to extend time is generally discretionary, in exercising the discretion the courts must deal with each case on its own facts. The 2004 Report also observed that an applicant for an extension of time must

<sup>68</sup> New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act - Modernising the law on sharing property on death*, Report 39 (August 1997).

demonstrate that he or she has an arguable claim for provision and will generally be required to satisfy the court that the delay in making the application should be excused.

- 4.52 The 2004 Report also suggested that legislation should enable representatives of children or other persons without capacity to apply to the court for directions on whether to make an application. If an application were made within the 12 month limit, the court should be empowered to treat any resulting application for family provision as having been made within the time limit.
- 4.53 This proposal was subsequently implemented, with modifications, in New South Wales. The *Succession Act 2006* provides for applications for family provision out of the estate of a deceased person by spouses, former spouses, children, grandchildren, dependants and certain persons living in a *de facto* relationship or close personal relationship with the deceased person at the time of his or her death.<sup>73</sup> Section 58 of the 2006 Act provides that applications for family provision orders must be made within 12 months from the date of death “unless the Court otherwise orders on sufficient cause being shown.”<sup>74</sup> In its 2005 Report on *Uniform Succession Laws: Family Provision*, the New South Wales Law Reform Commission commented that this time limit “balances the need for there not to be undue delay in the administration of an estate with the need to ensure that those with a genuine claim have sufficient time within which to make it.”<sup>75</sup> Section 93 of the 2006 Act provides protection for personal representatives who distribute the estate prior to an application for family provision.<sup>76</sup>

<sup>69</sup> In 1991 the Standing Committee of Attorneys-General in Australia recognised the need for uniform succession laws for the whole of Australia and approved the establishment of the National Committee for Uniform Succession Laws. The National Committee consisted of representatives of the Law Reform Commissions (or Councils) for Queensland, New South Wales, Victoria, Western Australia, the Commonwealth of Australia and New Zealand; and the Attorney-General’s Department of South Australia, the Australian Capital Territory, the Northern Territory and Tasmania.

<sup>70</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (December 1997), at 29.

<sup>71</sup> Australian National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC MP 28 (December 1997), at 35.

<sup>72</sup> Australian National Committee for Uniform Succession Laws, *Supplementary Report to the Standing Committee of Attorneys General on Family Provision*, published by Queensland Law Reform Commission, QLRC R 58 (July 2004), at 54.

<sup>73</sup> See Chapter 3 of *Succession Act 2006*. The *Succession Amendment (Family Provision) Act 2008* inserted Chapter 3 in relation to family provision into the *Succession Act 2006*.

<sup>74</sup> The time limit under the previous *Family Provision Act 1982* was 18 months from the date of death.

<sup>75</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005), at 15. While the legislation proposed by the New South Wales Law Reform Commission and the 2006 Act provide for a time limit of 12 months from the date of death, the wording of the discretion proposed by the New South Wales Law Reform Commission varies from that enacted. The Law Reform Commission proposed a time limit of 12 months after the death of the deceased person “unless the Court otherwise directs” whereas the 2006 Act prescribes a 12 month time limit “unless the Court otherwise orders on sufficient cause being shown.”

<sup>76</sup> Section 93 of the 2006 Act provides that the legal representative of the estate of a deceased person may distribute the property in the estate if, among other situations, the property is distributed at least 6 months after the deceased person’s death. It also provides that in that case the legal representative of the estate is not liable in respect of that distribution to any person who was an applicant for a family provision

## 6. Conclusions and recommendation on retaining the 6 month time limit

- 4.54 The short, unextendable time limit imposed by section 117 can cause hardship to potential claimants. The Commission has therefore considered whether this hardship would be prevented by either the lengthening of the time limit, or empowering the courts to grant an extension in appropriate cases, or a combination of these two methods. Another possibility that the Commission raised in its 1989 Report<sup>77</sup> and in the Issues Paper on this project is whether the personal representatives of the deceased should be under an obligation to inform the potential beneficiaries of the possibility of making a claim. Many of the submissions presented the duty to inform potential beneficiaries and the possibility of extension of time as two alternative solutions to the problem of vulnerable persons being unaware of their entitlements. The obligations of personal representatives are discussed in Part C, below.
- 4.55 Brady, discussing the mandatory nature of the time limit as set out in *PD v MD*,<sup>78</sup> observed that “if our legislators had addressed the question of disability and applications under s.117, they would surely have included the latter in s.127, and their omission must rank as an oversight which cries out for amending legislation.”<sup>79</sup> Canny observes that it is noteworthy in England and Wales that there is little difficulty caused by the possibility of extension of the time limits in that jurisdiction.<sup>80</sup> Similarly, Storan has argued that; although the Irish approach has the advantage of certainty, the English approach provides a more equitable outcome. One of the submissions in response to the Issues Paper argued that “gross injustice” that could occur if minors or those who lack capacity are denied access to the courts. Furthermore there is particular difficulty in even determining how often this problem arises because such cases are, almost by definition, not brought before the courts.
- 4.56 Spierin notes that there are advantages to the short time limit: it allows the personal representatives of the deceased to promptly distribute the deceased’s estate, noting that England and Wales have addressed any injustices arising from the short time limit by providing for an unfettered right of extension but also providing immunity for personal representatives for distributing the estate.<sup>81</sup> Some respondents to the Issues Paper disagreed with such a broad discretion to extend time, although there was support for granting the court discretion to extend time in particular circumstances, such as where the potential applicant is a minor, or a person whose capacity is in question
- 4.57 As noted above, the Commission in its 1989 Report, considered the arguments for and against a short, unextendable time limit but decided to keep the time limit at 12 months

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order affecting the estate if the legal representative did not have notice at the time of the distribution of any such application and if the distribution was properly made by the legal representative.

<sup>77</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989).  
<sup>78</sup> [1981] ILRM 179.

<sup>79</sup> Brady, *Succession Law in Ireland* 2nd ed (Butterworths, 1995) paragraph 17.77.

<sup>80</sup> Canny, *Limitation of Actions* 2nd ed (Round Hall, 2016) at 316.

<sup>81</sup> Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 3rd ed (Butterworths, 2003) paragraph 836.



(as it then was) but allow a discretion to extend. As noted above this recommendation was never implemented, indeed the time limit was reduced from 12 months to 6 months. Some of the submissions in response to the Issues Paper expressed the view that the previous time limit was adequate and that it should never have been reduced.

- 4.58 Some submissions in response to the Issues Paper, emphasising the paramount importance of the speedy distribution of the estate, recommended that the strict time limit should remain unchanged. The problems arising from the strict time limits, it is argued, could be remedied by imposing a duty on the personal representatives of the deceased to notify potential applicants. This possibility is considered in the next section.
- 4.59 Both the length and the strict nature of the time limit are relevant to its constitutionality. In its 2011 Report the Commission acknowledged that there are 3 clear interests involved in assessing the law on limitations.<sup>82</sup> These interests are: the interests and rights of the plaintiff, the interests and rights of the defendant, and the public interest. The plaintiff's right to litigate is a property right protected under Article 40.3.2°. The defendant has an interest in the timely resolution of claims against him or her to avoid uncertainty caused by the threat of potential litigation or the prejudice caused by defending proceedings long after the events giving rise to them. There is also the public interest in the protection of children and vulnerable adults, parental obligations, the provenance of wills on the one hand and the timely administration of estates on the other hand. Fixed time limits are, by necessity, of general application and will not ensure that the right balance is struck between these interests in every single case.
- 4.60 In *Vella v Morelli*,<sup>83</sup> the Supreme Court acknowledged the public interest in the courts adjudicating on testamentary disputes.<sup>84</sup> If the time limits in section 117 prevent the courts from examining these issues (whether by their fixed nature, or their length, or both) it is arguably contrary to the public interest. Of course, this consideration must be counterbalanced with other aspects of the public interest, such as certainty or the speedy administration of estates. Indeed, the courts have also acknowledged that certainty and the timely administration of estates are also in the public interest. In *Moynihan v Greensmyth*,<sup>85</sup> the Supreme Court held that there is a public interest in the speedy administration of estates. The Supreme Court held that a limitation period of 2 years was not an unjust attack on the right to litigate, because the Oireachtas had to strike a balance between the interests of the beneficiaries of the estate on the one hand and the right to make claims against the estate on the other hand. Some reasonable limitation period was required in order reconcile the competing interests of these two groups. In the circumstances, the Supreme Court held that a 2 year period from the date of death was not unreasonable, even where the plaintiff is a minor. Although this is a longer period than section 117, it is clear from this decision that short, fixed time limits can be

<sup>82</sup> *Report on Limitation of Actions* (LRC 104 - 2011), paragraph 1.36.

<sup>83</sup> [1968] IR11.

<sup>84</sup> In the case the Supreme Court held that the usual rule in probate litigation is that costs should follow the event. The reason for this is the public interest in the testamentary disposition of property. This reasoning was upheld more recently by the Supreme Court in *Elliot v Stamp* [2008] IESC 10.

<sup>85</sup> [1977] IR 55.

acceptable. While some commentators have expressed concern that section 117(6), as it is currently constituted, does not strike the right balance between the interests of potential claimants and the need for certainty in the administration of estates, this decision of the Supreme Court may allay some of these concerns.

- 4.61 Some of the submissions received in response to the Issues Paper have suggested that section 117 should be amended to provide for a fixed 12 month time limit, rather than the current fixed 6 month limit. Arguably, this would reduce some of the hardship for potential applicants. If section 117 provided for a more forgiving length of time, such as 12 months, it might reduce the likelihood that applicants are disadvantaged by their own delay, or lack of awareness of their rights. A longer time would permit potential claimants to discover their entitlements if they had a greater opportunity to seek out legal advice. If the current short time limit causes hardship then, as some submissions argued, it should be extended to provide greater access to the remedy provided by section 117.
- 4.62 However, providing for a longer, but unextendable, time limit would not address some of the criticism of the current limit, namely that it is too inflexible to respond to the circumstances of a particular case. Such an amendment would also have the result of delaying the distribution of almost every estate. The problem identified in many of the submissions is that some vulnerable persons, such as minors and those with capacity issues would be unaware of their rights. A slightly longer time limit might mean some of these potential applicants would be able to bring claims that would otherwise have been excluded. However, the Commission is of the view that the majority of those potential applicants who, because of incapacity, are unaware of their rights 6 months from the date of the grant of representation would similarly be unaware of those rights after 12 months. A longer but unextendable time limit therefore would do little to address the concerns raised, while lengthening the probate process for many.
- 4.63 The Commission acknowledges that this is a departure from the Commission's conclusion in the 1989 Report, which recommended that the (then) 12 month limit should be maintained. Although 6 months is a relatively short period of time, this is to be measured from the date of the grant of probate, as clarified by Recommendation 11 above. Because of the "executor's year", the 6 month time limit from the grant of probate could be 18 months from the date of death.<sup>86</sup> The Commission considers that this is ample time for most potential applicants to fully inform themselves of their legal entitlements. Furthermore, while there would have been good reason for a longer time limit in 1989, speed of communication has increased considerably since that time. As a result of the rapid advancement of information technology, it is now much quicker and easier for a potential applicant to receive notification of the death of a relative or discover their legal entitlements. This technological development has made many aspects of life quicker and more convenient and the Commission considers that it may also permit the speedier distribution of the estate than was the case in 1989.

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The Commission understands that it typically takes between 9 and 12 months

- 4.64 The Commission therefore recommends that section 117 should not be amended to allow for a greater amount of time within which to make a claim. The amount of time should remain 6 months from the date of the grant of representation, as recommended above in this Chapter. This will reduce the possibility that the short time limits will cause injustice if a party does not bring a claim soon enough. The time limit of 6 months strikes the right balance between allowing sufficient time within which to bring an application and the importance of the speedy administration of the estate.
- 4.65 **The Commission recommends that section 117 of the *Succession Act 1965* should continue to provide that an order shall not be made except on an application made within 6 months of the date of the first taking out of representation of the deceased's estate.**

## 7. Conclusions and recommendation that there should not be a judicial discretion to extend the time limit

- 4.66 Although the Commission has not recommended a longer default time limit, a related but separate question must be considered as to whether the time limit should be fixed or allow for an extension in the interests of justice. The strictness of the time limit could, arguably, cause injustice where potential applicants, through no fault of their own, are unaware of their entitlements.
- 4.67 The problem of the trade-off between certainty and flexibility is familiar to the law. It is a feature of almost all rules that their strict application might appear to cause unfairness in certain sympathetic cases. Nonetheless, there is also a public interest in the certainty and predictability of the law. The decision to be made as to whether a particular rule should be rigid or flexible depends on the specific case and whether greater mischief would be caused by uncertainty, than would be averted by the flexible and sympathetic application of the law.
- 4.68 As noted above, constitutional issues are engaged in striking the balance between certainty and flexibility. A judicial discretion to extend time in the interest of justice would allow the courts even greater scope to strike the correct balance between these aims, on the facts of each particular case. This would arguably ensure greater protection of claimants from an unjust attack on their right to litigate, while at the same time taking account of the interests of the personal representatives and beneficiaries in the speedy administration of the estate. Without a discretion to extend time some parties may not realise they are entitled to make an application, for example where the applicant is a minor or their capacity is in question.
- 4.69 Some of the submissions in response to the Issues Paper argued that a judicial discretion to extend the time within which to bring a claim is more likely to strike the right balance between the competing constitutional rights of the parties involved. Against this however, as noted above the Supreme Court has upheld the constitutionality of time

limits where there is no right of extension, even where minors are involved. Such time limits can be justified by the importance of the speedy administration of estates.<sup>87</sup>

- 4.70 If there were a discretion to extend the time limit, hardship to potential applicants might arise less frequently. Many submissions raised the specific examples of minors and those whose capacity is in question who may not be provided for if they are unaware of their right to apply. Some submissions also argued that the extension of time should only be possible where the applicant is a minor or a person whose capacity is in question.
- 4.71 One of the submissions argued that because of the social nature of family provision legislation, strict time limits are less appropriate than they may be in other areas of law. Strict adherence to time limits should not frustrate the purpose of family provision legislation, which is to ensure that family members are provided for. Arguably it is incongruous that section 117, which currently grants the courts wide discretion to remedy perceived injustices, nonetheless places rigid restrictions on potential claimants' access to the remedy provided.
- 4.72 However, while there are advantages to allowing the courts to extend time, there are also considerable disadvantages, which some of the submissions observed. Currently, once the fixed time limit has elapsed, personal representatives may proceed with the distribution of the estate. However, where there is a possible extension of time, personal representatives may be reluctant to do this, in case a claim against the estate subsequently arises. Of course, this could have the effect of needlessly delaying distribution of the estate, thus preventing or delaying the beneficiaries from receiving their inheritance. In England and Wales where, as noted above, the courts have an unfettered discretion to extend time, the relevant legislation addresses this difficulty. The *Inheritance (Provision for Family and Dependents) Act 1975* provides protection from liability for personal representatives, where, no application having been made, they distribute the estate after the expiration of the default time limit. This creates another difficulty however, as distributing the estate to the potential beneficiaries might defeat the claims of potential applicants. Again, this issue is addressed in England and Wales. The legislation further provides that, where a claim is successful the courts may have recourse to redistribute the estate in favour of the successful applicant. Some of the submissions that recommended a possible extension of time also commended this approach to the Commission. As noted above, the Commission also recommended this approach in its 1989 Report.<sup>88</sup>
- 4.73 The difficulty with this approach is that it creates uncertainty for beneficiaries. This could create a "chilling effect", preventing the full enjoyment of inheritance by beneficiaries because of the possibility that they may later have to return their entitlement. Beneficiaries may be reluctant to spend or invest the money they inherit out of concern that there is still the residual risk of a claim under section 117 years after the deceased's death. This uncertainty could potentially apply to a large number of estates. Furthermore,

<sup>87</sup>

*Moynihan v Greensmyth* [1977] IR 55.

<sup>88</sup>

*Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989).

because the result of a section 117 claim is heavily dependent on the facts of each case, the outcome can be hard to predict. In addition, ordering a beneficiary to repay their inheritance could cause financial hardship, although in England and Wales this is something that the courts consider in deciding whether to make such an order. Similarly, as one of the submissions highlighted, section 117 claims can be quite divisive for families. If the court was given power to disturb distributions already made this could add another dimension to an already emotive dispute.

- 4.74 While the flexible time limit might be attractive because of the greater protection it provides for potential claimants, it was evident from some of the submissions that it would also create significant difficulties. It was also clear from some of the submissions that there was no perfect solution to this problem. The rigidity of the current time limit has some disadvantages but so too did all of the proposed alternatives. The recommendations in this area necessarily involved a trade-off between certainty, predictability and the efficient administration of estates on the one hand; and flexibility, and enforcement of obligations on the other. On balance, the Commission is of the view that allowing the courts greater flexibility would sacrifice too much in the way of certainty and efficiency in the administration of estates.
- 4.75 In acknowledgement of these difficulties some submissions suggested that the judicial discretion to extend time should be restricted only to needy applicants or that there should be a maximum time limit. The Commission is of the view however that this approach would suffer from many of the difficulties present in the broad discretion to extend, although it might reduce the magnitude of the difficulties. It may not be clear in advance of proceedings, for example, whether a particular applicant lacks capacity. If the exception was restrictive enough to provide certainty, then it may not capture all cases of potential injustices that would justify the exception. On the other hand if the exception was broad enough to allow the courts considerable discretion in sympathetic cases it would lead to much greater uncertainty.
- 4.76 Therefore, in light of the above analysis, the Commission is of the view that the advantages associated with providing for judicial discretion to extend the time limit would be outweighed by the disadvantages of uncertainty over the administration of estates.
- 4.77 The Commission acknowledges that this involves a different approach to the analysis in the 1989 Report, in which the Commission had argued that fixed time limits were a result of excessive emphasis on certainty at the expense of the interests of potential claimants. However the Commission now considers that that position understates the importance of certainty and efficiency in the administration of estates. An open-ended discretion to extend time would sacrifice too much certainty for many estates, in the interest of providing greater protection for a narrow class of potential applicants. The Commission accepts that this may cause hardship in individual cases, but on balance the Commission is of the view that uncertainty over inheritance would give rise to greater hardship overall.

- 4.78 In light of these considerations, the Commission recommends that there should not be a discretion to amend the time within which to bring an application under section 117.
- 4.79 **The Commission recommends that section 117 of the *Succession Act 1965* should not be amended to provide for a judicial discretion to extend the time limit within which an application may be made.**

## C. Retaining the position that claimants need not be notified of section 117

- 4.80 Related to the limitation period in section 117 of the *Succession Act 1965* is whether a duty should be imposed on the personal representative of the estate of a deceased person to notify potential claimants of their right to make an application under section 117. Currently section 117 does not impose such an obligation on personal representatives.

### 1. Notice procedure concerning spouses under section 115 of 1965 Act

- 4.81 Arguably, the procedure for notifying spouses of their right of election over the legal right share under section 115(4) of the *Succession Act 1965* may be regarded as relevant to the question as to whether any similar duty is to be extended to section 117 cases.<sup>89</sup> Section 115(4) imposes a mandatory duty on personal representatives to notify the surviving spouse of their right of election over the legal right share. Under section 115, where the surviving spouse has been provided for in the will of the testator, he or she must exercise the right of election within 6 months of the notification or within 12 months of the taking out of the grant of probate, whichever is later. In default of election the surviving spouse will receive his or her entitlement under the will or, in the case of partial intestacy, their entitlement under the will and the rules of intestacy.

### 2. No current duty to notify potential claimants under section 117

- 4.82 At present, personal representatives are not obliged to notify the children of the deceased of their right to make an application under section 117. This was confirmed by the High Court (Quirke J) in *Rojack v Taylor*.<sup>90</sup> The Court noted that "the duty of a solicitor who has been retained to advise the personal representative of a deceased person is to advise and assist the personal representative in the due and proper administration of the estate in accordance with the directions contained within the testator's will."<sup>91</sup> The Court

<sup>89</sup> A similar duty is also provided for under section 56 of the *Succession Act 1965* regarding the right to appropriate the dwelling house.

<sup>90</sup> [2005] IEHC 28, [2005] 1 IR 416. The defendants were retained by the plaintiff to act on her behalf in her capacity as personal representative of her late mother in the administration of her estate. The plaintiff argued that the defendants also owed her a duty in her capacity as a potential beneficiary, which included a duty to advise the plaintiff to seek independent legal advice so that she could pursue any claim she may have under section 117 of the 1965 Act.

<sup>91</sup> *Ibid* at 426.



observed that there is no duty imposed, by legislation or otherwise, which requires the personal representative, or by extension a solicitor retained to advise them on the administration of the estate, to notify potential claimants of their right to make an application under section 117. The Court cited with approval the comments of Spierin who noted that:

“[it] has even been suggested that it might be unwise for a personal representative to give such notice ... it is argued that he would be imprudent (particularly if he was a professional executor), to do anything by way of notifying the child, or otherwise, which would encourage or instigate proceedings under s. 117. The bringing of such an application would to some extent frustrate the directions contained in a will, and would prejudice beneficiaries thereunder to whom the executor would be accountable.”<sup>92</sup>

- 4.83 The Court also considered whether there was a more limited duty to advise potential claimants to seek legal advice without referring to the potential for a claim under section 117. The Court, however, referred to the practical problems with this approach, recommending legal advice to a child of the deceased would inevitably lead to follow-up questions about why they should seek legal advice. The Court held that there was no duty on the solicitor retained by the personal representatives to notify the potential claimant that they should seek independent legal advice, unless the potential claimant directly enquired as to possibility of a claim under section 117. In such circumstances the solicitor would owe a duty to the estate, and possibly a duty to the claimant, to advise them that they should seek independent legal advice.
- 4.84 The Court also held that whether the potential claimant was also the executor of the will was immaterial to the issue of whether they should be notified of the right to challenge the will. There is no reason to treat potential beneficiaries differently depending on whether they also happen to be the executor. Where the solicitor is retained to advise them as to the administration of the estate, it could conflict with their duties to advise the administrator in their capacity as a beneficiary. The courts have acknowledged this potential for conflict where the executor purports to make a claim against the estate. A conflict of interest would arise where one person attempted to both prosecute and defend a set of proceedings under section 117.<sup>93</sup> If the executor intends to take a claim under section 117 they should not seek to extract a grant of probate, or, if they have already extracted a grant they should renounce it.
- 4.85 In its 1989 *Report on Land Law and Conveyancing Law: General Proposals*,<sup>94</sup> the Commission noted that one of the submissions received suggested that, given that the

<sup>92</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 3rd ed (Butterworths, 2003) paragraph 744. The 4th edition of the text, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Butterworths, 2011), refers to the decision in *Rojack v Taylor* [2005] IEHC 28, [2005] 1 IR 416 and observes that it strengthens the view that it would be negligent to notify a child of its ability to bring a claim.

<sup>93</sup> *McHugh v McHugh* [2012] IEHC 75.

<sup>94</sup> Law Reform Commission, *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), at 22.

class of persons who may apply under section 117 is a narrow and ascertainable one, the personal representative should perhaps be under a duty to notify adult children (or parents or guardians of infants) of their right to apply. The Commission observed that “such an obligation could place an unfair burden on personal representatives in that it could require them to make enquiries of the known next-of-kin as to the possible existence of others.” The Commission did not adopt the proposal, noting that a personal representative is most likely to publish a notice under section 49 of the *Succession Act 1965* addressed to creditors and other claimants.<sup>95</sup>

- 4.86 As noted above, Section 115 of the 1965 Act also imposes an obligation on personal representatives to notify the spouse or civil partner of a deceased person in writing of the right of election<sup>96</sup> over the legal right share. It could be argued that this provision gives rise to similar conflicts as the proposed obligation to notify potential applicants under section 117. However it could also be argued that such conflicts do not arise for the legal right share as it is a presumptive entitlement of surviving spouses rather than a contentious application against the estate.
- 4.87 Similarly, some legislative provisions that are similar to section 117 require the personal representatives of the deceased to notify certain persons of the fact of the deceased’s death. These sections do not, however, require the personal representative to inform potential applicants of any right to claim against the estate. Section 18 of the *Family Law (Divorce) Act 1996* confers a financial provision remedy similar to section 117 on a former spouse following the grant of a decree of divorce. In his commentary on the *Succession Act 1965*, Spierin notes<sup>97</sup> that section 18(6) of the 1996 Act imposes an obligation on personal representatives to “make a reasonable attempt to ensure that notice of [the] death is brought to the attention of the other spouse concerned.” A similar duty is imposed on personal representatives by section 15A of the *Family Law Act 1995* which

<sup>95</sup> Section 49 of the *Succession Act 1965* provides protection to personal representatives who are not personally liable to a creditor or other persons with a claim against the estate in relation to assets that they have distributed if they have given notice under section 49(1) and at the time of distribution, they did not have notice of the claim. Section 49(1) stipulates that where personal representatives have “given such notices to creditors and others to send in their claims against the estate of the deceased as, in the opinion of the court in which the personal representatives are sought to be charged, would have been given by the court in an administration suit, the personal representatives shall, at the expiration of the time named in the said notices...be at liberty to distribute the assets of the deceased...having regard to the claims of which the personal representatives have then notice.”

<sup>96</sup> Section 111 of the *Succession Act 1965* entitles a spouse to a share in the estate of their deceased spouse, commonly known as the legal right share. Section 111A of the 1965 Act entitles civil partners to a share in the estate of their deceased civil partner. Where, under the will of a person who dies wholly testate (that is, all of their property is dealt with under the terms of their will), there is a devise or bequest to the spouse or civil partner, section 115(1)(a) permits the spouse or civil partner to elect to take either that devise or bequest, or their legal right share. Similarly, where a person dies partly testate and partly intestate (that is, the terms of the will does not cover all of the property), section 115(2)(a) provides that their spouse or civil partner may elect to take either their legal right share, or their share under the intestacy together with any devise or bequest to them under the will of the deceased. Section 115(4) imposes an obligation on personal representatives to notify the spouse or civil partner in writing of the right of election conferred by the section.

<sup>97</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011) paragraph 837. The common origins of section 117 of the 1965 Act and those for family provision in the 1996 Act (and the *Family Law Act 1995*) have also been noted in the Report, above.

provides a similar remedy for spouses following the grant of a decree of judicial separation.<sup>98</sup> Section 127 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, which provides for applications for provision out of the estate of a deceased civil partner, imposes a similar duty.

- 4.88 Apart from section 117, most other provisions that provide similar remedies require personal representatives to notify potential applicants of the fact of death. Other than section 117 itself, another notable exception to the rule that potential claimants are informed of the death is Section 194 of the 2010 Act. Under Section 194, a qualifying cohabitant may apply for provision from the estate of a deceased cohabitant. Section 194 does not impose any obligation on personal representatives to notify potential applicants of the fact of death. Arguably, there is no obligation provided for in section 194 because potential applicants would be cohabitants or former cohabitants. An obligation to notify cohabitants would require a detailed factual inquiry and would be more difficult to establish with certainty because the relationship is necessarily not formally constituted. Another exception is section 67A of the *Succession Act 1965*, which provides for applications on behalf of the children of a civil partner or partners who died intestate. As with section 117 of the 1965 Act, section 194 of the 2010 Act does not provide for an obligation to notify potential claimants of the fact of death. Again, it is arguably more onerous to notify children of the deceased than spouses because of potential uncertainties around paternity or children of whom the deceased was unaware.

### 3. Notifying potential claimants in other jurisdictions

#### England and Wales

- 4.89 The Law Commission of England and Wales in its 1974 *Second Report on Family Property: Family Provision on Death* considered the question whether a provision should be introduced to ensure that all persons who might be applicants under the proposed family provision legislation should be notified of their right to apply.<sup>99</sup> The Commission noted that a number of consultees opposed the idea “on the ground that it would be impracticable and might lead to delay in the winding up of estates; and it was thought that the provision allowing an extension of time for applications gave sufficient protection.”<sup>100</sup> Furthermore the Commission raised doubts about the enforcement of such a provision, arguing that it would be unjust to place an additional burden on personal representatives if there was a penalty for the breach of any duty to notify. On that basis, the Law Commission of England and Wales concluded that it was not in favour of imposing the duty.
- 4.90 The legislation discussed by the Law Commission of England and Wales (the 1938 Act, since replaced by the 1975 Act) differs from section 117 of the *Succession Act 1965* in that

<sup>98</sup> See section 15A(6) of the 1996 Act, discussed above.

<sup>99</sup> See Law Commission of England and Wales, *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974).

<sup>100</sup> *Ibid* paragraph 145.

the range of potential applicants is considerably broader. Whereas section 117 deals only with claims by the children of the deceased, the English 1975 Act provides for claims for family provision not only by the children of the deceased but also by the spouse, civil partner, former spouse, former civil partner, cohabitant and child of the deceased as well as certain others who are treated as the deceased's child or are being maintained by the deceased. Therefore, arguably, any obligation to notify potential claimants under the English legislation would be far more burdensome on the personal representatives than an obligation imposed under the *Succession Act 1965*.

### New Zealand

- 4.91 Section 4 of the New Zealand *Family Protection Act 1955* provides for a right of children to claim against their deceased parents for maintenance. Regarding a claimant's entitlement to be notified about this right, section 4(4) of the 1955 Act provides:

"An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the court for advice or directions as to whether he ought so to apply; and, in the latter case, the court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation."

- 4.92 This is a limited statutory exception to the general practice and does not apply to adult beneficiaries who have decision-making capacity.<sup>101</sup> Although expressed in discretionary terms the New Zealand High Court held in *Re Magson*<sup>102</sup> that the courts have interpreted this provision as an obligation. On appeal, the New Zealand Court of Appeal held that it did not necessarily impose a duty on the administrator to apply but that in a clear case such a duty was likely to arise. One commentator has suggested that section 4(4) of the 1955 Act imposes a duty on an administrator to consider whether or not to make an application.<sup>103</sup>
- 4.93 The 1955 Act does not provide any guidance as to the duties of personal representatives to notify potential claimants of their claims, so there is no explicit statutory basis for such a duty. However, if a claim is brought under the 1955 Act, Rule 451 of the *Rules of the New Zealand High Court* requires the applicant to disclose to the High Court the details of any other affected parties, to enable the court to determine the most effective means to adequately represent those persons' interests.<sup>104</sup>
- 4.94 While there is no general statutory duty on administrators to notify adult children of the possibility of a claim under the 1955 Act, the courts have recognised that personal representatives have a duty to notify potential applicants in certain specific

<sup>101</sup> *Sadler v Public Trust* [2006] FRNZ 115, paragraph 35.

<sup>102</sup> [1983] NZLR 592.

<sup>103</sup> Patterson, *The Law of Family Protection and of Testamentary Promises in New Zealand* (2nd ed, 1994), at 94.

<sup>104</sup> *Judicature Act 1908*, schedule 2, Rule 451(2).

circumstances. In *Irvine v Public Trustee*,<sup>105</sup> The New Zealand Court of Appeal held that a personal representative's duty to be even-handed between all beneficiaries also extends to all persons entitled or potentially entitled under the 1955 Act, of whose claims the personal representative is aware. It was not necessary to decide the case for the court to consider whether this duty extended to persons of whom the personal representative ought to be aware.

- 4.95 In *Re MacKenzie*,<sup>106</sup> the New Zealand High Court held that the formal initiation of proceedings was a prerequisite for the duty set out in *Irvine* to take effect. The Court also held that enquiries were sufficient for the personal representative to be aware of the potential claims. The Court concluded that there was a breach of fiduciary duty in the case, because the executrix (and sole beneficiary under the will) had actively misled the plaintiffs as to the size of the estate.
- 4.96 In *Re Stewart*,<sup>107</sup> the testator was specifically prohibited from contacting named potential claimants or informing them of his death. The New Zealand High Court held that the duty to act even-handedly and to "not thwart" claims against the estate was fiduciary in nature.<sup>108</sup> Accordingly if a personal representative was aware of potential beneficiaries, he or she might breach this duty if these potential beneficiaries were not advised of a right to claim under the 1955 Act. The Court considered that, ideally, the law should impose a positive obligation on the personal representatives of the deceased to notify all potential claimants.<sup>109</sup> Despite this, the Court reluctantly concluded that the law imposed only a duty not to conceal facts that would enable known potential claimants to make a claim.<sup>110</sup> In reaching this conclusion the Court also had regard to the fact that the 1955 Act had made provision for persons of insufficient capacity to bring their own claim,<sup>111</sup> but this did not extend to all adult children. On appeal, the New Zealand Court of Appeal did not address the issue of whether such a duty was fiduciary in nature but held that if there was a breach of fiduciary duty then the proper course of action was for the claimants under the 1955 Act to bring a claim against the executors personally.<sup>112</sup> The Court of Appeal also left open the question as to whether the duty of even-handedness included a general duty to advertise death or advise all potential claimants.<sup>113</sup>
- 4.97 In *Sadler v Public Trust*,<sup>114</sup> the New Zealand High Court held that although the duty had been described as an obligation to refrain from impeding potential claimants, the manner in which the courts had considered that the duty could be discharged contained some positive obligations. These obligations included the duty to notify potential claimants of

<sup>105</sup> [1988] NZLR 67.

<sup>106</sup> [1998] 16 FRNZ 487.

<sup>107</sup> [2002] NZLR 809.

<sup>108</sup> *Ibid* at 824.

<sup>109</sup> Or, alternatively, a proscription against distributing the estate if the personal representatives knew of any potential claims, which in practice Laurensen J concluded would amount to the same thing.

<sup>110</sup> [2002] NZLR 809, at 823, 824.

<sup>111</sup> *Re Stewart* [2002] NZLR 809, at 824.

<sup>112</sup> *Price v Smith* [2004] NZFLR 329, at 334.

<sup>113</sup> *Ibid*.

<sup>114</sup> [2006] FRNZ 115.

their rights, or at a minimum the fact of the death of the testator. The Court preferred to state the duty in a negative sense, that is, that there is a prohibition on concealing facts that might enable a claim to be brought. On this analysis failure to take active steps to draw attention to an adult child's rights to take a claim, for example the fact of the deceased's death, could not amount to a breach of the duty of even-handedness. On the other hand, if a potential claimant made inquiries, it would be a breach of this duty for the personal representatives to conceal facts that would enable them to bring a claim. The Court also went on to conclude that the duty of even-handedness did not include a general fiduciary duty owed by personal representatives to potential claimants.

4.98 In reaching this conclusion, the Court was also mindful of the potential burdens that a positive duty to act would place on personal representatives. Logically, any duty would apply to all claimants under the 1955 Act.<sup>115</sup> The 1955 Act potentially provides for claims by: spouses and civil partners,<sup>116</sup> *de facto* partners (cohabitants),<sup>117</sup> grandchildren,<sup>118</sup> stepchildren who are maintained,<sup>119</sup> and parents of the deceased.<sup>120</sup> The Court was of the opinion that if such an onerous burden was to be placed on personal representatives, Parliament would have specifically provided for it.<sup>121</sup>

4.99 On appeal, the Court of Appeal in *Sadler v Public Trust*<sup>122</sup> summarised the position in New Zealand as follows:

"(a) A duty of even-handedness extends to potential claimants against an estate where an executor is aware that they wish to make a claim.

(b) This duty extends to ensuring that an executor does not actively and dishonestly conceal relevant material about the estate from potential claimants who seek information about the estate.

(c) We leave open the question of whether the duty of even-handedness may extend to those of whose claim the executor ought to be aware. We also leave open whether any duty of even-handedness to such potential claimants would extend to a duty to inform those potential claimants of the fact of death.

(d) There is no general duty on an executor to advertise the fact of death or to inform all potential claimants of the fact of death. This applies even where there may be a suspicion (but not sufficient to bring the potential claimant within category... (c) above) that a particular potential claimant

<sup>115</sup> *Sadler v Public Trust* [2006] FRNZ 115 at paragraph 66.

<sup>116</sup> Section 3(1)(a) of *The Family Protection Act 1955*.

<sup>117</sup> Section 3(1)(aa) of *The Family Protection Act 1955*.

<sup>118</sup> Section 3(1)(c) of *The Family Protection Act 1955*.

<sup>119</sup> Section 3(1)(d) of *The Family Protection Act 1955*.

<sup>120</sup> Sections 3(1)(e), 3(1A) of *The Family Protection Act 1955*.

<sup>121</sup> The policy reasons for this position were explained in the subsequent case of *Public Trust v Public Trust* [2009] BCL 285 the High Court (Priestly J) held that to notify all such claimants would cause unnecessary delay and expense and that notification would encourage people to take cases and to "have a crack at the estate" even if there was little chance of success.

<sup>122</sup> [2009] NZFLR 937.



may wish to make a claim. This means that the question left open by this Court in *Price v Smith*... has now been answered in the negative.”<sup>123</sup>

- 4.100 The draft Bill appended to the New Zealand Law Commission’s 1997 *Report on Succession Law*<sup>124</sup> contained a consolidation, without amendment, of the duties in section 4(4) of the *Family Protection Act 1955*.

#### Australia

- 4.101 In *Carstrom v Boesen*,<sup>125</sup> the Supreme Court of New South Wales provided the following guidance on what personal representatives should do if there are potential family provision applications:

“The Court has often said to executors that they must distribute estates early, but there does need to be considerable discretion when there is a likelihood of a claim being made under the Family Provision Act. It would seem to me to be wise practice, in circumstances such as the present, to indicate to possible claimers by letter - especially when they do not live in the area covered by the newspaper in which the ad is being placed - that they should either, within the next X days, notify that they will be making a claim or, alternatively, there will be a distribution.”

- 4.102 The Court emphasised the desirability of quick distribution of estates, and merely indicated that it would be good practice to notify potential claimants rather than imposing a positive obligation on personal representatives.
- 4.103 The subsequently enacted New South Wales *Succession Act 2006*, as noted above, provides protection for personal representatives who did not have notice of a family provision application at the time of distribution. Under section 93 of the 2006 Act; the estate may be distributed once the personal representatives have provided adequate notice under the legislation prescribing the form of such notice,<sup>126</sup> the time limit in the notice has expired and they do not have any notice of any application or intended application for family provision.
- 4.104 In *Underwood v Gaudron*,<sup>127</sup> the Supreme Court of New South Wales considered the timely notification of potential claimants for family provision. While the Court noted that the personal representatives had strictly complied with the requirements of section 93 of the 2006 Act the Court also noted that the comments in *Carstrom v Boesen* provided useful guidance.

<sup>123</sup> *Sadler v Public Trust* [2009] NZFLR 937, at 946.

<sup>124</sup> New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (1997).

<sup>125</sup> [2004] NSWSC 1109.

<sup>126</sup> Section 17 of the New South Wales *Civil Procedure Act 2005*.

<sup>127</sup> [2014] NSWSC 1055.

#### 4. Conclusions and recommendation that there should not be a duty to notify potential claimants

- 4.105 The responses to the Issues Paper were divided on the issue of whether the personal representative of the deceased ought to notify the potential claimants of their entitlements under section 117. Acknowledging that there were advantages and disadvantages to either approach some of the respondents argued that an extension of time was preferable to providing a duty to notify while others reached the opposite conclusion. Many of the submissions that recommended an obligation to notify potential claimants argued that this was an alternative solution to the problems arising from the strict time limit. Some of the submissions, while arguing that personal representatives should not be obliged to notify potential claimants of their entitlements under section 117, nonetheless argued that they be obliged to notify potential claimants of the fact of the death of their parent.
- 4.106 Although it is sometimes argued that requiring personal representatives to notify potential claimants would cause excessive litigation, arguably this misses the point. In this Report the Commission has endeavoured to analyse the merits of a continued right of a child to apply for provision out of the estate of their parent. In the above recommendations the Commission has considered the burden that litigation places on estates, personal representatives and families. The Commission has made recommendations on the basis that the burden imposed by those recommendations is justified in the interest of providing for children. If the entitlement to apply is justified, then it is desirable that members of the public are aware of this entitlement.
- 4.107 The Commission, therefore, agrees that it would be desirable if potential claimants were aware of their right to apply for provision out of their parent's estate. However, it does not necessarily follow that personal representatives specifically should be obliged to notify them of their right to apply. Many of the submissions in response to the Issues Paper expressed concern that this would give rise to potential problems.
- 4.108 The first potential problem is the burden that it would place on personal representatives. If such a duty was imposed, personal representatives may have to take reasonable steps to locate all children of the deceased, assess whether or not they should make a claim and notify them of their entitlements. Often it is clear how many children someone had, but in some cases it may be more difficult to locate all the children of the deceased. As a result, such a duty may be unduly burdensome on personal representatives and unnecessarily delay the administration of the estate.
- 4.109 The second potential problem is conflicts of interest. A duty to notify potential claimants would impose conflicting obligations on personal representatives. As noted in the High Court decision in *Rojack v Taylor*,<sup>128</sup> an obligation to notify potential claimants would be inconsistent with their existing obligations to administer the estate faithfully in accordance with the wishes of the testator or the rules of intestacy. If personal

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<sup>128</sup>

[2005] IEHC 28, [2005] 1 IR 416.

representatives were obliged to consider the personal circumstances of each potential beneficiary to assess whether they may have a claim and, accordingly, inform them of their right to apply, this could result in conflicts of interest. In these circumstances a personal representative fulfilling their duty to the estate would be directly contrary to the interests of the child who wishes to challenge the will. Conversely, where a personal representative had diligently discharged their obligations to the potential claimant under section 117, this would be directly contrary to the interests of the established beneficiaries. This would result in personal representatives being placed in the unenviable position of deciding which of their duties to fail to discharge.

- 4.110 Third, these conflicting obligations could give rise to the perception that personal representatives were acting in breach of their obligations. This would be damaging to personal representatives even where such a perception is unfounded. This would be damaging for the vast majority of personal representatives who discharge their obligations diligently and honestly. The appearance of conflict could undermine public trust or confidence in executors and administrators. This could interfere with the effective administration of estates if there was an erosion of public trust in personal representatives. The difficult job of personal representatives, and that of solicitors advising them, would be made more difficult if they were discouraged from acting in the best interests of the estate for fear that it might be perceived as favouring some other interest.
- 4.111 Acknowledging the potential difficulties, many of the respondents who argued in favour of a duty to notify potential claimants recommended a very limited duty to restrict the scope for conflicting obligations. Some of the respondents suggested that there should only be an obligation to notify minors and those whose capacity is in question, because they are the most vulnerable to potential injustices arising from the short time limits. However, such an obligation would only reduce the prevalence of conflicts rather than preventing them entirely. In addition, it would impose an even more onerous burden on personal representatives to determine the age or capacity of a potential claimant under section 117. This problem would be compounded by the requirement on personal representatives to determine whether they were required to notify a particular applicant of their rights in conflict with their duties as a personal representative.
- 4.112 Another suggestion made in the submissions was that, if the Commission recommends a duty to notify potential claimants, the notification should be made in a stereotyped format with the language of the notice prescribed by statute. The benefit of this approach, it was argued, was that it would not result in dilemmas for personal representatives because the duty would be straightforward and readily complied with. However this solution does not avoid the issue that personal representatives would still be burdened with locating all children of the deceased. Many of the above problems may still arise. Personal representatives may still have decisions to make regarding the notification, for example: how soon to send the notification or what course of action to take if the personal representative was concerned that the notification might not have been received by the intended recipient. Such problems would result in the personal

representative having to make decisions, the result of which could prefer the interests of potential beneficiaries over those of the estate. On the other hand if the duty is couched in such a way that avoids these problems, merely requiring the mechanical sending of a form, then the obligation to notify the potential beneficiaries may be ineffectual at solving the problem.

- 4.113 As referred to above, arguably many of these objections could be raised against the duty of the personal representatives to notify the surviving spouse under section 115 of the 1965 Act. However, the legal right share is different. The default position is that the spouse is entitled to their legal right share save where it is renounced<sup>129</sup> or disclaimed.<sup>130</sup> A testator may not fail to provide for his or her spouse without their assent. It is therefore, in furtherance of a testator's obligation to the estate, rather than in conflict with it, that they must notify the surviving spouse of their right of election. Often the estate may not be distributed until the spouse has made their election. Furthermore, the deceased's personal representatives could not contest the clear entitlement of a surviving spouse to their legal right share. Under section 117, on the other hand, a personal representative would have to make a decision as to whether to settle a claim under section 117, or alternatively, contest it in court. A personal representative may, on legal advice, take the view that a claim under section 117 is unfounded as the testator has fulfilled his or her obligations to his or her children. Arguably, imposing a duty on the personal representatives places conflicting pressures on them in reaching such decisions, which may impair their ability to discharge their primary obligation to the estate.
- 4.114 The issues of time limits and duties are, to a certain extent, interrelated as they are both proposed solutions to the problem of vulnerable people being unaware of their entitlements. As noted above, some of the submissions expressed the view that one or the other of these options should be recommended in order to protect minors or those lacking capacity. Nonetheless, the Commission is of the view that, on balance, the disadvantages of both proposed solutions outweigh the advantages.
- 4.115 The Commission considers that providing for a duty of personal representatives of the deceased to notify potential claimants of their entitlements under section 117 would impose too onerous a burden on personal representatives to comply with potentially inconsistent and conflicting duties. The Commission has also considered more limited obligations to notify potential claimants of their entitlements but these proposals result in similar difficulties.
- 4.116 **The Commission recommends that section 117 of the *Succession Act 1965* should not be amended to impose a duty on personal representatives of a deceased person to notify potential claimants of their right to make an application under section 117.**

<sup>129</sup> Section 113 of the *Succession Act 1965*.

<sup>130</sup> *O'Dwyer v Keegan* [1997] 2 ILRM 401.

- 4.117 The Commission also invited submissions on the issue of whether a duty should be imposed on personal representatives of the estate of the deceased to notify potential beneficiaries of the fact of death. As noted above, such a duty exists in some claims against the estate of the deceased such as those by the former spouse of the deceased, but not others such as section 117. Other examples of claims against the estate of the deceased that do not require personal representatives to notify potential claimants of the death of the deceased are section 67A of the *Succession Act 1965* and claims by cohabitants under section 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. Arguably the determining factor in whether or not the provision contains an obligation to notify potential claimants of the fact of death is the burden it would place on personal representatives.
- 4.118 It is not unduly onerous to impose a burden on personal representatives to notify spouses or former spouses of the deceased's death. This is because of the legal formalities associated with marriage and divorce and the fact that marriage is necessarily a relationship between two persons. These practical limitations reduce the difficulty of complying with the obligation. Cohabitants or children, on the other hand, are less easy to identify conclusively. A duty to notify such persons of the fact of death give rise to difficult decisions to be made by personal representatives in assessing whether someone falls within the scope of the obligation. This burden could give rise to some of the problems of conflicting obligations as identified above.
- 4.119 **The Commission recommends that section 117 of the *Succession Act 1965* should not be amended to impose a duty on personal representatives of a deceased person to notify potential claimants under section 117 of the death of their parent.**

## CHAPTER 5

### SUMMARY OF RECOMMENDATIONS

- 5.01 The Commission recommends that, in approaching the reform of section 117 of the *Succession Act 1965*, it should have regard to the principle that a parent should be free to dispose of his or her property after death in accordance with his or her wishes provided that there is no clear breach of his or her parental obligations to a child. [paragraph 2.195]
- 5.02 The Commission recommends that, having regard to the principle that parental obligations to a child should primarily be concerned with the circumstances of the child rather than any entitlement to inherit, whether moral or otherwise, section 117 of the *Succession Act 1965* should be amended by the removal of the reference to “moral duty.” [paragraph 2.197]
- 5.03 The Commission recommends that section 117 of the *Succession Act 1965* should continue to provide that the court is to consider whether “proper provision” has been made by the deceased for his or her children, and that, subject to the specific matters referred to in subsequent recommendations, the factors which the court should consider when deciding cases under section 117 should not be further specified and should continue to remain for the court to determine. [paragraph 2.201]
- 5.04 The Commission recommends that, having regard to the principles that parental obligations should primarily be concerned with the circumstances of the applicant rather than a moral entitlement to inherit and that a deceased parent is presumed to be best placed to decide the most effective method of complying with his or her obligations, section 117 *Succession Act 1965* should be amended to specify that a parent is presumed to have properly provided for children aged 18 years of age or older (or 23 if in full time education) at the time of the deceased parent’s death. [paragraph 2.204]



- 5.05 The Commission recommends that in the case of applications under section 117 of the *Succession Act 1965* by children 18 years of age or older (or 23 if in full time education) at the time of death of the deceased parent, the deceased parent will be presumed to have made proper provision for the child. The presumption may only be rebutted by the establishment of one or more of the following matters:
- (a) The applicant has a particular financial need, including such need by reason of the applicants health or decision-making capacity;
  - (b) The estate contains an object of particular sentimental value to the applicant; or
  - (c) The applicant has relinquished or, as the case may be, had foregone the opportunity of remunerative activity in order to provide support or care for the testator or intestate during the testator's or the intestate's lifetime. [paragraph 2.208]
- 5.06 The Commission recommends that section 117 of the *Succession Act 1965* should be amended to provide that, in all cases where the court makes an order for proper provision, including in the cases referred to in the recommendation in paragraph 2.208, above, the court may order that such provision should be made out of the estate of the deceased parent only to the extent necessary to remedy the specific failure of duty identified in the proceedings. [paragraph 2.210]
- 5.07 The Commission recommends that, in order to achieve a suitable balance between the competing principles of fair parental obligations on the one hand and providing for the actual needs of children on the other, section 117 of the *Succession Act 1965* should continue to provide for a two-stage test subject to an amendment that specifies that:
- (a) Whether the deceased parent had failed to make proper provision for his or her child should be decided on the basis of facts that were known to the deceased parent or reasonably foreseeable to the deceased parent immediately before his or her death; and
  - (b) Where the court finds that there has been a failure to make proper provision for the child, the court should order provision to be made on the basis of facts available to the court at the time of the hearing of the case. [paragraph 2.231]
- 5.08 The Commission recommends that section 117 of the *Succession Act 1965* should be extended to include claims by children of deceased parents who die wholly intestate. [paragraph 3.52]
- 5.09 The Commission recommends that section 67A(3) to (7) of the *Succession Act 1965* should be repealed. [paragraph 3.54]
- 5.10 The Commission recommends that the court, in making provision for a child of the deceased under section 117 of the *Succession Act 1965*, shall ensure that the amount to which the surviving spouse of the deceased, who is not the parent of the applicant, is entitled shall not be less than the amount to which he or she would have been entitled as a legal right share had the deceased parent died wholly testate. [paragraph 3.67]

- 5.11 The Commission recommends that section 117 of the *Succession Act 1965* should continue to provide that the time limit runs from the date of the first taking out of representation of the deceased's estate [paragraph 4.19]
- 5.12 The Commission recommends that section 117 of the *Succession Act 1965* should be amended to clarify that the date of "first taking out of representation of the deceased's estate" should be interpreted as:
  - (a) where the deceased has died wholly or partly testate:
    - (i) the date of the first grant of probate with a valid will annexed or
    - (ii) the date of grant of administration with the valid will annexed;
  - (b) Where the deceased has died wholly intestate: the date of the first grant of administration by the person or persons entitled to take out such a grant. [paragraph 4.20]
- 5.13 The Commission recommends that section 117 of the *Succession Act 1965* should be amended to clarify that nothing prevents an application from being initiated before first taking out of representation of the deceased's estate. [paragraph 4.24]
- 5.14 The Commission recommends that section 117 of the *Succession Act 1965* should continue to provide that an order shall not be made except on an application made within 6 months of the date of the first taking out of representation of the deceased's estate. [paragraph 4.65]
- 5.15 The Commission recommends that section 117 of the *Succession Act 1965* should not be amended to provide for a judicial discretion to extend the time limit within which an application may be made. [paragraph 4.79]
- 5.16 The Commission recommends that section 117 of the *Succession Act 1965* should not be amended to impose a duty on personal representatives of a deceased person to notify potential claimants of their right to make an application under section 117. [paragraph 4.116]
- 5.17 The Commission recommends that section 117 of the *Succession Act 1965* should not be amended to impose a duty on personal representatives of a deceased person to notify potential claimants under section 117 of the death of their parent. [paragraph 4.119]

## APPENDIX A

### SECTION 117 AS AMENDED

117.—(1) 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.

- (1A) (a) An application made under this section by virtue of Part V of the Status of Children Act, 1987, shall be considered in accordance with subsection (2) irrespective of whether the testator executed his will before or after the commencement of the said Part V.
- (b) Nothing in paragraph (a) shall be construed as conferring a right to apply under this section in respect of a testator who dies before the commencement of the said Part V.<sup>1</sup>

(2) 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.

(3) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.

- (3A) An order under this section —
- (a) where the surviving civil partner is a parent of the child, shall not affect the legal right of that surviving civil partner or any devise or bequest to the civil partner or any share to which the civil partner is entitled on intestacy, or
- (b) where the surviving civil partner is not a parent of the child, shall not affect the legal right of the surviving civil partner unless the court, after consideration of all the circumstances, including the testator's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.<sup>2</sup>

(4) Rules of court shall provide for the conduct of proceedings under this section in a summary manner.

(5) The costs in the proceedings shall be at the discretion of the court.

(6) An order under this section shall not be made except on an application made within 6 months<sup>3</sup> from the first taking out of representation of the deceased's estate.

<sup>1</sup> Section 117(2A) was inserted by the *Status of Children Act 1987*.

<sup>2</sup> Section 117(3A) was inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

<sup>3</sup> The 12 month time limit in section 117(6) was reduced to 6 months by the *Family Law (Divorce) Act 1996*.

## APPENDIX B

### DRAFT SUCCESSION (AMENDMENT) BILL

#### CONTENTS

##### Section

1. Short title and commencement
2. Amendment of section 117 of the Succession Act 1965
3. Repeals

## ACTS REFERRED TO

Status of Children Act 1987 (No.26 of 1987)  
Succession Act 1965 (No.27 of 1965)

## DRAFT SUCCESSION (AMENDMENT) BILL 2017

### BILL

*entitled*

An Act to amend section 117 of the Succession Act 1965 and to provide for related matters.

**Be it enacted by the Oireachtas as follows:**

#### Short title and commencement

1. — (1) This Act may be cited as the Succession (Amendment) Act 2017.

(2) This Act comes into operation on such day or days as the Minister for Justice and Equality may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

#### ***Explanatory Note***

*Section 1* of the draft Bill is a standard section setting out the Short Title and the commencement arrangements.

#### **Amendment of section 117 of the Succession Act 1965**

2. — The Succession Act 1965 is amended by the substitution of the following section for section 117 of the Act of 1965:

##### **“Provision for children.**

##### **[New]**

**117.—**(1) Where, on application by or on behalf of a child of a testator or intestate—

(a) the court is of opinion that the testator or intestate has failed to make proper provision for the child in accordance with his or her means, whether by his or her will or otherwise,

then

(b) the court may order that such provision shall be made for the child out of the estate as the court thinks just.

(2) 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 or intestate 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.

- (3) (a) Where an application is made by a child who is 18 years of age or more (or, if the applicant is in full time education, who is 23 years of age or more) at the time of death of the testator or intestate, the court shall presume that the testator or intestate made proper provision for the child within the meaning of subsection (1)(a).
- (b) The presumption in paragraph (a) shall be capable of being rebutted only where the applicant establishes one or more than one of the following matters—
  - (i) that the applicant has a particular financial need, including such need by reasons of the applicant's health or decision-making capacity,
  - (ii) that the estate contains an object of particular sentimental value to the applicant, or
  - (iii) that the applicant relinquished or, as the case may be, had foregone the opportunity of remunerative activity in order to provide support or care for the testator or intestate during the testator's or the intestate's lifetime.
- (4) Where the court makes an order under subsection (1)(b), it shall order that such provision shall be made out of the estate of the deceased testator or, as the case may be, intestate, only to the extent required to remedy the failure to make proper provision in accordance with subsection 1(a).
- (5) (a) The court shall determine whether proper provision has been made under subsection (1)(a) on the basis of facts that were either known to the testator or intestate or were reasonably foreseeable by him or her immediately prior to his or her death.
- (b) Where the court finds that there has been a failure to make proper provision under subsection (1)(a), the court shall make provision in accordance with subsection (1)(b) on the basis of facts available to the court at the time of the hearing of the case.
- (6) (a) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the parent of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.
- (b) An order under this section shall not, in the case where the surviving spouse of the deceased is not the parent of the

child, affect the amount to which such surviving spouse would be entitled as a legal right had the deceased died wholly testate.

(7) An order under this section —

- (a) where the surviving civil partner is a parent of the child, shall not affect the legal right of that surviving civil partner or any devise or bequest to the civil partner or any share to which the civil partner is entitled on intestacy, or
- (b) where the surviving civil partner is not a parent of the child, shall not affect the legal right of the surviving civil partner unless the court, after consideration of all the circumstances, including the testator's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.

(8) (a) An application made under this section by virtue of Part V of the Status of Children Act 1987 shall be considered in accordance with subsection (2) irrespective of whether the testator executed his or her will before or after the commencement of the said Part V.

(b) Nothing in paragraph (a) shall be construed as conferring a right to apply under this section in respect of a testator who dies before the commencement of the said Part V.

(9) Rules of court shall provide for the conduct of proceedings under this section in a summary manner.

(10) The costs in the proceedings shall be at the discretion of the court.

(11) (a) Subject to paragraph (c), an order under this section shall not be made except on an application made within 6 months from the first taking out of representation of the deceased's estate.

(b) In this section 'first taking out of representation' means —

- (i) where the deceased has died wholly or partly testate, either the date of the first grant of probate with a valid will annexed or the date of grant of administration with the valid will annexed,
- (ii) where the deceased has died wholly intestate, the date of the first grant of administration by the person or persons entitled to take out such a grant.

(c) Nothing in this section shall be construed as preventing an application being made prior to the first taking out of representation of the deceased's estate.

(12) Nothing in this section shall be construed as conferring a right to apply under this section in respect of a deceased parent who died wholly intestate before the coming into force of section 2 of the Succession (Amendment) Act 2017.”

### ***Explanatory Note***

Section 2 of the draft Bill, which proposes to substitute a new section 117 into the *Succession Act 1965*, seeks to implement the vast majority of the recommendations in the Report.

*Subsection (1)* broadly corresponds with the current section 117(1), subject to 2 important reforms. The first reform is the addition of the word “intestate” to implement the recommendation in **paragraph 3.52** that section 117 should be extended to intestacy, that is, to apply to cases where the deceased parent has not made a will. The second reform is to delete the words “in his moral duty” to implement the recommendation in **paragraph 2.197** that section 117 should be based entirely on the test as to whether “proper provision” has been made for children, the Commission having concluded that the phrase “moral duty” had created ambiguity concerning the extent and scope of the parent’s duty.

*Subsection (1)* also includes a drafting change, the separation into paragraphs (a) and (b) of the two-stage test that applies under section 117, by which the court must first determine whether the parent has failed to make “proper provision” for the child and only then to move on to the second stage, which is that the court “may” make an order that such provision should be made for the child who has applied under section 117 “as the court thinks just.”

*Subsection (2)* corresponds almost directly with the current section 117(2), subject to the reform by way of the addition of the word “intestate” to implement the recommendation in **paragraph 3.52** that section 117 should be extended to intestacy. Apart from that reform, *subsection (2)* continues to provide that the court is to consider the application under section 117 from the point of view of a prudent and just parent, taking into account the position of each of the children of the deceased parent 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.

*Subsection (3)* is new and therefore does not correspond with any text in the current 117. *Subsection (3)* implements the recommendations in **paragraph 2.208** that, in the case of adult applicants, the courts should apply a presumption that the parent has made proper provision for the children, and that this presumption should be capable of being rebutted in 3 instances only. Thus, *subsection (3)* provides that where an application is made by a child who is, at the time of death of the deceased parent, 18 years of age or more (or, if the applicant is in full time education, who is 23 years of age or more), the court must presume that the testator or intestate made proper provision for the child. It also provides that this presumption can be rebutted, but only where the adult applicant establishes one or more than one of the following matters: (i) that the applicant has a particular financial need, including such need because of the applicant’s health or decision-making capacity; (ii) that the estate contains an object of particular sentimental value to the applicant; or (iii) that the applicant relinquished or, as the case may be, had foregone the opportunity of remunerative activity in order to provide support or care for the testator or intestate during the testator’s or the intestate’s lifetime. It should be noted that the reforms proposed in *subsection (3)* are limited to adult

applicants only, so that no presumption of proper provision would apply to an applicant who is under 18 (or under 23 if in full time education).

*Subsection (4)* implements the recommendation in **paragraph 2.210** and provides that where the court makes an order under subsection (1)(b), it shall order that such provision shall be made out of the estate of the deceased testator or, as the case may be, intestate, only to the extent required to remedy the failure to make proper provision in accordance with subsection 1(a).

*Subsection (5)* is also new and therefore does not correspond with any text in the current 117. *Subsection (5)* implements the recommendation in **paragraph 2.231** concerning 2 time-related elements involved in the court's decision as to whether proper provision has been made. The first element (which refers to the first part of the two-part test in *subsection (1)*) is that the court is to decide whether proper provision has been made on the basis of facts that were either known to the deceased parent or were reasonably foreseeable by him or her immediately prior to his or her death. This would replace the current test in the case law on section 117, which in some cases appears to consider that the deceased should have predicted matters that were not, in reality, foreseeable. This reform would not impose such an obligation on the deceased parent, but would instead consider whether proper provision had been made by reference to a parent who should anticipate what was reasonably foreseeable at the time of his or her death. The second element in *subsection (5)* (which refers to the second part of the two-part test in *subsection (1)*) is that where the court finds that there has been a failure to make proper provision, any order the court makes must be on the basis of facts available to the court at the time of the hearing of the case. This element broadly conforms to the current practice of the courts, and the Commission recommends in **paragraph 2.231** that this should be included in section 117 for purposes of clarity.

*Subsection (6)(a)* corresponds directly with the current section 117(3), and does not therefore involve any reform. It provides that an order under section 117 must not affect the legal right of a surviving spouse or, if the surviving spouse is the parent of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy. *Subsection (6)(b)* is new, and implements the recommendation in **paragraph 3.67** that an order under section 117 must not, in the case where the surviving spouse of the deceased is not the parent of the child, affect the amount to which such surviving spouse would be entitled as a legal right had the deceased died wholly testate.

*Subsection (7)* corresponds directly with the current section 117(3A), which was inserted into section 117 by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, and does not therefore involve any reform. It provides: (a) that an order under section 117, where the surviving civil partner is a parent of the child, must not affect the legal right of that surviving civil partner or any devise or bequest to the civil partner or any share to which the civil partner is entitled on intestacy; and (b) that an order under section 117, where the surviving civil partner is not a parent of the child, must not affect the legal right of the surviving civil partner unless the court, after consideration of all the circumstances, including the deceased's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.

*Subsection (8)* corresponds directly with the current section 117(1A), which was inserted into section 117 by the *Status of Children Act 1987*, and does not

therefore involve any reform. It provides that a section 117 application made under Part 5 of the *Status of Children Act 1987*, which introduced equal treatment in succession law for children whose parents were not married to each other, must be considered in the same way as a section 117 application by any other child, irrespective of whether the deceased parent made a will before or after Part 5 of the 1987 Act came into force (which was on 14 June 1988). It also provides that this does not confer a right to apply under section 117 in respect of a parent who died before Part 5 of the 1987 Act came into force.

*Subsection (9)* corresponds directly with the current section 117(4) and does not therefore involve any reform. It provides that rules of court are to provide for the conduct of proceedings under section 117 in a summary manner.

*Subsection (10)* corresponds directly with the current section 117(5) and does not therefore involve any reform. It provides that the costs in section 117 proceedings are at the discretion of the court.

*Subsection (11)* broadly corresponds with the current section 117(6), subject to a number of proposed reforms. Section 117(6) currently provides for a mandatory 6 month time limit for bringing an application, which runs from the first taking out of representation of the deceased's estate. The Report recommends in **paragraph 4.65** that the 6 month time limit should be retained. This is based on the need for certainty in the administration of estates; and the Commission also noted that, because this time limit runs from the first taking out of representation of the deceased's estate and not just from the death of the deceased, the time limit will, in practice, often amount to at least 1 year from the date of death.

*Subsection (11)* also includes 2 reforms. The first implements the recommendation in **paragraph 4.20** that the phrase "first taking out of representation" should be clarified to mean: (i) where the deceased has died wholly or partly testate, either the date of the first grant of probate with a valid will annexed or the date of grant of administration with the valid will annexed; and (ii) where the deceased has died wholly intestate, the date of the first grant of administration by the person or persons entitled to take out such a grant. This corresponds with the interpretation given by the High Court (Laffoy J) in *In re estate of F decd* [2013] IEHC 407, [2013] 2 IR 302. The second reform implements the recommendation in **paragraph 4.24** that a person should be allowed to bring a section 117 application before the first taking out of representation of the deceased's estate.

### Repeals

**3.** — Sections 67A(3), (4), (5), (6) and (7) of the Succession Act 1965 are repealed.

### Explanatory Note

Section 3 of the draft Bill implements the recommendation in **paragraph 3.54** that, as a consequence of the reforms recommended in the Report, sections 67A(3), (4), (5), (6) and (7) of the *Succession Act 1965* should be repealed.



## APPENDIX C

# THEMATIC ANALYSIS OF CASE LAW ON PROPER PROVISION UNDER SECTION 117

This Appendix contains a thematic analysis of the specific factors that the courts have considered in determining whether proper provision has been made under section 117. While the Commission does not make any recommendations in this Appendix, the Commission considers that this material may be of use for reference purposes.

### 1. Need, financial position and prospects in life of the child

The financial position and prospects of an applicant child are central to section 117 applications. Although it won't always be decisive, the poor financial circumstances of a child will make it more likely that the court will decide that the testator has failed to make proper provision for them. Kearns J in his 12<sup>th</sup> factor warns that the position of the child is not to be taken in isolation and the child's circumstances must be considered in the overall context. This factor is related to the issue of prior provision, which is discussed in greater detail below. Often if an applicant has already been provided properly for by the testator during his life, then he or she will have achieved a comfortable standard of living and will require no further provision.

In one of the early cases, *W v D*,<sup>1</sup> Parke J considered the position of the 8 children of a wealthy testator. The Court considered that the approach of the applicants was based on the incorrect assumption that the applicant must provide for the financial needs and career ambitions of each child. The Court held that none of the children have a right to a certain level of provision from the estate, despite the fact that they might want it more than the others.

In *PD v MD*,<sup>2</sup> the High Court (Carroll J) stated *obiter* that proper provision must include some opportunity for advancement in life, beyond mere maintenance or provision of necessities. If the testator, by will or otherwise, has not supported the career or education of the child; then the court is more likely to find that the testator has failed to properly provide for them.

In *Re McG v McG*,<sup>3</sup> it was held that the testator had failed to make proper provision for her sons who were not wealthy. In *In re NSM deceased*<sup>4</sup> however the fact that the children of the testator had established careers and were financially comfortable did not necessarily mean that the testator had discharged his moral duty to them. As the means of the testator are also relevant and the testator was relatively wealthy, the Court held that he had failed to make proper provision for them.

Just as the application of a wealthy child is not bound to fail, neither is the application of a poor child bound to succeed. *MCC v MDH*<sup>5</sup> involved applications by 2 adult daughters of the testator aged 47 and 49 at the time of hearing. In total the testator had 10 children,

<sup>1</sup> High Court, 28 May 1975.

<sup>2</sup> [1981] ILRM 179.

<sup>3</sup> High Court, 8 November 1978.

<sup>4</sup> (1973) 107 ILTR 1.

<sup>5</sup> [2001] IEHC 152.



the youngest of whom, aged 33, had Down's syndrome and required care. Both daughters had reasonable levels of income but were not wealthy. Although the testator had discouraged them from receiving higher education, they had shown admirable determination to obtain third level education and had forged successful careers. Both daughters felt that their father had failed to support them in this regard. After the wife's legal right share was accounted for, the net estate was worth approximately £380,000. Although there was some uncertainty over the interpretation of the will, the Court held that the testator had bequeathed the residue on trust for the maintenance of the youngest daughter because of her particular needs, which left little or nothing for his other children. The High Court (McCracken J) held that despite the absence of provision for the applicants by will or otherwise, the testator had not failed in his moral duty to them. Although the testator may be criticised for his decision, it was not improper for the testator to leave nothing to many of his children. This is because of the number of children he had and the particular health needs of his youngest daughter. Similarly in *B v B*,<sup>6</sup> the poor financial position of the plaintiffs did not necessarily mean that the testator had failed in his moral duty to them.

In *EB v SS*,<sup>7</sup> the majority of the Supreme Court held that the testator had not failed in her moral duty to make proper provision for the plaintiff, despite the fact that he had poor financial circumstances. The testator had already provided for him while she was alive and this provision had been squandered by the plaintiff.

The financial resources of a child will be relevant to the decision of the court, but the court will not look at this factor in isolation and it will often be compared to the overall circumstances of the case, particularly the means of the testator.

## 2. Means of the testator

Section 117 recognises an obligation on the parent to make "proper provision" rather than merely requiring "adequate provision". The courts have interpreted this as meaning "what is right"<sup>8</sup> or appropriate in all the circumstances, rather than merely looking at what the claimant requires for their maintenance.

In *In re GM; FM v TAM*,<sup>9</sup> the testator left a large estate. The High Court considered the position of a wealthy testator who had left nothing in his will for his adopted son and provided nothing in the way of support for him during his life. The Court held that the testator had failed in his moral duty to make proper provision for his son and that the duty on the testator was not to make adequate provision but to make "proper provision in accordance with the testator's means." Once the wife's legal right share was deducted there was £89,000 in the estate. The plaintiff was awarded one-half of whatever would be left from this figure once inheritance tax and costs were deducted.

In *In re NSM deceased*,<sup>10</sup> the testator's estate was worth £430,000, a considerable sum at the time. The Court held that the testator had failed to make proper provision for his younger son, although he had no need of provision. Taking into account the testator's means, among other factors, the Court held that a prudent and just parent in the circumstances would have left something to each of his children. The Court awarded the

<sup>6</sup> High Court, 25 February 1977.

<sup>7</sup> [1998] 4 IR 527.

<sup>8</sup> *EB v SS* [1998] 4 IR 527.

<sup>9</sup> (1970) 106 ILTR 82.

<sup>10</sup> (1973) 107 ILTR 1.

two daughters a legacy of £34,000 each and the younger son an interest in some of the shares in the estate (on death or remarriage of the testator's second wife) to make up for the failure to properly provide for them.

In *Re HD (No.2), W v Allied Irish Banks Ltd*,<sup>11</sup> the testator was a wealthy man owning 5 residential properties in south Dublin. Prior to his death the testator conveyed the fee simple interest in another property to his daughter, the plaintiff. Under the will the plaintiff also received a fixed income and the right to reside in one of the properties rent free. The High Court (Hamilton J) held that, although there was no doubt that the provision was adequate, it was not "proper" having regard to the means of the testator. Also taking account of the assistance provided by the plaintiff to her father, the Court held that the testator had failed in his moral duty to make proper provision in accordance with his means. The Court made an order directing the transfer to her of 3 more properties which is what a just and prudent parent would have done.

On the other hand where the testator does not have substantial means the court will often find that the testator has not failed his or her moral duty, even if the applicant child does have a particular need. In *B v B*,<sup>12</sup> the testator's estate was relatively small, worth just over £5,000. All of it was given to one of the 6 children under the will. The youngest child challenged the will under section 117, but the Court held that the testator had not failed in his moral duty.

In *J de B v H de B*,<sup>13</sup> the High Court (Blayney J), having regard to the value and composition of the estate, held that the testator had not failed in his moral duty to make proper provision for the plaintiff in accordance with his means. The testator had already provided for his children during his life and the main asset in the estate was a farm and stock, all of which was left to the widow for life with a remainder interest to another son. As the deceased had no liquid assets the only possible way to make further provision for the plaintiff would have been to charge such provision on the property left to the other son. The Court held that this would not be fair to the other son, having regard to the moral duty the testator owed him.

*In re SF*<sup>14</sup> concerned an application under section 117 in respect of an estate that was valued at over €14 million at the time of hearing. The testator's will divided his estate equally between his 6 children. The plaintiff, who had worked in the family business instead of pursuing his own independent career, was aged 43 at the time of hearing. The plaintiff argued that, during the testator's (his father's) lifetime, he had transferred property, which was intended to be developed, to the plaintiff in exchange for €1.2 million which was financed by a bank loan to the plaintiff and which was in turn guaranteed by the deceased. The property had significantly decreased in value since 2008 as a result of the economic downturn, and at the time of hearing it was valued at €160,000 while the amount outstanding on the loan was €1.6 million (that is, the property was in negative equity). This meant that the plaintiff was in a considerably worse position than his siblings because much of his share of the estate would be required to pay off the balance remaining on the bank loan. The High Court, in making provision under section 117 for the plaintiff, held that because the deceased had provided a personal guarantee for the bank loan, this survived his death and became part of the estate's responsibility

<sup>11</sup> High Court, 2 March 1977.

<sup>12</sup> High Court, 25th February 1977.

<sup>13</sup> [1991] 2 IR 105.

<sup>14</sup> [2015] IEHC 851.

under section 117. The Court held that the deceased had failed to properly provide for the plaintiff by not referring to the guarantee in his will, which significantly disadvantaged the plaintiff in comparison with his siblings as a result of the subsequent decrease in value of the property. The Court, therefore, ordered that the estate should pay the outstanding debt of €1.6 million to the bank. In addition the Court further ordered that the plaintiff should be allocated an additional €500,000, over and above his one-sixth share in the estate. This additional sum was ordered because of the substantial provision the testator had made during his lifetime to the other children, but not the plaintiff. It might be questioned whether the Court's decision to award an additional €500,000 even in the context of a large estate, accords with the general public perception of moral duties.

The reluctance of the courts to redistribute a small estate is sensible. A testator's means may not permit him or her to provide for every child. The readiness to distribute large estates might be questioned however. Some of the submissions in response to the Issues Paper suggest that there is sometimes a tendency to provide for applicant children simply because it is possible to do so out of the ample resources in the estate, rather than there being a failure of moral duty, as most people would understand it.

### 3. Age, health and decision-making capacity

Neither youth nor dependency are preconditions of applications under section 117. Independent adult children may, therefore, apply under section 117. The Irish case-law, discussed in the Chapter 2 suggests that many applicants are in their middle years. Although section 117 is not restricted to children under 18 or those with medical needs; the age, health and decision-making capacity of a child will often be relevant to what constitutes proper provision and whether they require greater support from their parents. Proper provision for children is not limited to provision of necessities, the testator also has an obligation to provide for his or her children's "advancement in life".<sup>15</sup>

As Kearns J stated, section 117 is "primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents."<sup>16</sup> Ordinarily an adult child who is financially secure should expect less support from their parents than a younger child who has not yet achieved this security, unless there are some particular issues relating to health or capacity. If the child is under age or has medical needs they are likely to be entitled to a greater level of provision from their parents, whether by will or otherwise. In *In re VC*<sup>17</sup> one of the plaintiffs was under 18 at the time of the hearing. The High Court (Clarke J) made provision out of the deceased's estate, which was worth approximately €1.3 million. The two plaintiffs were awarded 45 per cent and 35 per cent of the value of the estate respectively. The difference in the awards reflected the fact that the first plaintiff, who was under 18, required maintenance until she reached 18, while the second plaintiff was a young adult and did not require as large a figure for her proper provision.

If underage applicants also have medical or capacity issues, this is likely to be an important factor in determining whether proper provision has been made for them. In *Re LO'C v O'K*<sup>18</sup> an application was made under section 117 on behalf of the only child of the testator, she was under 18 and had Down's syndrome. The testator had never provided adequately for her maintenance during his life and under the terms of his will she was

<sup>15</sup> *PD v MD* [1981] ILRM 179.

<sup>16</sup> *XC v RT* [2003] IEHC 6, [2003] 2 IR 250.

<sup>17</sup> [2007] IEHC 399.

<sup>18</sup> High Court, 2 November 1970.

entitled to an annuity worth £50 charged on property devised to other family members. The High Court (Kenny J) held that the testator had failed in his moral duty to make proper provision for his child, particularly because of her medical needs. The Court also held that the medical needs of the child can be taken into account in both the first and second stages and, as noted above, that the obligation of the council to provide for her did not relieve her father of his obligation. The Court awarded the daughter the property absolutely so that these assets could be used to provide for her maintenance. Similarly in *H v H*<sup>19</sup> the plaintiff was under 18 at the time of hearing and suffered from an illness that required care and treatment. The High Court (Sheehan J) made an order in favour of the plaintiff of €409,000 out of an estate valued in excess of €2 million in recognition of her future needs of care and maintenance.

As noted above, adult children may also apply under section 117. In *In re NSM deceased*,<sup>20</sup> a claim was made against the estate of a wealthy testator whose adult children were financially secure. The testator died leaving a large net estate worth £405,000. He had 4 children all of whom were adults with large incomes of their own. The testator had remarried in England to his second wife. There were no children of this second marriage. After a legacy to one of his executors the testator gave his entire residue on trust to his second wife until death or remarriage, at which time the residue would transfer absolutely to his sons, the shares going to the elder son and the property going to the younger son. He gave nothing to his daughters. His younger son and 2 daughters brought claims under section 117. His younger son's contention was that there would be nothing left in his share after inheritance tax and the testator should have foreseen this. Kenny J in the High Court held that the testator had failed in his moral duty to make proper provision for his two daughters and younger son in accordance with his means. The Court awarded the daughters a legacy of £34,000 each and the younger son an interest in some of the shares in the estate (again on death or remarriage of the testator's second wife) to make up for the shortcoming. The Court also recognised that the testator had not fulfilled his promise to the younger son that he would inherit property. Some of the submissions have suggested that provision for non-dependents such as this would have surprised the members of the Oireachtas who enacted the legislation in 1965.

Cases like *NSM* where the adult children of the testator have no need of maintenance, can be contrasted with other cases where there is need.

In *MCC v MDH*,<sup>21</sup> the High Court held that a testator had not failed in his moral duty to make proper provision for two of his daughters. After the legal right share was deducted, the residue of the estate worth £380,000 was left on trust for the youngest daughter who had Down's syndrome. This left little or nothing for his two other daughters, who had not been provided much financial assistance from their father when he was alive. Nonetheless the Court held that the father had not acted improperly, because the applicants had reasonable levels of income and his youngest daughter had particular health needs.

In *In re Mk deceased*,<sup>22</sup> the High Court (Birmingham J) considered the position of one of the plaintiffs who was suffering from severe epilepsy. She was 34 at the time of hearing, her condition was so serious that she required constant care and she was on disability

<sup>19</sup> [2008] IEHC 163.

<sup>20</sup> (1973) 107 ILTR 1.

<sup>21</sup> [2001] IEHC 152.

<sup>22</sup> [2011] IEHC 22.

benefit. Although an adult, the plaintiff was incapable of managing her own affairs. She received a one-third share in a piece of property under the terms of the testator's will. The Court held that there was a "moral imperative" on the testator to provide for his infirm daughter and that the terms of his will were not sufficient to meet this obligation. In deciding what provision would satisfy the testator's moral duty, the Court ordered that the entire estate worth around €543,000 be converted into cash and distributed, with a 50 per cent share going to the testator's daughter.

In *HL v Bank of Ireland*,<sup>23</sup> a wealthy testator was survived by 4 adult children, all of whom applied under section 117. In this case however there was a clear failure of moral duty. The testator had been physically abusive to his children and had neglected their education and physical health needs when they were young. As a result of their numerous physical and emotional problems, and lack of education none of the children had received adequate training or established themselves in secure employment. The testator had awarded each of his children small nominal sums under his will. As the testator had failed entirely to provide for his children's advancement in life the children could easily establish to the satisfaction of the Court that the testator had failed in his positive obligation. The High Court (Costello J) held that the Court should have special regard to the medical needs of a testator's children.

A striking difference between *NSM* and *FF* was that, in the latter, the testator had clearly failed to provide for his children's education, or physical or emotional wellbeing. Although the plaintiffs were adults, they had never fully recovered from their father's neglect. In *NSM*, by contrast, there was no suggestion of any deficiency in their upbringing. The children were financially comfortable but the testator had not shared his considerable assets with all of them.

It would appear that since the Supreme Court decision *In re estate of IAC decd*,<sup>24</sup> adult applicants who are financially secure will have a heavy onus to discharge in order to be successful. In *IAC* the Supreme Court overturned a High Court award in favour of an adult child on the basis that she had not met this onerous burden of establishing a "positive failure of moral duty". The award in favour of the other adult child was upheld. This decision suggests that adult children will need to establish some particular circumstance in order to succeed, although the Commission understands that many cases are settled by providing some share of the estate to adult children.

In *EB v SS*,<sup>25</sup> both the High and Supreme Courts, considered the position of adult children. In the High Court, Lavan J held that the applicant child's necessity of provision must be established for an adult child's application under section 117 to succeed. This position was not addressed by the majority of the Supreme Court on appeal. The Supreme Court did observe, as noted above, that it was reasonable to assume that section 117 is primarily directed at children of an age at which they would expect support. Although the plaintiff had not achieved financial stability and independence owing to his addiction problems, he had squandered the earlier support that his parents had provided for him. The majority of the Court held that the testator had not failed in her moral duty to make proper provision for him. Barron J dissenting on this point argued that the testator had failed in her moral duty to make proper provision owing (in part) to the needs of the plaintiff on the one hand, and the means of the testator on the other.

<sup>23</sup> [1978] ILRM 160.

<sup>24</sup> [1990] 2 IR 143.

<sup>25</sup> [1998] 4 IR 527.

Although many cases since these Supreme Court decisions made awards in favour of applicants who need provision for maintenance<sup>26</sup> or health,<sup>27</sup> other applicants have succeeded where there is no such need. This was the case in *re SF*<sup>28</sup> (discussed in further detail below).

Some of the submissions in response to the Issues Paper on section 117 argued that, although the objectives behind section 117 were sound, the courts have been overly broad and generous to applicants in their interpretation of section 117. This generosity has, at times, been evident in the case of adult children. Some others were more critical of the concept of moral duty itself, advocating strongly in favour of testamentary freedom, particularly where the children were of full age and there was no need of maintenance. Many of those responding were opposed to what was seen as an entitlement of children to share in their parent's estate, irrespective of their circumstances.

#### 4. Prior provision by the testator and provision by others

The text of section 117 recognises a parental duty to make provision for their children "by will or otherwise." This is consistent with the discussion in Chapter 2, above, on the nature of the moral duty, it is an obligation that parents owe their children in general and, although there is no legal method of enforcement of these obligations until after the parent has died, the duty may be discharged while the parent is alive. Although generally speaking parents owe their children a "moral duty to make proper provision" for them, section 117 does not create an obligation to leave something in the will to each child as the duty may be discharged while the parent is still alive.<sup>29</sup> Often provision made during the life of the testator will be in the form of education but it may also be gifts of property or money.

In one of the earliest cases on section 117, the Supreme Court recognised that provision for a child during the life of a parent may satisfy the parent's moral duty. In *In re GM; FM v TAM*,<sup>30</sup> the absence of any provision by the testator for the plaintiff during the life of the testator was relevant to the Court's assessment of whether the plaintiff had been properly provided for.

In *Re HD (No.2)*, *W v Allied Irish Banks Ltd*,<sup>31</sup> the High Court (Hamilton J), although ultimately deciding that the testator had failed in his moral duty because of the considerable means at his disposal, held that the prior conveyance of property to the plaintiff by the testator during his lifetime was relevant to the determination.

In *HL v Bank of Ireland*,<sup>32</sup> the High Court felt that the complete neglect by the testator of his children's educational needs was one of the ways in which the testator had failed his moral duty to his children. None of his children received adequate education and at least one of them was functionally illiterate. The Court had "no hesitation" in finding that the testator had failed his moral duty in this case and awarded his children additional sums ranging from £40,000 to £90,000 to remedy this failure.

<sup>26</sup> *In re VC* [2007] IEHC 399.

<sup>27</sup> *In re MK deceased* [2011] IEHC 22.

<sup>28</sup> [2015] IEHC 851.

<sup>29</sup> There may also be reasons other than prior provision which may excuse a parents lack of provision for a child in his or her will, for example the poor conduct of the child or that the parent's means are insufficient to provide for all children.

<sup>30</sup> (1970) 106 ILTR 82.

<sup>31</sup> High Court, 2 March 1977.

<sup>32</sup> [1978] ILRM 160.



In *In Re BE, RE v AJ*,<sup>33</sup> the testator's estate was relatively small, largely because she had already made provision for all her children by providing them with interests in properties during her lifetime. In the case of the plaintiff, property had been transferred to another family member with an obligation to pay the plaintiff an annuity. This was in contrast to the position of his siblings who each received an absolute interest in the property. The High Court (Barrington J) held that this amounted to proper provision. It was clear the Court was influenced by the plaintiff's personal problems, meaning it may have been unwise to transfer the property directly to him.

In *PD v MD*,<sup>34</sup> although the High Court (Carroll J) held that the application was made outside the strict time limit, the Court nonetheless observed that facilitating the "advancement in life" of a child was an important part of proper provision. A parent may provide a comfortable standard of living for their children by providing them with an education or funds to ensure their financial security. This may be done while the parent is alive or as part of the will. An example of this can be found in *Falvey v Falvey*<sup>35</sup> in which the testator provided for the education of the children of his second marriage in contrast with his lack of such provision for his son of his first marriage. The High Court held that the testator had failed in his moral duty to make proper provision for the son of the first marriage. The Court awarded him £15,000 and made no additional provision for the children of the second marriage as the testator had already provided for their education.

In *J de B v H de B*,<sup>36</sup> the High Court (Blayney J) held that the testator had not failed to make proper provision for the plaintiff. The testator had 7 children and the plaintiff had received financial support for his education which enabled him to establish himself as a music producer. In contrast some of the other children had not been supported financially in this way.<sup>37</sup>

In *In re estate of IAC decd*,<sup>38</sup> the Supreme Court held that the combination of financial provision during life, and gifts under the will, were sufficient to discharge any moral obligations the testator owed to one of her children. Where the financial support by a parent of their children is "indicative of a concerned assistance" to their family, the court should be reluctant to substitute the parent's judgment for its own. Provision was not as high as it might have been but this did not necessarily reflect a breach of duty. In another decision of the Supreme Court, *EB v SS*,<sup>39</sup> the Court held that a considerable gift of money during the life of the testator amounted to proper provision for the plaintiff, despite the fact that the plaintiff had dissipated that sum by the time the testator died. The testator did not fail in her moral duty to the plaintiff by not providing for him in her will.

Kearns J in his summary of the applicable principles to section 117 cases in *XC v RT*<sup>40</sup> addressed the issue of prior provision directly in factors (h) and (i), discussed above in

<sup>33</sup> High Court, 11 January 1980.

<sup>34</sup> [1981] ILRM 179.

<sup>35</sup> [1985] ILRM 169.

<sup>36</sup> [1991] 2 IR 105.

<sup>37</sup> Although the plaintiff had received a similar level of provision in the will to 5 of his siblings, the eldest child would ultimately inherit the family home. The court declined to make provision for the plaintiff out of this asset, in part because it would be unfair to the eldest child to make him liable for a sum of money when he had inherited an asset. The court was also influenced by settlements which were reached between the estate and 2 other siblings over section 117 claims and was reluctant to make a further order reducing the eldest son's claims.

<sup>38</sup> [1990] 2 IR 143.

<sup>39</sup> [1998] 4 IR 527.

<sup>40</sup> [2003] IEHC 6, [2003] 2 IR 250.

paragraph 2.40. Proper provision for the child of a testator may amount to providing financial support for their education, which will enable them to achieve financial security themselves. As noted above, the Court held that provision for the children of the testator during his lifetime substantially discharged any duty owed to them. As the case law in this section demonstrates, Kearns J was correct to identify this as an important factor in the decided cases. In light of modern demographic trends discussed in Chapter 1 of this Report, these considerations are likely to become increasingly important as education becomes the major method of securing a child's future.

Although it is clear that provision for children during the life of the testator can satisfy the moral duty of the testator, proper provision by other persons warrants further examination.

The prohibition on the court interfering with a disposition in favour of the spouse, unless that spouse is not also the parent of the child, suggests that the moral duty is owed jointly by parents. This was confirmed in *In re JLW Deceased, CW v LW*<sup>41</sup>, discussed further below. As both parents owe the duty jointly to their children it is logical that it could be discharged by either or both of them. It is not necessarily a failure of moral duty for one parent to make no provision for a child, provided the child was previously or will ultimately be provided for by the other parent. However it also appears to be the case that provision by other persons who do not owe a moral duty under section 117, may nonetheless operate to reduce an award made. Again, there is a certain logic to this; if the child has been properly provided for, then no obligation remains on the parent to provide for them. Although conversely it could be argued that the parent has still failed in their duty to provide for their children, the fact that someone else has done so doesn't change this. Indeed, in the case of state provision it seems that this argument prevails. In *LO'C v OK*<sup>42</sup> Kenny J, referring to the daughter of the testator who suffered from Down's syndrome, stated that "the statutory obligation of the county council to maintain her in an institution did not relieve her father of a moral obligation."<sup>43</sup> This may appear to be an inconsistency, however unlike private citizens who may gratuitously and generously provide for another whether or not they are in need; the state often has a duty to provide for persons who do not have the means to support themselves. The courts have taken the view that section 117 should not permit parents with the means to provide for their children to ignore the needs of those children, because the state will take up the slack.<sup>44</sup>

## 5. Provision for others and equality between the children

Section 117(2) clearly sets out that in considering the application of a child of the testator the court should be "as fair as possible to the child to whom the application relates and to the other children." This has been interpreted as requiring the courts to consider the duty to make proper provision for the other children, not just the applicant. This issue often becomes important in the context of modern families where there may be children of more than one relationship. In these cases the courts have the difficult task of weighing

<sup>41</sup> [2005] IEHC 325, [2005] 4 IR 439.

<sup>42</sup> High Court, 2 November 1970.

<sup>43</sup> *Ibid* at 5.

<sup>44</sup> In the English case of *Ilott v Mitson and Ors* [2015] EWCA Civ 797, [2016] 1 All ER 932 the English Court of Appeal structured an award in such a way as to not reduce state benefits. In *Ilott v Blue Cross and Ors* [2017] UKSC 17 the Supreme Court overturned the decision of the Court of Appeal on the basis that the Court of Appeal had wrongly assessed the extent to which a more modest award would affect state benefits.

up the competing interests of all of these children. In addition the “Kearns Principles”<sup>45</sup> recognise that a just parent would take into account all moral obligations not just those relating to their children, for example the testator’s obligation to support their own parents. Although parents must treat all children fairly, the courts have also ruled that there is no general rule that children of the testator should be treated equally.<sup>46</sup>

In *L v L*,<sup>47</sup> Costello J also addressed the preliminary legal issue of whether the court should consider moral duties that the testator owes to others in section 117 applications. The two plaintiffs were 37 and 33 at the time of hearing, their mother was the testator’s first wife whom he divorced in England. The deceased’s second wife was the defendant in the proceedings who had 2 children with him, aged in their 20s at the time of hearing. The testator’s wife was entitled to his entire estate under the terms of his will. Costello J held that a “prudent parent” would have in mind all moral duties, not merely those obligations which were enforceable under the 1965 Act. The defendant was not the mother of the plaintiffs, so it was open to the Court to redistribute any entitlement under the will of the testator or share on intestacy (but not the legal right share). There was a dispute over the validity of the second marriage and as a result the legitimacy of the children of that marriage. Illegitimate children were, at the time, precluded from making an application under section 117. Costello J held that, whether or not the children were legitimate, the testator still owes them a moral duty. Had the children of the second marriage brought a claim under section 117, then the Court would have had to rule on their legitimacy. It was not necessary to rule on that point, whether the testator owed them a moral duty was not dependent on whether or not the parent owed them a legal duty. However, because they were not beneficiaries under the will, nor did they bring a claim under section 117, the Court need not take into account provision for them because they would not be affected by an order for provision under section 117. Regarding the second wife of the testator, however, the Court held that it must take account the moral duty which the testator owes to her, despite the fact that it is not an enforceable legal duty under section 117. This is because the second wife of the deceased is capable of being affected by an order of the court, as she inherited the entirety of the testator’s estate.

Cooney,<sup>48</sup> commenting on this decision, elaborated on the concept of unenforceable moral duties. Although the testator owes moral duties to persons other than their children, there is no legal method for bringing a case to enforce those duties. Furthermore a court cannot order provision for such persons but they can take those duties into account when deciding if to reduce a bequest in a will when making provision for children.

In *MFH v WBH*,<sup>49</sup> Barron J held that the phrase “other children” in section 117 refers only to other applicants and beneficiaries under the will because they are capable of being affected by a court order, but all other children of the deceased should not be considered. Spierin has commented that this is too narrow a view, and that Barron J, in the later case of *Falvey v Falvey*,<sup>50</sup> expressed support for the broader view that all children of the testator should be considered. In *Falvey* the High Court was again asked to weigh up the

<sup>45</sup> See Keating, *Succession Law in Ireland: Principles, Cases and Commentary* (Clarus Press, 2016) at 129, referring to the summary by the High Court (Kearns J) of the applicable principles in *XC v RT* [2003] IEHC 6, [2003] 2 IR 250.

<sup>46</sup> See for example *EB v SS* [1998] 4 IR 527.

<sup>47</sup> [1978] IR 288.

<sup>48</sup> Cooney, “Succession and Judicial Discretion in Ireland: the Section 117 Cases” (1980) *Irish Jurist* 62.

<sup>49</sup> [1984] ILRM 687.

<sup>50</sup> [1985] ILRM 169.

competing moral claims of the complex modern family. The Court expressly took account of the needs of children who would benefit only indirectly via their mother's entitlement under the will.

In *MFH*, the testator was survived by his second wife and nine children. The estate was worth approximately £185,000, the bulk of which was the value of the land. The house was left to the wife for life, after which time a grandson would receive it. The remainder of the estate was left to his executor and son L in his mid-thirties at the time of hearing. He left nothing to any of his other children. L, the defendant, had worked as a mechanic and emigrated to England but returned home to help his father when his mother died. The testator's 4 unmarried children with ages ranging from early 20s to late 30s, who lived in the family property, brought claims under section 117. Each of them attained only primary education and made their own way in life. The Court held that the testator had failed in his moral duty to make proper provision for them and made further provision out of the estate of the deceased, but did not consider the positions of the other 4 children who were not party to proceedings or beneficiaries under the will.

In *JH & CDH v Allied Irish Banks and Others*,<sup>51</sup> the High Court (McWilliam J) considered an application by the children of a testator who left an estate worth £25,000. The father left one-third of his estate to his wife, a £1,000 legacy to each of his two children, with the residue to his nephew and sister. The father had separated from the mother with little communication with her or his children. Both children were in their early to mid-twenties at the time of trial. Both children suffered from depression and had received treatment for this illness. The daughter had a degree in modern languages and worked as a secretary, the son never completed his leaving certificate due to his illness. The Court held that the testator had failed to make proper provision for his children no matter how thwarted or aggrieved he may have felt. The Court, citing *L v L*,<sup>52</sup> held that it must consider any other moral obligations the testator owes. However, on the facts, the testator owed no moral obligation to his sister or his nephew, given their circumstances. The greater part of his estate after legal right share should have been given to his children.

In *In re estate of IAC decd*,<sup>53</sup> the Supreme Court held that the testator had failed in her moral duty to make proper provision for one of the plaintiffs, but not the other. In assessing the total provision for her 4 children during life and under the will, the Court found that the testator had treated one of her children less favourably than the others by a significant margin. This was sufficient to overcome the burden of establishing a "positive failure of moral duty" and the Court made additional provision for the aggrieved child by granting her an interest in property bequeathed to another child under the will. The Court held that this was sufficient to remedy the breach of duty.

Although the courts will often consider the moral obligations the testator owes to other persons, there is no requirement that the courts treat all such persons equally. In *EB v SS*<sup>54</sup> the Supreme Court considered this point. The Court held that, as noted above, there is no general rule that equal provision for all children will discharge the moral obligation of the deceased. There is no stereotyped formula or general rule, so the obligations a parent owes to their child will depend on the circumstances of their relationship. It stands to

<sup>51</sup> [1978] ILRM 203

<sup>52</sup> [1978] IR 288.

<sup>53</sup> [1990] 2 IR 143.

<sup>54</sup> [1998] 4 IR 527.

reason therefore that it should not be assumed that equal provision is justified, as each of a parent's children may have vastly different capacities, needs or resources. In addition the majority in the Supreme Court in *EB v SS* (Keane and Lynch JJ) held that if it considered the needs of the plaintiff's children (that is, the grandchildren of the testator) this would extend the duty beyond the scope intended by the Oireachtas. Barron J, dissenting on this point, argued that, although in danger of giving strained construction to the wording of the statute, considering the needs of the plaintiff's children would give effect to the intention of the Oireachtas.

In *In re VC*,<sup>55</sup> the High Court also had regard to the needs of the former partner of the deceased even though section 117 does not impose a legal obligation to provide for her. Although there was no legal obligation, the Court held it was required to have regard to the moral obligation owed to the deceased's partner in making provision for the children. The Court held that it was clear from the principles listed in *XC v RT*<sup>56</sup> that moral obligations owed by a testator were not confined to those for whom a legal obligation arises. The deceased had failed in his obligation to make proper provision for both of his children and the Court reduced the entitlement of the testator's former partner in order to make proper provision. This was a smaller reduction to her testamentary entitlement than might otherwise have been ordered, owing to the deceased moral duty to make provision for her. Similarly *In re MK*,<sup>57</sup> the High Court (Birmingham J) recognised the moral obligation to the deceased's partner, even though no such parallel legal obligation existed.

Provision for others will often become relevant in the context of complex modern families<sup>58</sup> where the courts have the difficult task of weighing up all the various competing obligations which the testator owes. In general the flexibility of section 117 has given wide discretion for the courts to consider all the factors and make an order that is "just and prudent."

## 6. Previous conduct and actions

The behaviour of the testator's children is a relevant circumstance in deciding whether the testator has failed his moral duty to make proper provision for the child in accordance with his means. This is consistent with the guidelines in section 117(2) that stipulates that the court may consider circumstances it considers appropriate in order to be fair to the parties involved. "Proper provision" under section 117 incorporates an element of reciprocity and that the obligation of parents is, at least partially dependent, on the deserving conduct of their children.

Good conduct by a child may justify greater provision under the testator's will or a larger award made under section 117. In *B v B*,<sup>59</sup> the Court took into account the contributions that one of the children made to the household. The testator had 6 children and their ages ranged from late 40s to early 60s at the time of hearing. The defendant had received the entire estate under the will worth around £5,000, which primarily consisted of the family home. The plaintiff was 49 at the time of the hearing and in irregular employment. The High Court (Hamilton J) held that this did not amount to a failure in moral duty because, despite the fact that the defendant was financially comfortable, he had

<sup>55</sup> [2007] IEHC 399.

<sup>56</sup> [2003] IEHC 6, [2003] 2 IR 250.

<sup>57</sup> [2011] IEHC 22.

<sup>58</sup> In *DC v DR* [2015] IEHC 309, [2016] 1 ILRM 178 the courts have shown that the applicability of the general principles of section 117 to the modern context of cohabitation.

consistently made contributions to the household. The plaintiff on the other hand was in irregular employment but he had not made any contributions to the household. In *Re HD (No.2)*, *W v Allied Irish Banks Ltd*,<sup>60</sup> the High Court, in making proper provision for the plaintiff, also took into account the support she had given her elderly father.

Just as good conduct on the part of the plaintiff can entitle them to a larger share of the estate, so too may bad behaviour diminish or even extinguish the duty owed by parents.

In *PMCD v MN*,<sup>61</sup> McCracken J in the High Court held that the conduct of the plaintiff was a relevant factor which the court may consider in assessing whether the testator had discharged his moral duty to the plaintiff. The Court described the violent and threatening behaviour by the plaintiff as “appalling” and held that the testator’s obligation to properly provide for the plaintiff was satisfied by provision during his life and £5,000 in the will. On appeal, the Supreme Court (Barron, Barrington and Keane JJ) affirmed that conduct of the plaintiff was a relevant factor which the court may consider. The Court held that it could consider the bad behaviour of a child to either extinguish or diminish the moral obligation of the parent. The Court unanimously held that the conduct of the plaintiff was not sufficiently extreme so as to disentitle him from any further provision. The plaintiff was awarded the family property. Keating commended the “humane approach” of the Court here, recognising that the moral duty was to be assessed in totality, taking into account the long relationship of the parties and courts must not merely take the final state of the relationship between the parties as representative of the whole.<sup>62</sup>

It seems that poor conduct will rarely be decisive in precluding a successful claim under section 117. In *Falvey v Falvey*,<sup>63</sup> the testator’s son from his first marriage stood to inherit one-third of the family business from his father under his father’s will. After an altercation, however, the father executed a new will leaving his son out entirely. The Court held that family disharmony did not extinguish the moral duty of the testator. He had failed in his moral duty to make proper provision for his son. The Court ordered provision to be made for the son along the lines of the testator’s original will. Similarly in *HL v Bank of Ireland*,<sup>64</sup> the High Court (Costello J) held that a testator owed a moral duty to help in the rehabilitation of a child who had been convicted of an offence and spent time in prison, although in this case the conduct of the testator towards his son was also very poor.

The parent’s conduct is also relevant to the court’s inquiry. In *In re estate of IAC decd*,<sup>65</sup> the Supreme Court (Finlay CJ) held that the parent child relationship was relevant to the moral duty of the testator. Where the parent child relationship is one of caring and kindness, the court should be reluctant to intervene. On the other hand, “different considerations apply” where there is a “marked hostility” between one child and the testator. Spierin points out that it might be easier to establish a failure of moral duty in a

<sup>59</sup> High Court, 25 February 1977.

<sup>60</sup> High Court, 2 March 1977.

<sup>61</sup> [1998] IEHC 183, [1999] 4 IR 301.

<sup>62</sup> Keating, *Succession Law in Ireland: Principles, Cases and Commentary* (Clarus Press, 2016) at 138.

<sup>63</sup> [1985] ILRM 169.

<sup>64</sup> [1978] ILRM 160.

<sup>65</sup> [1990] 2 IR 143.



case of unjustified antipathy on the part of the parent.<sup>66</sup> The courts will, therefore, assess the conduct of the plaintiff in the context of their relationship with the parent.

## 7. The testator's wishes

As discussed in Chapter 1, section 117 represents an interference with the testamentary freedom of the testator. This can be justified on the grounds that the testator's freedom to dispose of his or her property should be limited where it conflicts with family obligations. In the case of section 117, these obligations are currently characterised as a "moral duty to make proper provision", although other jurisdictions use different phrases to capture the obligations. The testamentary freedom of the testator should therefore be limited to the extent necessary in order to satisfy this obligation.

As discussed at above at paragraph 2.19, however, the moral duty to make proper provision is judged by the objective standard of a prudent and just testator. The test is not subjective and the testator's intention is not conclusive as to whether he or she has satisfied this duty. The court will, however, have regard to a statement by the testator as to their reasons for making a certain disposition. In *EB v SS*<sup>67</sup>, although the Court held that the testator's view was not decisive, the Court did consider the reasons the testator had for making the disposition that she did. The court will presume that the testator knows their children best and they will have regard to the reasons the testator made their will in the way they did, in order to decide if it was something which a prudent and just testator would do.

The intention of the testator becomes more important in the second stage of the inquiry, once the court has established that the testator has failed in his or her moral duty. The court, in deciding what provision would be proper, must make the minimum interference with the will possible. The court will strive to give effect to the testator's wishes insofar as those wishes are not inconsistent with his or her duties under section 117.

In *Re HD (No.2)*, *W v Allied Irish Banks Ltd*,<sup>68</sup> the High Court (Hamilton J) first recognised the principle that there should be minimal interference with the will (although the terms of the will are not contained in the judgment).

In *A v C & Anor*,<sup>69</sup> the plaintiff, who was in his 40s, challenged his father's will under section 117. The testator had 5 children, 3 of whom were dependent on him despite their ages. The plaintiff had been given property to live on and was allowed to farm some of the lands of the testator for his own gain. Under the terms of his will the testator left a valuable property to one of his sons, charged with the sum of €40,000 each for the plaintiff and another son and an obligation to maintain the testator's wife. Another property was given to the spouse for life with a reversionary interest to two of the other siblings. Under the will the plaintiff was entitled to €40,000 but would lose his home and his livelihood as they would be disposed of by other means. The High Court (Laffoy J) held that the testator had failed his moral duty to the plaintiff. The Court considered the terms of the will and the moral duty owed to the other children in deciding what provision would be appropriate. The Court held that a prudent and just parent would not have altered any of the provisions of the will, save for the sum of €40,000 that the plaintiff was

<sup>66</sup> See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011).

<sup>67</sup> [1998] 4 IR 527.

<sup>68</sup> High Court, 2 March 1977.

<sup>69</sup> [2007] IEHC 120.

entitled to. The Court, therefore, made an order substituting the sum of €40,000 for that of €750,000 to take account of the fact that the testator lost his home and means of income.

It is not always possible to give effect to the intentions of the testator, however. In *W v D*,<sup>70</sup> the High Court (Parke J) agreed that the court should only interfere with the will to the minimum extent necessary. However, the will was made almost entirely inoperative by changed circumstances; many of the properties referred to had been sold prior to the testator's death and the testator did not have power of disposition over another property because he only had a life interest in it. The Court, therefore, felt compelled to depart from the general principle of minimal interference. The court also agreed that the relevant date to consider the breach of duty is the date of death. Parke J held that the testator had failed in his moral duty to make proper provision for the child in accordance with his means. Although the testator's will gave preference to some of his children, the Court divided up the net estate (after the satisfaction of the wife's legal right share) among all 8 of the children, each receiving between 11 per cent and 15 per cent of the net estate.

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High Court, 28 May 1975.

The Law Reform Commission is an independent statutory body established by the Law Reform Commission Act 1975. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

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