ISSUES PAPER

SECTION 117 OF THE SUCCESSION ACT 1965

(LRC IP 9 - 2016)

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Background to this Issues Paper and the questions raised

1. This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*.[1] It examines section 117 of the *Succession Act 1965*, which provides that a child, including an adult child, of a deceased parent who has made a will may apply to court for a declaration that the parent failed in his or her "moral duty to make proper provision for the child" in accordance with the parent's means during the parent's lifetime, whether in the parent's will or otherwise. If the court agrees that the parent failed to comply with the duty to make proper provision for the child, it may make an order that such provision as it considers just should be made for the child out of the deceased parent's estate.

2. This Issues Paper is seeking views on the following 5 issues:

    1. Whether section 117 of the *Succession Act 1965* should be repealed, retained as it is or amended; and if it is to be retained but amended whether to prescribe the matters to which the court should have regard in deciding whether to make an order under the section (see page 49);

    2. Whether section 117 should be extended to permit applications by children of parents who have died intestate (that is, without having made a will) (see page 59);

    3. Whether the 6 month time limit for applications under section 117 should be increased and/or whether the courts should have a discretion to extend it (see page 68);

    4. Whether the date from which the time limit in section 117 begins requires clarification or reform (see page 74);

    5. Whether the personal representatives of the deceased parent should be under a duty to inform children of their entitlement to make an application under section 117 (see page 82).

1 Report on Fourth Programme of Law Reform (LRC 110-2013), Project 7, which concerns discrete areas of succession law. The Report on Prevention of Benefit from Homicide (LRC 114-2015) completed the Commission's review of the first element of this project and this Issues Paper deals with the second element.

Policy and demographic context of this Issues Paper

3. In approaching this Issues Paper, the Commission has taken into account the legal policy that lies behind section 117 of the 1965 Act as well as the changing demographic context in which it operates.

Legal policy underlying section 117

4. Prior to the 1965 Act, a person making a will was completely free to decide to whom to leave his or her property: the surviving spouse and children could be completely left out and the entire estate could be left to a cousin, friend or a charity for example. The 1965 Act imposed significant restrictions on this "testamentary freedom." Section 117 is contained in Part 9 of the *Succession Act 1965* which is headed "Legal Right of Testator's Spouse and Provision for Children." The policy underlying Part 9 of the 1965 Act is to protect the spouse and children of a testator from being completely disinherited.

5. Prior to the enactment of the 1965 Act, the Department of Justice examined the legislative approaches adopted in other jurisdictions to the protection of surviving spouses and children from disinheritance.[2] The approaches favoured in other jurisdictions included:

   (a) 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;[3]

   (b) allowing a claimant to apply for a definite part of the inheritance if he or she chose to do so;[4]

   (c) giving certain dependants the right to apply to the court and empowering the court to award maintenance at its discretion.[5]

6. Following this analysis, a *Succession Bill 1964* was debated in the Oireachtas which incorporated the first approach, that is, a fixed legal right share approach for both the spouse and surviving children irrespective of dependency. Concerns were raised in relation to this fixed approach when the 1964 Bill was debated in the Oireachtas. 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 right shares for spouses only;

2 The enactment of a comprehensive *Succession Bill*, to include limits on freedom of testamentary freedom, had been included in the Department of Justice's *Programme of Law Reform* (Pr.63789, 1962), at 7-9.

3 See Department of Justice Programme of Law Reform (Pr.63789, 1962), at 9, noting this was the approach applied in Scotland, Brazil, France, Spain and Switzerland.

4 *Ibid*, noting that this approach, derived from Roman law, was applied in New York and Louisiana.

5 *Ibid*, noting that this approach was applied in New Zealand, some Canadian Provinces, and in Northern Ireland and England.

and while children are entitled to fixed shares on intestacy this can be overridden in a will, but this is in turn subject to being reviewed in an application under section 117.

7. During the Oireachtas debates on the 1965 Act, the Minister for Justice 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."[6] Thus, section 111 of the *Succession Act 1965* provides that, where there is a will, the surviving spouse in entitled to a minimum "legal right share" of one-half of the estate where the testator leaves a spouse and no children, and a legal right share of one-third of the estate where the testator leaves a spouse and children. The surviving spouse's legal right share overrides any contrary provisions in the testator's will. If there is no will (an intestacy), section 67 of the 1965 Act provides that if there is a surviving spouse and children, the spouse has a "legal right share" to two thirds of the estate, with the remaining one third distributed equally between the children. As noted above, the 1965 Act contains no legal right share for children where there is a will, so that the 1965 Act allows the testator: to leave nothing in the will to any children, to leave two thirds to one or more child or to leave each child the same share. This relative freedom of disposition is subject only to a possible application by a child under section 117 of the 1965 Act. Section 117 therefore reflects an intention by the Oireachtas to allow for some adjustment of the terms of a will to take account of individual circumstances of children.

8. As to the rationale behind section 117, the Minister for Justice noted during the Oireachtas debates that the system of legal rights originally proposed in the 1964 Bill could impose unduly rigid limitations on the discretion which a testator should have to divide his or her estate among the various members of the family in a manner best suited to the particular needs and circumstances of each case. The Minister stated that the interests of children would be best safeguarded by empowering a court to determine what constitutes dependency and to decide in its discretion to make provision as may seem proper and just in a particular case.

9. In proposing the discretionary system in section 117, the Minister observed that in interpreting the New Zealand legislation from which it had been drawn (discussed further below), the New Zealand courts had "accepted the notion of a moral duty." He noted that the question addressed by those courts had been: "what moral duty did this particular deceased person owe to this particular applicant?" He observed that the duty varied from case to case and depended, among other things, on the means of the applicant and the testator. This analysis thus forms the background to the enactment of section 117 of the 1965 Act.

10. In summary, therefore, section 111 of the 1965 Act provides that a spouse is automatically entitled, even if the testator's will says otherwise, to at least one third

6 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.

of the deceased's estate if there are children and at least one half if there are no children. This "legal right share," as section 111 of the 1965 Act describes it (or "forced heirship" as it is sometimes described), trumps anything in the will. For children, the 1965 Act contains a "half way house" approach: if there is no will, section 67 of the 1965 Act provides that the children have a "legal right share" of one third between them if there is a surviving spouse and to an equal share between them of the entire estate if there is no surviving spouse. However, by contrast with the approach to the surviving spouse, if there is a will the 1965 Act allows this to deal with the children broadly as the testator saw fit, subject only to an application by a child under section 117 of the 1965 Act that the parent failed in his or her moral duty to make "proper provision" for the child. As noted, this "half way house" was deliberately chosen by the Oireachtas in the 1965 Act, and it rejected a proposal that, where there has been a will, the children's legal right share should be as "automatic" as the surviving spouse's. The distinction is clear: the 1965 Act provides that the surviving spouse's legal right share is an absolute minimum that cannot be overcome by a will; the children's share that operates under section 67 of the 1965 Act where there is no will can be trumped by a will, subject to the ability to apply under section 117.

11. The social and familial contexts for the 1965 Act have changed since it was enacted. For example, until 1988, children born to parents who were not married to each other were not entitled to claim under section 117: this changed when the *Status of Children Act 1987* removed many of the legal distinctions between children born within and outside marriage. Similarly, Article 41 of the Constitution was amended in 1995 to remove the constitutional prohibition on divorce; and since the enactment of the consequential *Family Law (Divorce) Act 1996* the application of section 117 must take account of more complex family patterns in which claims by children of a number of different parents may be at play.

12. It is likely therefore that the policy behind family provision legislation such as section 117, and its application in practice will, and should, reflect such changed social and legal settings. The Commission considers that this should be taken into consideration in the context of any reform of section 117 of the 1965 Act.

The changing demographic context in which section 117 operates

13. A second matter that the Commission has taken into account in this Issues Paper is the changing demographic context in which section 117 of the 1965 Act operates.

14. As noted during the Oireachtas debates on the 1965 Act, section 117 was derived from the family provision legislation first enacted in New Zealand in 1900, discussed below. At the beginning of the 20th century, half the population of the UK and Ireland died at 72. Since then, medical and scientific advances, combined with better

nutrition, have extended life expectancy. Even since 1965, life expectancy in Ireland has increased by approximately 10 years.[7]

15. Another related change in family dynamics is that children remain dependent on their parents for longer, but have greater opportunities than many previous generations. Parents may decide to have children later and may themselves become dependent on the support of their own children later in life.[8] Lifetime earnings may become increasingly viewed as a safety net to provide for someone's later years, rather than a helping hand to give the next generation.

16. The English gerontologist, Professor Sarah Harper, has written and commented extensively on how these demographic changes affect issues of generational succession,[9] including what she describes as the "generational contract." 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.

17. 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. This will arise because parents are having fewer children, and that therefore there are fewer of them to care for the parents in later life; and that the parents live longer, so that they have a longer time period, potentially, to fund their own later life, notably their health and care requirements. This also means that they may be less likely to leave inheritances for their children in the way that children in the 20th Century may have expected. 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. Professor Harper has noted that in the second half of the 20th century the middle classes aspired to leave something to their children in the way that the very wealthy had done before World War I (1914-1918). She considers that this 20th century idea, that getting on the property ladder was not only to own a house but was also something to pass down to the next generations, may be quite short-lived in the 21st century.

18. The effect of this may be that in the 21st century the older generation may consider that it does not owe much to the next generation, their children, once their children are adults. 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 deposit for a first mortgage, that would previously have been the inheritance left behind.

7 There was an increase in life expectancy from 72.9 years to 82.9 between 1966 and 2011. See http://www.cso.ie/multiquicktables/quickTables.aspx?id=vsa30.

8 The average age of mothers has increased steadily for both married and unmarried women since 1980. See http://www.cso.ie/multiquicktables/quickTables.aspx?id=vsa17.

9 See for example Harper, *Ageing Societies: Myths, Challenges and Opportunities* (Oxford, 2006). 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 ER 932, discussed in section 1.4.2, below.

19. In general public policy terms, Professor Harper has noted that this may have a disproportionate impact between, on the one hand, those with sufficient capital to own a house, to fund their old age and to pass on an inheritance and, on the other hand, those not wealthy enough to own a house, who cannot save enough to pay for their own care in old age, and who may have to fall back on whatever the State provides by way of the social security "safety net." The children of this second group may step in to help, but in doing so they will lose what earnings they have been able to put together without having had any help from their parents, for example, by way of support through university. In the end, they too may have little to inherit. In short, there is a real prospect that the "new" generational contract may lock into place a division between two classes, based on home-ownership and education.

20. In the 21st century inherited wealth may grow faster than earned wealth, so that the gap between the two groups will widen over time. A possible policy alternative would be that, instead of caring directly for their elderly parents, people of working age could pay high enough taxes to fund a good-quality universal state care system similar to the system that operates in some Scandinavian countries such as Denmark. [10]

21. The relevance of this discussion to section 117 of the 1965 Act, and to comparable family provision arrangements in other jurisdictions, is that it raises the question whether statutory provision for children to make claims where their parents have actually left some inheritance for them should take account of these demographic changes.

22. It would appear that in recent years New Zealand courts, in applying family provision legislation (on which section 117 was modelled), have taken into account the changes from the traditional generational contract to the "adapted generational contract." This is illustrated by the case law which suggests that because older people have more responsibility to maintain themselves for longer than was the case in the past, this has a consequent lowering of the expectation that their children should inherit than may have applied in the past.[11] As a result the New Zealand courts are less inclined to make a family provision order for a child who was not provided for out of the estate of their parent. Similarly, in Australia, It has been argued that a combination of changing demographics and judicial willingness to read "moral duty" into legislation has led to overly generous awards. These changes have, it is argued, distorted the original policy behind the Australian family provision legislation, which was originally enacted to protect dependent or otherwise vulnerable children. This has, in turn resulted in Australian law reform bodies recommending a reversal of this trend.

23. In the 2015 English Court of Appeal decision *Ilott v Mitson and Ors*,[12] discussed below, the Court held that reasonable financial provision could only be made for the claimant by providing her with a sum that would be sufficient to buy the home she rented from a housing association. The Court also awarded her a capital sum to meet

10 See Benedictus, "Disinheritance and the Law" *The Guardian*, 31 July 2015.

11 See section 1.4.1.

12 [2015] EWCA Civ 797, [2016] 1 All ER 932, discussed in section 1.4.2, below.

her income needs, which was expressly calculated by the Court so that it would not affect her State social security benefits. The approach of the Court in this case, while making relatively conservative "proper provision" for the claimant, arguably did not consider the wider public policy context, namely, that the Court assumed that it was appropriate that the State should, and would continue to have the ability to, support the claimant through means-tested social security benefits rather than deciding to award her a larger sum that would disentitle her to such means-tested State benefits.

24. Because of these demographic changes, it is relevant therefore to consider whether the objectives the Oireachtas had in mind in enacting section 117 of the 1965 Act 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. This arose in the High Court decision *In re SF*, discussed below.[13]

Commission's general approach to comparative family provision regimes

25. Section 117 must also be interpreted against the background of the specific "half way house" regime discussed above. In that respect, the Commission is conscious that the application of family provision legislation in other jurisdictions must be examined from the point of view of whether they operate against a similar general background, such as in Scotland, or whether, as in England and Wales, they operate against the background of legislation based largely on "testamentary freedom." Moreover, the concept of a "moral duty" plays a central part in section 117 and the meaning of that duty, which derives from New Zealand legislation, and what social values it incorporates, are central to the application of section 117.

26. Against this general policy context and demographic background, the Commission proceeds to examine whether section 117 is in need of reform.

13 [2015] IEHC 851, discussed in section 1.2, below.

ISSUE 1

MATTERS TO BE CONSIDERED WHEN MAKING ORDERS UNDER SECTION 117 OF *SUCCESSION ACT 1965*

1.1. Overview of section 117

1.01 Section 117(1) of the *Succession Act 1965* provides:

> "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 [or her] moral duty to make proper provision for the child in accordance with his [or her] means, whether by his [or her] 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 thus provides for applications by children, including adult children,[14] for provision out of the estate of their deceased parent where the deceased parent has made a will. In *EB v SS*[15] 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."[16] The case law on section 117 indicates that applicants' ages range from the early 30s to mid-40s at the time applications are heard.

1.03 Section 117 does not provide for applications by children of parents who die intestate, that is, without having made a will: whether section 117 should be extended to intestacy cases is considered in Issue 2, below.

1.04 In an application under section 117 the court:

- must consider the application from the point of view of a just and prudent parent;[17] and

14 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.

15 [1998] 4 IR 527.

16 *Ibid*.

17 Section 120(2) of the *Succession Act 1965*.

- must take into account the position of each of the deceased person's children and any other circumstances which it considers of assistance in arriving at a decision that will be as fair as possible to the applicant and to the deceased person's other children.[18]

1.05 In addition, an order under section 117[19] must not affect the legal right of a surviving spouse[20] or, if the surviving spouse is the parent of the applicant, any devise or bequest to that spouse or any share to which he or she is entitled on intestacy.[21] The policy behind this is that it would be expected that the surviving spouse (that is, the parent of the relevant child or children) will provide for the child out of the bequest, and that, accordingly, a bequest of all the testator's estate to the surviving parent of a child discharges any moral duty to that child.[22]

1.2. The meaning of "failure in moral duty to make proper provision" in section 117

1.06 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.

1.07 First, the court decides whether the testator has failed in his or her moral duty to make proper provision for the applicant as required under section 117(1) of the 1965 Act. In *L v L*[23] the High Court (Costello J), in deciding whether the deceased had failed in his moral duty, held that the court should have regard not just to the moral duty owed to the other children but also anyone else the testator may have owed a moral obligation. In *XC v RT*[24] the High Court (Kearns J) confirmed that "there is a high onus

18 Section 120(2) of the 1965 Act.

19 Section 120(3) of the 1965 Act.

20 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 into the Constitution in 2015, which states that marriage may be contracted in accordance with law by two persons without distinction as to their sex) 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.

21 Section 67 of the 1965 Act (which deals with married persons) and section 67A of the 1965 Act (which deals with civil partners) provide for the distribution of a deceased person's estate on intestacy, that is, where the deceased person has died without having made a will. If the person dies leaving a spouse or civil partner and no children, the spouse or civil partner takes the whole estate. If the deceased person dies leaving a spouse or civil partner and children, the general rule (subject to sections 111A and 117: see footnote 7, above) is that the spouse or civil partner takes two thirds of the deceased person's estate with the remaining one third distributed amongst the deceased person's children. As noted in footnote 7, above, 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; and the Commission does not, therefore, review those provisions in this project.

22 Lyall, *Land Law in Ireland* 3rd ed (Roundhall, 2010), at 1054.

23 [1978] IR 288.

24 [2003] 2 IR 250.

of proof placed on an applicant for relief under section 117, which requires the establishment of a positive failure in moral duty."[25] If the applicant overcomes this "relatively high onus to discharge,"[26] the court proceeds to the second stage to assess what provision is to be ordered for the applicant child.

1.08 At the second stage, 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 the courts in a number of cases.

1.09 In *In re GM; FM v TAM*,[27] the plaintiff was the 32 year old adopted son of the testator. He was a merchant seaman. The testator had been a medical doctor and had paid for the all the expenses associated with the plaintiff's education. The plaintiff was not provided for in the will of the testator. The High Court confirmed that the existence of a moral duty must be decided by objective considerations and 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.

1.10 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 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.

1.11 In *In re Estate of IAC decd*,[28] the Supreme Court considered an application under section 117 by twin daughters of the deceased, aged 41 at the time of the case. The Supreme Court adopted and approved the principles set out in *In re GM; FM v TAM* and also added further principles which it admitted might be considered a qualification of them. The Court confirmed that the wording "failed in his moral duty to make proper provision for the child in accordance with his means" placed a "relatively high onus of proof on an applicant." In this regard, the applicant must establish a positive failure in moral duty and "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." An order should not, therefore, be made simply because the court

25 [2003] 2 IR 250 at 262.
26 *In re Estate of IAC decd* [1990] 2 IR 143 at 148.
27 (1970) 106 ILTR 82.
28 [1990] 2 IR 143.

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 increased the award made to one of the plaintiffs in the High Court on the basis that the testator should have anticipated the expense arising from the probable breakdown of the plaintiff's marriage.

1.12 In *EB v SS*,[29] 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 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 testatrix) 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.

1.13 The Supreme Court confirmed that, in considering whether the deceased had failed in his or her moral duty, the court was not entitled to take into account matters which arose after the testator's death. The Court also 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 in his or her moral duty 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." In addition the majority in the Supreme Court (Keane and Lynch JJ) held that if it considered the needs of the plaintiff's children (that is, the grandchildren of the deceased) 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.

1.14 Having considered these principles the majority in the Supreme Court upheld the decision of the High Court that the plaintiff was not entitled to any provision out of the will of the deceased under section 117.

29 [1998] 4 IR 527.

1.15 Spierin[30] 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. As noted above the Supreme Court clearly stated in *EB v SS*[31] that the issue of the moral duty is judged on the facts at the time of death. However the earlier decision of the High Court in *In re NSM*[32] had 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." 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. This means that 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.[33] In *In re SF*[34] the High Court (White J) confirmed that the 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.

1.16 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[35] may be in question.[36] 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."[37]

1.17 In *XC v RT*[38] 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

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

31 [1998] 4 IR 527.

32 (1973) 107 ILTR 1.

33 See also *In re JLW* [2005] 4 IR 439, in which the High Court (O'Sullivan J) held, making an award for the plaintiff, that the testator was credited with the foreknowledge that his wife would be taken into wardship and that her committee would decide to take her legal right share. The wardship jurisdiction will be replaced when the *Assisted Decision-Making (Capacity) Act 2015* is brought into force.

34 [2015] IEHC 851.

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

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

37 *Ibid* paragraph 822.

38 [2003] 2 IR 250.

this decision the Court set out 18 matters which it was agreed were derived from the case law cited on section 117:

1. 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.

2. 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.

3. 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.

4. Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.

5. The duty created by section 117 is not absolute.

6. 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.

7. Section 117 does not create an obligation to leave something to each child.

8. 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.

9. 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.

10. The duty under section 117 is not to make adequate provision but to provide proper provision in accordance with the deceased parent's means.

11. 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.

12. 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.

13. 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.

14. 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.

15. Special circumstances would also refer to the physical or decision-making capacity[39] of the child.

16. 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.

17. 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 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.

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

1.18 Since the decision of the High Court in *XC v RT*[40] 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.

1.19 Although as the case law above demonstrates many cases involve adult children, children under 18 may also claim under section 117. In *In re VC*[41] 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 figure for her proper provision. Similarly *H v H*[42] also involved a person under 18. The plaintiff in this case also 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.

1.20 In *In re VC*, above, the High Court also had regard to the needs of the 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

39 See generally the *Assisted Decision-Making (Capacity) Act 2015.*
40 [2003] 2 IR 250.
41 [2007] IEHC 399.
42 [2008] IEHC 163.

the children. The Court held that it was clear from the factors listed in *XC v RT* that moral obligations owed by a testator were not confined to those for whom a legal obligation arises. The Court therefore reserved 15 per cent of the assets for the partner of the deceased. Similarly in *In re MK*[43] the High Court (Birmingham J) recognised the moral obligation to the deceased's partner even though no such parallel legal obligation existed.

1.21 The High Court decision (White J) in *In re SF*[44] is noteworthy for the application of section 117 in the context of the financial and economic difficulties that emerged in 2007. One feature of the case was "negative equity" which has been a familiar situation for many people in Ireland since 2007. In addition, the High Court made an order under section 117 in connection with a loan guarantee made in favour of the plaintiff by his deceased father, something which Professor Sarah Harper had suggested would be a feature of the modern "generational contract" discussed above.

1.22 *In re SF* concerned an application under section 117 in respect of an estate 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 under section 117. The Court held that the deceased had failed in his moral duty to 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.

1.23 In *DC v DR*[45] the High Court (Baker J) drew analogies between the case law on proper provision for children under section 117 and provision for qualified cohabitants under section 194 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. Section 194(3) of the 2010 Act provides that the court may make an

43 [2011] IEHC 22.
44 [2015] IEHC 851.
45 [2015] IEHC 309, [2016] 1 ILRM 178.

appropriate order providing for a qualified cohabitant out of the estate of the deceased if:

> "the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard."

1.24 *DC v DR* involved a cohabiting couple who were in their 60s when the testatrix died, and the plaintiff applied for provision from her estate under the 2010 Act.[46] The High Court noted that while the case law on section 117 could assist the court in making an order for proper provision, it was also the case that the test under the 2010 Act was different to that under section 117 of the 1965 Act because the circumstances of the cohabitees' relationship are relevant to the court's decision under section 194 of the 2010 Act.[47] However, the Court held that some of the factors set out in *XC v RT*[48] in respect of section 117 of the 1965 Act, 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.

1.25 The 2010 Act applies to adult cohabiting partners, unlike section 117 of the 1965 which applies to the deceased's children, whether under 18 or over 18. However the High Court considered that the two tests were similar enough that the case law on section 117 could be of assistance.

1.26 It is at least arguable that the general terms used in section 117 of the 1965 Act and section 194 of the 2010 Act, "moral duty" and "proper provision", have the advantage that they allow courts a degree of interpretive flexibility when faced with novel situations. In this way section 117 arguably accommodates the changing demographic and economic circumstances discussed above, allowing the courts to emphasise different factors depending on the societal context and the facts of the particular case.

1.3. Family provision orders in judicial separation and divorce

1.27 As noted above (and discussed further below), section 117 of the 1965 Act was based on comparable family provision legislation in other jurisdictions, first enacted in New Zealand in 1900, which provided for such applications not only by children but also by other family members such as spouses, whether after a death or in the event of judicial separation or divorce. Statutory provision for judicial separation or divorce did not exist in this State in 1965, but has since been enacted. As a result, the courts

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

47 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 moral duty.

48 [2003] 2 IR 250.

have also been empowered to make comparable family provision orders in judicial separation and divorce cases.

1.28 Thus, section 15A of the *Family Law Act 1995*[49] 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.[50] 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.

1.29 The court may make a range of orders, a periodical or lump sum order,[51] a property adjustment order,[52] a financial compensation order,[53] a pension adjustment order[54] or other ancillary order.[55] 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[56] and any devise or bequest made by the deceased spouse to the applicant.

1.30 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."[57]

1.31 In addition to the general guideline above, sections 16(2) of the 1995 Act and 20(2) of the 1996 Act set out the broadly similar factors to which the court should have "particular" regard when making specified orders under the Acts.[58] These provisions are also broadly similar to section 20(2) of the *Judicial Separation and Family Law Reform Act 1989*, which was repealed and replaced by the 1995 Act. Section 20(2) of the 1996 Act sets out the following factors:

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,

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49 Inserted by section 52(g) of the *Family Law (Divorce) Act 1996*.

50 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* unless there has previously been a decree of divorce.

51 See section 8 of the *Family Law Act 1995* and section 13 of the *Family Law (Divorce) Act 1996*.

52 See section 9 of the *Family Law Act 1995* and section 14 of the *Family Law (Divorce) Act 1996*.

53 See section 11 of the *Family Law Act 1995* and section 16 of the *Family Law (Divorce) Act 1996*.

54 See section 12 of the *Family Law Act 1995* and section 17 of the *Family Law (Divorce) Act 1996*.

55 See section 10(1)(a) of the *Family Law Act 1995* and section 15(1)(a) of the *Family Law (Divorce) Act 1996*.

56 See section 8(1)(c) of the *Family Law Act 1995* and section 13(1)(c) of the *Family Law (Divorce) Act 1996*.

57 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." 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."

58 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*.

(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage or registration in a civil partnership[59] of the spouse or otherwise),

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another,[60] as the case may be,

(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,[61]

(e) any physical or mental disability of either of the spouses,

(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,

(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,[62]

(h) any income or benefits to which either of the spouses is entitled by or under statute,

(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it,

(j) the accommodation needs of either of the spouses,

(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring,[63]

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

59 The reference to civil partnership was inserted by section 157 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

60 The equivalent section 16(2)(c) of the *Family Law Act 1995* refers to "separated" in place of "commenced to live apart from one another."

61 The equivalent section 16(2)(d) of the *Family Law Act 1995* does not include the text "the duration of their marriage" and refers to "together" in place of "with one another."

62 The equivalent section 16(2)(g) of the *Family Law Act 1995* refers to "together" in place of "with one another."

63 The equivalent section 16(2)(g) of the *Family Law Act 1995* refers to "judicial separation" in place of "divorce."

1.32 Section 16(4) of *the Family Law Act 1995* and section 20(4) of the *Family Law (Divorce) Act 1996* set out the following additional factors to which the court should have "particular" regard in relation to dependent members of the family:

(a) the financial needs of the member,[64]

(b) the income, earning capacity (if any), property and other financial resources of the child,[65]

(c) any physical or decision-making capacity issue concerning the member,[66]

(d) any statutory income or benefits to which the member is entitled,[67]

(e) the manner in which the member was being and in which the spouses concerned anticipated that the member would be educated or trained,[68]

(f) the matters specified in sections 20(2)(a), 20(2)(b), 20(2)(c) and 20(3) of the 1996 Act, or in sections 16(2)(a), 16(2)(b), 16(2)(c) of the 1995 Act.

(g) the accommodation needs of the child,[69]

(h) spousal conduct.[70]

1.33 These provisions broadly reflect provisions in other jurisdictions, discussed below.

1.4. Judicial orders for proper provision for children and other family members in other jurisdictions

1.4.1 New Zealand

1.34 As already observed, during the Oireachtas debates on the *Succession Act 1965*, it was noted that section 117 was derived from the judicial discretion system that had been first adopted in New Zealand. 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 jurisdictions (discussed further below). The 1900 Act was subsequently incorporated into the New Zealand *Consolidated Statutes 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.

1.35 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

64 See section 16(4)(a) of the *Family Law Act 1995* and section 20(4)(a) of the *Family Law (Divorce) Act 1996*.
65 See section 16(4)(b) of the *Family Law Act 1995* and section 20(4)(b) of the *Family Law (Divorce) Act 1996*.
66 See section 16(4)(c) of the *Family Law Act 1995* and section 20(4)(c) of the *Family Law (Divorce) Act 1996*.
67 See section 16(4)(d) of the *Family Law Act 1995* and section 20(4)(d) of the *Family Law (Divorce) Act 1996*.
68 See section 16(4)(e) of the *Family Law Act 1995* and section 20(4)(e) of the *Family Law (Divorce) Act 1996*.
69 See section 16(4)(g) of the *Family Law Act 1995* and section 20(4)(g) of the *Family Law (Divorce) Act 1996*.
70 See section 19 of the *Family Law Act 1995* and section 23 of the *Family Law (Divorce) Act 1996*.

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,[71] children, grandchildren, certain stepchildren and, in certain circumstances, the parents of the deceased.[72] Like the 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 available from his or her estate for their "proper maintenance and support."[73] 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 will or for not making any provision or any further provision for any person whether or not such evidence would otherwise be admissible in a court of law.

1.36 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 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 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.

1.37 In the latter 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.[74] 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.[75]

1.38 The 1955 Act was reviewed by the New Zealand Law Commission. In its 1996 Discussion Paper, *Succession Law: Testamentary Claims*,[76] the New Zealand Law

71 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 7 above has had significant effects on the provisions of the 2010 Act concerning civil partnership.

72 Section 3 of the *Family Protection Act 1955*.

73 Section 4 of the *Family Protection Act 1955*.

74 Peart, "Awards For Children Under the Family Protection Act" (1995) 1 BFLJ 224, 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.

75 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." In 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 requirement of financial need for making an order.

76 New Zealand Law Commission; *Succession Law: Testamentary Claims*, Preliminary Paper 24 (1996), at 13.

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 Act 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." 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." 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."

1.39 In its subsequent 1997 Report[77] 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 of support to 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."[78] In the draft Bill accompanying its 1997 Report, the Commission therefore recommended that the extensive provisions in the 1955 Act would 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 four types of applications for provision by children of the deceased.

1.40 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 assisted towards the attainment of economic independence." 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

77 New Zealand Law Commission; Succession Law - *A Succession (Adjustment) Act*, Report 39 (1997).
78 *Ibid*, at 28.

provided by the deceased to the child; and the actual and potential ability of the child to meet his or her needs.

1.41 The second recommended claim was a needs claim, which would apply if the child is an adult, would not be entitled to make a support claim but would require 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.

1.42 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.[79]

1.43 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.

1.44 These recommendations have not been implemented at the time of writing (April 2016), 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*[80] 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 testatrix to make, but rather whether adequate provision had been made for proper maintenance and support for the claimant.[81] 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 for any remedy for the breach the Court could have

79 Such claims would be made to a Disputes Tribunal under the New Zealand *Disputes Tribunal Act 1988*. At the time of the New Zealand 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 amount was increased to NZ$15,000 by section 4 of the *Disputes Tribunals Amendment Act 2009*. This amount may be extended to NZ$20,000 by agreement between the parties (see section 13 of the *Disputes Tribunals Act 1988*).

80 [1999] BCL 948 (NZHC), [2000] 2 NZLR 479 (NZCA) (Richardson P, Gault, Keith and Tipping JJ).

81 [2000] 2 NZLR 479 at 492.

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.

1.45 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.[82] The Court noted the 1988 *Report of the Working Group on Matrimonial Property and Protection*[83] 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.[84] Section 4 of the 1955 Act referred to "maintenance and support,"[85] and the Court considered that "support" meant that it was entitled to look beyond mere economic necessity when considering whether to make an award.

1.46 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.[86] The Court observed that the "expansive" view of the moral duty had not 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.[87] 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.

1.47 The decision in *Williams v Aucutt* represented the beginning of a trend away from the almost automatic 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 some cause 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.[88] The Court of Appeal showed a degree of restraint regarding the quantum of award, which was a relatively modest to serve the limited purpose of recognition of the family connection.[89] The decision in *Williams v Aucutt*[90] has therefore been referred to as the "conservative

82 *Ibid* at 489, 490.

83 New Zealand Department of Justice, *Report of the Working Group on Matrimonial Property and Protection* (1988).

84 *Williams v Aucutt* [2000] 2 NZLR 479 at 491.

85 Section 4(1) of the *Family Protection Act 1955.*

86 *Williams v Aucutt* [2000] 2 NZLR 479 at 490.

87 *Williams v Aucutt* [2000] 2 NZLR 479 at 496.

88 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, 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.

89 An order was made under the *Family Protection Act 1995* even in the absence of economic necessity or the need for "maintenance" on the part of the claimant.

90 [2000] 2 NZLR 479.

approach", by contrast with the perceived "expansive approach" which preceded it.[91] Subsequent case law continued this more conservative trend:[92] orders made under the 1955 Act should be limited to the amount required to repair the breach of moral duty.[93]

1.48 Thus, in *Henry v Henry*[94] the New Zealand Court of Appeal 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 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 $1,000,000 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 Court held that it should make the minimum disruption to the will and do no more than was necessary to remedy to 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 a breach of moral duty had been established.

1.49 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 the courts appear confident of their ability to assess societal attitudes to testamentary freedom, it has been argued that judicial thinking is in fact out of line with public opinion[95] and that the conservative judicial approach maintains the broad basis of intervention and merely urges moderation when it comes to the assessment of relief.[96] 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.

1.4.2 England, Wales and Northern Ireland

1.50 The English *Inheritance (Family Provision) Act 1938* and its Northern Ireland equivalent the *Inheritance (Family Provision) Act (Northern Ireland) 1960* were also

91 See *Henry v Henry* [2007] NZFLR 640 at 650.

92 *Auckland City Mission v Brown* [2002] 2 NZLR 650, *Henry v Henry* [2007] NZFLR 640.

93 *Auckland City Mission v Brown* [2002] 2 NZLR 650.

94 *Henry v Henry* [2007] NZCA 42, [2007] NZFLR 640 at 652.

95 Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" [2008] CLWR 356 has argued 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.

96 *Ibid.*

based on New Zealand's *Family Protection Act 1908*. The aim of the 1938 Act, shared by the 1960 Act, was to ensure that reasonable provision was made for the maintenance of the surviving spouse[97] and dependent children.[98] 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.[99]

1.51 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.[100] 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.[101]

1.52 In its 1974 *Second Report on Family Property: Family Provision on Death*,[102] 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 for the surviving spouse ownership of a share of the family property.[103] 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.

1.53 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.[104]

97 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*.

98 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.

99 See section 7 of the *Intestates Estate Act 1952*.

100 Section 1(6) of the *Inheritance (Family Provision) Act 1938*.

101 Section 1(7) of the *Inheritance (Family Provision) Act 1938*.

102 Law Commission of England and Wales *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974).

103 Before the enactment of the 1975 Act, 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.

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

1.54 Regarding children, by contrast the Law Commission of England and Wales confirmed that the aim of family provision legislation should "remain that of securing reasonable provision for their maintenance."[105] 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."[106] 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 of 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 ceased;

(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.

1.55 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, child of the family or dependant of that person.[107] Although the 1975 Act contains more categories of eligible persons, for most applicants relief is

105 *Ibid*, paragraph 80.

106 *Ibid*, paragraph 101.

107 Section 1 of the *Inheritance (Provision for Family and Dependants) Act 1975* 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, whether that treatment was referable to the deceased's marriage or civil partnership; and any person who immediately before the death of the deceased was being maintained by the deceased.

restricted to provision for "maintenance."[108] The only exception is spouses, in respect of whom 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 Dependants) (Northern Ireland) Order 1979.*[109]

1.56 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 the circumstances.[110] 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 will point "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 will point "towards a generous exercise of the jurisdiction, and towards ideas of family property."[111]

1.57 Section 2 of *the Inheritance (Provision for Family and Dependants) 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. 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.[112] 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.

108 In *Re Coventry* [1980] Ch 461, Oliver J noted that the limitation to maintenance levels meant that the 1975 Act was not as dramatic a change from the 1938 Act as it might have appeared. Oliver J observed that applications by employed, able bodied young men, although possible under the new law "must be relatively rare and need to be approached... with a degree of circumspection."

109 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.

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

111 *Ibid*, paragraph 58-08.

112 *Ibid* paragraph 58-16.

1.58 In determining whether and in what manner to exercise its power under the *Inheritance (Provision for Family and Dependants) Act 1975*, the court must have regard to the following matters:[113]

(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.

1.59 In applications by the deceased person's children, the court must also have regard to the manner in which the applicant was being or in which he or she might expect to be educated or trained.

1.60 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:

(a) 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;

(b) whether in assuming such responsibility, the deceased person did so knowing that the child was not his or her own;

(c) the liability of any other person to maintain the child.

1.61 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*[114] 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

113 Section 3(1) of the English *Inheritance (Provision for Family and Dependants) Act 1975*.
114 [1979] 1 All ER 546.

successfully make an application. The Court held that "maintenance" included considerations of "well-being, health, financial security and allied matters."[115]

1.62 In *In re Coventry*[116] the English Court of Appeal upheld a more restrictive interpretation of the meaning of maintenance. The High Court (Oliver J) had interpreted "maintenance" more narrowly and had been critical of the broad interpretation of maintenance equating it 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."[117] The High 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.

1.63 The leading English textbook referred to above has identified 3 possible approaches to proper provision for children.[118] The first "cautious approach," is represented by the decision of the English High Court in *Re Coventry* and its disapproval of other, broader interpretations of maintenance. The second, "more adventurous," approach represented *by In re Estate of MC*[119] relies on comparison between legal relationships and *de facto* relationships (the true nature of the relationship rather than the technical legal form) in order to determine what provision is appropriate*. Re Christie* represents the third and "most adventurous" approach and has been subject of criticism although some support for it has been expressed.[120] The textbook suggests that the cautious approach, which strictly applies the statutory guidelines, is the correct one, and this has been supported by the 2015 English Court of Appeal decision *in Ilott v Mitson and Ors*,[121] discussed below.

1.64 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

115 *Ibid* at 550.
116 [1980] Ch 461.
117 *Ibid* at 474.
118 See Williams, Mortimer and Sunnucks, Executors, *Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013), paragraph 58-09.
119 (1979) 9 Fam Law 26. The applicant was treated as 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.
120 In *Leach v Lindeman* [1986] Ch 226 Slade LJ cited the Canadian case *In Re Duranceau* [1952] 3 DLR 714 at 720 to the effect that the question of maintenance to be answered was "is the provision sufficient to enable the dependant to live neither luxuriously nor miserably, but decently or comfortably according to his or her station in life?"
121 [2015] EWCA Civ 797, [2016] 1 All ER 932.

claim, because most adults will be supporting themselves."[122] 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 difficulty of determining the standard of reasonable provision for a child.[123]

1.65 In the 2015 English Court of Appeal decision *Ilott v Mitson and Ors*,[124] the Court continued to approve the relatively narrow "maintenance" approach in the 1975 Act, as discussed in the case law and leading textbook discussed above. However, the Court also held that where an adult child, in this case a daughter in her 50s, lived modestly and was not 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.

1.66 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 three charities, The 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.

1.67 At first instance, the claimant had been awarded £50,000 from the estate. On appeal, the English Court of Appeal increased the award. The Court held that the judge at first instance had erred in limiting the award on the grounds that the claimant knew her mother intended not to leave her anything in her will (lack of expectancy) and of her ability to live within her limited means. The Court of Appeal noted that the trial judge had been required to calculate financial provision for the claimant's maintenance under the 1975 Act but had not known what affect the award would have on her State benefits. 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 of Appeal 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.

122 Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com. No. 331 (2011), paragraph 6.6.

123 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.

124 [2015] EWCA Civ 797, [2016] 1 All ER 932.

1.68 The 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 appears to remain within the "narrow" approach taken in the cases discussed above. At the time of writing (April 2016), this decision is under appeal to the UK Supreme Court.

1.4.3 Australia

1.69 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.[125] While they have since been amended and replaced,[126] the language remained broadly similar. In general, they provide that if the applicant is left with "inadequate provision" for "proper maintenance and support,"[127] 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.[128] Those entitled to claim includes spouses, children and grandchildren although this varies between jurisdictions.[129] 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.

1.70 The courts apply a two-stage process for deciding whether to make an order for family provision. The court must first answer a "jurisdictional question" and then a "discretionary question."[130] 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? It may be of note that the requirement to first establish that provision is "inadequate" is similar to the Irish courts' requirement that there

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

126 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).

127 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.

128 In *Coates v National Trustees Executors & Agency Co Ltd* (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;" and Fullagar J agreed, at 517, stating: "The approach which assumes uniformity of intention is the correct approach."

129 See Table 2 in McGregor-Lowndes and Hannah, "Reforming Australian Inheritance Law: Tyrannical Testators v Greying Heirs?" [2009] APLJ 62 at 68.

130 *Singer v Berghouse* (1994) 181 CLR 201.

must first be a "positive failure of moral duty" to make proper provision for the applicant.[131]

1.71 In *Vigolo v Bostin*[132] the High Court of Australia considered, among other things, the relevance of "moral duty" to the statutory test for "proper provision." The term "moral duty" had previously been described as a "gloss"[133] on the statutory wording and the precise implications of this were discussed in the High Court. 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.[134] 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.[135] Although the Court warned against losing sight of the statutory text, 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 of "moral claim" as a convenient shorthand for statutory interpretation was outweighed by the fact that it had often eclipsed the statutory test.[136] They concluded that strict adherence to the statutory language would be preferable in order to avoid this problem.[137]

1.72 Some commentators have suggested that family provision laws are a product of the values of the early 20th century and that the courts have been interpreting the "moral duty" in this context.[138] As discussed in the Introduction to this Issues Paper, any previous expectation of a moral obligation 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 21st 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."[139]

1.73 In light of these issues, it was accepted that there was a need to harmonise succession law in the Australian states and territories, including the law on family

131 *XC v RT* [2003] 2 IR 250: see footnote 25, above.
132 [2005] HCA 11.
133 *Singer v Berghouse* (1994) 181 CLR 201.
134 *Vigolo v Bostin* [2005] HCA 11 at paragraph 21.
135 *Ibid* at paragraph 6.
136 *Ibid* at paragraph 73.
137 *Ibid* at paragraph 51. The judges also agreed that there was no dispute that a potential claimant who was financially well-off can still make a successful claim.
138 McGregor-Lowndes and Hannah, "Reforming Australian Inheritance Law: Tyrannical Testators v Greying Heirs?" [2009] APLJ 62 at 70.
139 *Ibid* at 71.

provision.[140] Arising from this, a National Committee for Uniform Succession Laws was established to review Australian succession law, including family provision legislation, and between 1997 and 2009 it 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*.[141] As noted below, elements of this Report have since been implemented, while others have been expressly rejected.

1.74 As to those eligible to apply for family provision, the 1997 Report recommended that non-adult children and lawful 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.[142] 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.[143] 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.[144] 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 the1958 Act on which this approach was based.

1.75 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*:[145]

(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;

140 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.

141 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).

142 *Ibid*, Appendix 1, at 2-3.

143 *Ibid*.

144 *Ibid* at 20. This open-ended category of applicants was inserted into the 1958 Act by the Section 55 of the *Wills Act 1997* (Victoria).

145 *Ibid*, Appendix 1, at 3-4. The criteria were based on those in section 91(4) of the *Administration and Probate Act 1958* (Victoria).

(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.[146]

1.76 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.[147] 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 above, and in the comparable family provision legislation in England and Northern Ireland: this is not surprising given their common 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.

1.77 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

146 The list of criteria also included "any relevant Aboriginal or Torres Strait customary law or any other customary law."

147 *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 consider one of the criteria.

already applied by Australian state and territory courts.[148] 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."[149] 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 there had not been adequate provision and accordingly what provision if any should be made, the Report recommended that the court have regard to as many the same criteria for special provision (listed above) that the court would consider relevant.

1.78 Although "moral duty" is not referred to in the model legislation, nonetheless, 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.[150]

1.79 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 two "automatic" categories of non-adult child and lawful 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,[151] 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 for Uniform Succession Laws, 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*.[152]

148 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.

149 Note that in the interests of harmonisation the National Committee included the "advancement in life" element which had been absent in the legislation in some jurisdictions.

150 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.

151 Law Reform Commission of Victoria, *Report on Succession Laws* (2013), Chapter 6.

152 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."

1.80 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,[153] 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.[154] The Law Reform Commission also adopted the 1997 Report's list of criteria (albeit with slightly different wording) for all three determinations.

1.81 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.[155] 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[156] of the deceased, the 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."[157] 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,[158] these retain the established term "adequacy."[159]

(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,

153 New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005).

154 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 as the issue had become less sensitive by the time the 2005 Report was written.

155 Parliament of New South Wales, *Hansard*, 26 June 2008, p.9422: the Hon John Hatzistergos, Attorney-General and Minister for Justice, second reading speech to the *Succession Amendment (Family Provision) Bill 2008*.

156 Section 57 of the *Succession Act 2006* (NSW). 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.

157 Section 59(1)(b) of the *Succession Act 2006* (NSW).

158 Section 60(2) of the *Succession Act 2006* (NSW).

159 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."

(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,

(a) 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,

(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,

(c) 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,

(d) whether any other person is liable to support the applicant,

(e) the character and conduct of the applicant before and after the date of the death of the deceased person,

(f) the conduct of any other person before and after the date of the death of the deceased person,

(g) any relevant Aboriginal or Torres Strait Islander customary law,

(h) 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.

1.82 The New South Wales courts have viewed the list of criteria as a "valuable prompt"[160] or guideline to assist in establishing the meaning and legislative objective of the 2006

160 *Verzar v Verzar* [2012] NSWSC 1380 at paragraphs 121 and 123.

Act; and they have also retained the non-statutory term "moral duty" to refer to the criterion (p): "any other matter the Court considers relevant…"[161]

1.83 In *Panozzo v Worland*[162] the Supreme Court of Victoria (Forrest J) held that the appropriate time to consider the financial resources and needs of the applicant as required by section 91(4)(h) 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 future"[163] 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*[164] the High Court of Australia had held that a 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.[165] Therefore, it is arguable that this reasoning also applies to the New South Wales 2006 Act.

1.4.4 Scotland

1.84 Scottish succession law is of particular interest 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 common law of succession, provided that where the deceased has written a will, the spouse[166] and issue are entitled to a sum of money equal to a fixed proportion of the relevant part[167] of the estate.[168] These entitlements are referred to as "legal rights," The same phrase as used in this State 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 relictae* (for widows) or *jus relicti* (for widowers). The legal rights for children (issue) are known as "the Bairn's Part," or *legitim*. Whatever remains after the satisfaction of legal rights is known as "the Dead's Part." If there are both a spouse and children, the spouse receives a sum of money equal to one third of the relevant estate and the children as a group receive

161 In *Newman v Newman* [2015] NSWSC 1207 at paragraph 128, criterion (b) of the 2006 Act was taken to include the moral duty.

162 [2009] VSC 206.

163 This is reproduced in almost identical terms in section 91A(d) of the *Administration and Probate Act 1958* inserted in 2014: see footnote 139, above. 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.

164 [1956] HCA 23.

165 See section 91A of the *Administration and Probate Act 1958* inserted in 2014: see footnote 139, above.

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

167 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 complex, and the Scottish Law Commission has recommended that the distinction be removed for the purposes of succession law 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.

168 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*.

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.[169] The remaining share 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). As noted, the Scottish system of fixed legal shares greatly influenced the *Succession Act 1965*. As noted above, the *Succession Bill 1964* had initially proposed to include fixed legal shares for children as well as spouses but the 1965 Act 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, subject to section 117 which provides for an application to court where it can be determined whether "proper provision" has been made.[170]

1.85 Distribution as part of the will in favour of the spouse or children is presumed to be in satisfaction of the 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*[171] the Scottish Court of Session indicated in 1916 the policy behind the Scottish system of legal rights for children, which was later codified in the *Succession (Scotland) Act 1964*:

> "the right which our law gives to children in their father's estate, in common with the laws of most civilised countries except England, [i]s a very important check on capricious or unjust testaments."

1.86 The Scottish Law Commission has proposed possible 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.[172] A number of reasons were given to support this. Firstly, the maintenance obligation ceases at the age of majority, 18, and if parents do 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, it is primarily the State's, rather than the

169 Known as *per stirpes* distribution: see section 11(2) of the *Succession (Scotland) Act 1964*.

170 During the Dáil debates in 1964 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), available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/takes/dail1964120200051?opendocument&highlight=scotland

171 1916 SC 860 at 870, 1916 2 SLT 74 at 77.

172 Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com (2007).

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.[173]

1.87 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 would equal to 25 per cent of the amount that the deceased's issue would inherit had the deceased died intestate, also having 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. Clause 30 of the draft Bill in the 2009 Report proposed in this respect 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."

1.88 At the time of writing (April 2016) 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 family provision, as addressed by the Scottish Law Commission, have been reserved for later legislation.[174]

173 Scottish Law Commission, *Report on Succession,* Scot Law Com No. 215 (2009) at 43.

174 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.

1.5. Questions for consideration

In light of the discussion above the Commission considers that it is appropriate to seek views on whether section 117 of the 1965 Act should be repealed, retained as it is or amended. If consultees consider that section 117 of the 1965 Act should be retained but amended, the Commission also seeks views on the factors, if any, to which the courts should have regard in deciding whether to grant such an order and the amount so ordered.

Since section 117 of the 1965 Act concerns broadly comparable matters as are dealt with in the making of family provision orders under the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996*, and since both section 117 and family provision orders are derived from comparable provisions in New Zealand, England, Wales, Northern Ireland and Australia, the Commission also seeks views as to whether these provisions should be considered together to ensure that there are no unnecessary inconsistencies between them.

The Commission is also seeking the views of consultees on whether account should be taken of the effect of current or future demographic changes.

QUESTION 1

1(a) Do you think that section 117(1) of the *Succession Act 1965*, which provides that the testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means, should be repealed, retained as it is or amended?

1(b) If the answer to 1.(a) is that section 117(1) should be retained but amended, do you think that section 117(1) should include the matters to which the court should have regard in deciding whether to grant an order under it? If so, please indicate what factors should be set out.

1(c) If the answer to 1.(a) is that section 117(1) should be retained but amended, do you think that the test that the testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means should be applied as of the date of the making of the will, the date of death or the date of the court hearing?

1(d) Do you think that the matters to be considered in the making of orders under section 117 of the *Succession Act 1965* should be different from, or similar to, those set out in section 16 of the *Family Law Act 1995* and section 20 of the *Family Law (Divorce) Act 1996*?

1(e) Do you think that section 117 of the 1965 Act should be consolidated with the family provision sections in the 1995 and 1996 Acts into a single set of statutory rules on family provision?

1(f) Do you have any other general comments on section 117 of the 1965 Act, including whether account should be taken of the effect of current or future demographic changes?

Please type your comments (if any)

ISSUE 2

WHETHER SECTION 117 SHOULD BE EXTENDED TO INTESTACY CASES

2,1 Section 117 is limited to claims under a will, and does not apply to intestacy

2.01 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.

2.02 Section 67A(3) of the 1965 Act (inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*)[1] 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.[2] 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.[3]

2.03 Section 109(1) of the 1965 Act provides that the jurisdiction of the court to make orders under Part 9 of the *Succession Act 1965*, 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 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. It has been pointed out that where the court is asked to reconstruct a will to make proper provision under section 117 this would include taking into account of undisposed estate as well.[4] 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.[5]

1 As noted in footnote 7 in Issue 1, above, 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.

2 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.

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

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

5 With the exception of the intestate share of the spouse, 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.

2.04 In *RG v PSG*[6] the High Court (Carroll J) examined the meaning of the terms "testator" and "partial intestacy" under the 1965 Act. 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 to intestacy in effect, 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 the testator is said to have died partly testate. Spierin has commented that this decision was clearly motivated by the Court's desire to make provision for the children under section 117.[7]

2.05 Section 121 of the *Succession Act 1965* is also relevant to situations of partial testacy because it 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.[8] This is because once 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*[9] 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 for the court to make such an order if the case was one of pure intestacy, that is, where the deceased had not made any will.[10]

2.06 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

6 [1980] ILRM 225.

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

8 *MPD v MD* [1981] ILRM 179 at 182.

9 [2014] IEHC 32.

10 As opposed to partial intestacy which can occur where the deceased has validly executed his or her will but some or all of the gifts under that will fail, as discussed above.

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."

2.07 In its 1989 *Report on Land Law and Conveyancing: General Proposals*,[11] 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."

2.08 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."[12]

2.09 Keating, in discussing the possible extension of section 117 to intestacies, has pointed to 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."[13]

2.10 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.[14] 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."

2.11 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

11 Law Reform Commission, Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989), paragraph 45.

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

13 Keating in Byrne and Binchy, *Annual Review of Law 1989* (Round Hall, 1990), 294.

14 Brady, *Succession Law in Ireland*, 2nd ed (Butterworths, 1995), paragraph 8.24.

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.[15]

2.12 It may also be relevant to consider that the default rules on intestacy under the 1965 Act differ from other common law jurisdictions, which are discussed further below. The 1965 Act provides for an automatic share of the estate for children where the deceased has died without making a will.[16] This arrangement may be less likely to cause hardship to children than legislation elsewhere which 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. 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.

2.2 Legislation on claims by children in other jurisdictions

2.2.1 England, Wales and Northern Ireland

2.13 As already discussed above, 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[17] 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.

2.14 The 1952 Act implemented the recommendations of the 1951 *Report of the Committee on the Law of Intestate Succession*.[18] 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

15 Pilkington, "Section 117 of the Succession Act 1965" (1999) 2 Bar Review 89.

16 Section 67 of the *Succession Act 1965*.

17 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.

18 *Report of the Committee on the Law of Intestate Succession* CMD. 8310 (1951), chaired by the Law Lord, Lord Morton. The Committee and the Report were also informally referred to as the "Morton Committee" and "the Morton Report" respectively.

rules 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.

2.15 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.[19] Weight was also placed on the unexpectedly high numbers of estates that were being distributed at that time by means of intestacy. These estates were outside the scope of the 1938 Act and it this was also used as 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.[20]

2.16 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.[21] 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 intestacy, or the combination of his will and that law"[22] 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.

2.17 The English courts have considered whether different factors apply to family provision claims on intestacy. In *Re Coventry*[23] 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

19 House of Commons, Hansard 28 March 1952, p.1091: Second Reading speech on the *Intestates Estates Bill 1952* by 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.

20 Cretney, "Intestacy Reforms - The Way Things Were, 1952" (1994) Denning Law Journal 35.

21 Including adult children: see section 1(c) of the *Inheritance (Provision for Family and Dependants) Act 1975*.

22 Section 1 of the *Inheritance (Provision for Family and Dependants) Act 1975*.

23 [1980] Ch 461.

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."[24]

2.18 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 half of anything which remains.[25] Children[26] are entitled to 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 this State under the 1965 Act, which sets out mandatory legal right shares on intestacy and, as noted above, these may not be varied by way of family provision.[27]

2.2.2 Scotland

2.19 As noted above, 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[28] is entitled to three prior rights: dwelling house right,[29] furniture and plenishings,[30] and a cash sum.[31] 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."

2.20 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 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.

2.21 Once the prior rights and legal rights have been satisfied, the remaining estate[32] is distributed in accordance with section 2 of the 1964 Act, which sets out who is entitled to succeed in order of preference.[33]

24 *Ibid* at 488.
25 Section 46(1) of the *Administration of Estates Act 1925*. The sum is now index linked, the Lord Chancellor 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.
26 Or their descendants, if the child has already died they are entitled to take that child's claim by substitution.
27 Law Commission, *Intestacy and Family Provision Claims on Death,* Law Com. No. 331 (2011).
28 Spouse here includes "civil partner": see footnote 153 in Issue 1, above.
29 Section 8 of the *Succession (Scotland) Act 1964.*
30 *Ibid.*
31 Section 9 of the *Succession (Scotland) Act 1964.*
32 This refers to the whole estate including both heritage and movables.
33 The order of succession is as follows: children, parents and siblings equally, surviving spouse or civil partner.

2.22 The Scottish Law Commission has recommended that these rules be simplified.[34] 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 (April 2016).

2.23 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.[35]

2.2.3 New Zealand

2.24 The *Testator's Family Maintenance Act 1900* (subsequently incorporated into the consolidated New Zealand statutes in 1908) which, as noted above, first provided for family protection in New Zealand, did not provide for such orders in cases of intestacy.[36] A valid will was required for an order to be made under the 1908 Act and even 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.[37] The 1908 Act was amended by the *Statutes Amendment Act 1939* to extend its application to intestacies and partial intestacies.[38]

2.25 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 extend it to intestacy.[39]

2.26 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.

34 Scottish Law Commission, *Report on Succession*, Scot Law Com No. 215 (2009) at 11-12.

35 Scottish Law Commission, *Discussion Paper on Succession*, Scot Law Com (2007) at 19.

36 Section 33(1) of the *Family Maintenance Act 1908.*

37 *Yuill v Tripe* [1924] CA 196.

38 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.

39 As noted above, this approach was followed in England and Wales in the *Intestates Estates Act 1952.*

2.27 Like the position in England and Wales, discussed above, New Zealand legislation provides that, on intestacy, where the deceased leaves a spouse or partner[40] and children or other issue the surviving spouse is entitled to personal chattels and payment of a prescribed amount.[41] After these deductions the residue is held on trust in the following shares: a third for the spouse absolutely, two thirds for the children or other issue. 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.

2.28 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.[42]

2.2.4 Australia

2.29 Initially, as in other jurisdictions, family provision legislation in Australia 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.

2.30 In Western Australia, for example, when debating the *Inheritance (Family and Dependants 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."[43]

2.31 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.

2.32 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

40 Husband, wife, civil union partner or surviving *de facto* partner.

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

42 New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (August 1997) at 45.

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

person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both."

2.33 The effect of this provision is to permit family maintenance orders in respect of estates to be distributed by way of testacy or total or partial intestacy.

2.34 Similarly, 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*[44] 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."[45]

2.35 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.[46] 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[47] where, 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.

44 [2005] HCA 11.

45 [2005] HCA 11 at paragraph 115.

46 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).

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

2.3 Questions for consideration

The Commission therefore seeks the views of interested parties as to whether section 117 of the 1965 Act should be extended to cases arising under an intestacy or whether an alternative procedure for dealing with this issue should be considered.

QUESTION 2

2(a) Do you think that it would be appropriate to extend section 117 of the *Succession Act 1965* to claims by children of parents who die intestate?

2(b) If the answer to 2.(a) is "No", do you think that an alternative procedure is required to deal with claims by children in the case of intestacy?

Please type your comments (if any)

ISSUE 3

THE LIMITATION PERIOD UNDER SECTION 117

3.1 The 6 month limitation period in section 117 is mandatory

3.01 Section 117(6) of the *Succession Act 1965* contains a mandatory 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, provided for a 12 month limitation period, which was reduced to 6 months by section 46 of the *Family Law (Divorce) Act 1996*.

3.02 In *PD v MD*,[1] 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 is 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."[2] 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 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."[3]

3.03 Brady, discussing *PD v MD*, observed that "if our legislators had addressed the question of disability and applications under s.117, they would surely have included

1 [1981] ILRM 179.
2 [1981] ILRM 179 at 182.
3 *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*.

the latter in s.127, and their omission must rank as an oversight which cries out for amending legislation."[4]

3.2 Limitation periods and the Constitution

3.04 In its 1989 *Report on Land Law and Conveyancing: General Proposals*,[5] 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*[6] the Supreme Court held that the right to litigate is a property right protected 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.[7] The Commission observed that, as the 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.

3.05 In its *2011 Report on Limitation of Actions*,[8] 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 of 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 their timely administration.[9] The Commission also noted that in assessing limitation periods the courts will consider whether the balance of interests achieved is "unduly restrictive or unreasonable"[10] or "unreasonably or unjustly impose hardship."[11] Therefore, such limitation periods must be supported by just and reasonable policy reasons.[12] In a number of cases the courts have upheld quite short time limits. For example, in *In re the Illegal Immigrants (Trafficking) Bill 1999*[13] 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. Although the Supreme Court acknowledged that asylum

4 See Brady, *Succession Law in Ireland* 2nd ed (Butterworths, 1995), paragraph 17.77.
5 Law Reform Commission, Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989), paragraph 45.
6 [1972] IR 144.
7 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, then the action may be brought at any time before the expiration of three 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.
8 Law Reform Commission, Report on Limitation of Actions (LRC 104 - 2011).
9 *Ibid,* paragraph 1.85.
10 *O'Dowd v North Western Health Board* [1983] ILRM 186 at 190.
11 *Tuohy v Courtney* [1994] 3 IR 1, at 48.
12 *Ibid,* at 50.
13 [2000] 2 IR 360.

seekers face special problems that may make it particularly difficult for them to seek judicial review of decisions affecting them, the Court was satisfied that the discretion afforded to the courts to extend time was sufficiently wide to enable persons to have access to the courts.[14]

3.06 In its 2011 *Report on Limitation of Actions*,[15] the Commission also 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.[16] 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.[17]

3.07 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.

3.3 Rationale for the current fixed time limit in section 117

3.08 In *Re Estate of F (decd)*,[18] 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."

3.09 In its 1989 *Report on Land Law and Conveyancing: General Proposals*,[19] 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."[20] 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

14 *Ibid* at 394. See also Law Reform Commission, Consultation Paper on Limitation of Actions (LRC CP 54-2009).
15 Law Reform Commission, Report on Limitation of Actions (LRC 104 - 2011), paragraph 4.63.
16 *Ibid*, paragraph 4.72.
17 *Ibid*, paragraph 4.81.
18 [2013] IEHC 407, [2013] 2 IR 302, at paragraph 22.
19 Law Reform Commission, Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989), paragraph 45.
20 *Ibid*, at 22.

made or to empower the courts to extend the time limit.[21] 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.[22]

3.10 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 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*[23] and section 18 of the *Family Law (Divorce) Act 1996*.[24]

3.11 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.[25]

3.4 The position on time limits in other jurisdictions

3.4.1 England and Wales

3.12 In *Re Estate of F (decd),* the High Court (Laffoy J) noted that the law on the corresponding statutory provision in England and Wales provides some useful guidance. As noted above, *the Inheritance (Provision for Family and Dependants) 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

21 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).

22 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.

23 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*.

24 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*.

25 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* 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."

after the expiration of the 6 month time limit.[26] This protection does not, however, preclude the recovery of any part of the estate so distributed.[27] 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.

3.13 As also already noted above, the 1975 Act was enacted following the 1974 Report of the Law Commission of England and Wales, *Family Provision on Death*.[28] 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.[29] The English Commission observed that a time limit for such applications "must balance the interest of the possible applicants for family provision against the need for certainty in administering the estate."[30] The Commission concluded that the existing balance in this regard was fair and therefore made no proposal for change.

3.14 The discretionary power of extension in section 4 of the 1975 Act was considered by the English High Court in *Re Salmon decd*[31] in which it identified a non-exhaustive list of guidelines to assist in exercising its discretion:[32]

(a) The discretion is unfettered, to be exercised judicially and in accordance with what is just and proper;

(b) The onus is on the applicant to establish sufficient grounds for taking the case out of the general six month time limit;

(c) It is material to consider whether the applicant has acted promptly and the circumstances in which the applicant has sought the permission of the court after the time limit has expired;

26 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.

27 Law Reform Commission, Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989), paragraph 47.

28 Law Commission of England and Wales, *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974).

29 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 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.

30 Law Commission; *Second Report on Family Property: Family Provision on Death*, Law Com. No. 61 (1974), at 37.

31 [1979] 1 Ch 167.

32 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 applicant to establish a case for the exercise of the court's discretion and that the discretion must be exercised judicially.

(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.

3.15 These 6 guidelines were applied by the English High Court in *Re Dennis decd*,[33] 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 considering whether a defendant ought to have leave to defend in proceedings for summary judgment.[34]

3.16 In their commentary on the court's 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."[35] Two further matters which they propose the court should consider are:

(a) the existence of a pending application by another applicant and

(b) whether the delay in the distribution of the estate will cause hardship to the beneficiaries.

3.17 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."[36] However, following the decision of the High Court in *PD v MD*[37] a court in this jurisdiction 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

33 [1981] 2 All ER 140.

34 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*. In the *Stone* case, 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."

35 See Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* 20th ed (Thomson Sweet & Maxwell, 2013), paragraph 58-14.

36 *Ibid.*

37 [1981] ILRM 179.

settlement of their claim prior to institution of the necessary and often costly court proceedings in respect of their claim.[38]

3.4.2 New Zealand

3.18 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.[39] 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.

3.19 In its 1997 Report *Succession Law: A Succession (Adjustment) Act,*[40] 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 after the death of that person or within 12 months after the grant of administration in the estate of that person, whichever period expires first. This recommendation has not been implemented at the time of writing (April 2016) and the limitation periods in section 9 of the *Family Protection Act 1955* remain in force.

3.4.3 Australia

3.20 In its 1991 *Report on Family Provision*, the Australian National Committee for Uniform Succession Laws[41] 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

38 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 when they are lodged in the High Court's Central Office whereas proceedings are not deemed to have been issued in the Circuit Court until they have been served.

39 See section 9(2) of the New Zealand *Family Protection Act 1955*.

40 New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (August 1997).

41 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.

deceased person's estate do not miss out on the opportunity to have their claim determined."[42]

3.21 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."[43]

3.22 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*.[44] 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 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.

3.23 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.

3.24 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.[45] 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."[46] 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

42 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.

43 *Ibid*, at 35.

44 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.

45 See Chapter 3 of the *Succession Act 2006*. The *Succession Amendment (Family Provision) Act 2008* inserted Chapter 3 in relation to family provision into the Succession Act 2006.

46 The time limit under the previous *Family Provision Act 1982* was 18 months from the date of death.

the administration of an estate with the need to ensure that those with a genuine claim have sufficient time within which to make it."[47] Section 93 of the 2006 Act provides protection for personal representatives who distribute the estate prior to an application for family provision.[48]

3.5 Questions for consideration

The Commission therefore seeks the views of interested parties on whether the time limit prescribed in section 117(6) of the *Succession Act 1965* should be amended. The Commission also seeks views on whether section 117(6) should be amended to empower the courts to extend the time limit prescribed.

47 New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005), at 15. Whilst 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 Commission varies from that enacted. The New South Wales 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."

48 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 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.

QUESTION 3

3(a) Do you think that the 6 month limitation period for applications under section 117 of the *Succession Act 1965* should be amended?

3(b) If so, what do you think is an appropriate limitation period, having regard to whether the period commences on the date of death or the date of grant of representation?

3(c) Do you think that the time limit should be different in cases where the applicant is a child; or a person whose decision-making capacity is in question, within the meaning of the *Assisted Decision-Making (Capacity) Act 2015*?

3(d) Do you think that the courts should be given a discretion to extend the time limit?

3(e) If the answer to 3.(d) is "yes":

(i) do you think that the discretion should be exercised on identified grounds and, if so,

(ii) what factors should be taken into account in exercising the discretion?

3(f) If the answer to 3.(d) is "yes":

(i) where the court orders an extension, do you think that it should have power, where appropriate, to disturb distributions already made?

(ii) in exercising this power, do you think that the court should take into account whether the person receiving a benefit, or the personal representatives, had knowledge constructive or actual of a possible claim?

Please type your comments (if any)

ISSUE 4

THE DATE ON WHICH THE LIMITATION PERIOD BEGINS

4.1 The limitation begins from "first taking out of representation"

4.01 Section 117(6) of the *Succession Act 1965* provides that the 6 month limitation period begins from the "first taking out of representation." In *Re Estate of F (decd)*,[1] the High Court (Laffoy J) 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. 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[2] 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.[3] 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 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 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 will annexed so that the application in that case was within the time limit.

4.02 The Court noted that, in interpreting section 117(6), the 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."[4]

1 [2013] IEHC 407, [2013] 2 IR 302.

2 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."

3 A grant issued on foot of a court order where a proposed plaintiff wishes to issue proceedings against the estate of a deceased person and a grant has not been taken out in that estate is generally referred to as a grant 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 [2013] IEHC 407, [2013] 2 IR 302, at paragraph 30.

4.03 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 deceased 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; and 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 his estate was not established, and that 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.

4.04 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.

4.05 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. He 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)."[5] Spierin also cites this as an example of how the jurisdictional nature of the time limit (discussed above in Issue 3) can cause anxiety where there is uncertainty as to the date at which times starts running.

4.2 The date when the limitation period begins in other jurisdictions

4.2. 1 England and Wales

4.06 In *Re Estate of F (decd)*,[6] the High Court (Laffoy J) examined the corresponding provision in the *Inheritance (Provision for Family and Dependants) 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)*[7] 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

5 See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011), paragraph 772. The name of the case is not cited in the text.

6 [2013] IEHC 407, [2013] 2 IR 302.

7 [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 prescribed under 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.

merely enables a particular thing to be done in relation to the estate and did not enable the distribution to take place."

4.07 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.[8] The Commission confirmed that there was an inconsistency because the grants listed in section 23 of the 1975 Act, which limited the type of property which could be distributed, were disregarded while grants limited to special purposes and which did not enable the personal representatives to distribute any property appeared to start the time running.[9] 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).

4.08 Section 23 of the 1975 Act was amended by the *Inheritance and Trustees' Powers Act 2014* to give effect to this recommendation.[10] 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).

4.09 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

8 Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death,* Law Com. No. 331 (2011), paragraphs 7.55 to 7.70.

9 *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.

10 See section 6 and schedule 3 of the *Inheritance and Trustees' Powers Act 2014*.

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.[11] 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."[12] 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.[13] 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)."[14]

4.2.2 New Zealand

4.10 In New Zealand, the time 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." The New Zealand Law Commission, in its 1997 Report,[15] recommended a time limit of 18 months after the date of death or 12 months after the grant of administration, whichever period expires first. This recommendation has not been implemented at the time of writing (April 2016).

4.2.3 Australia

4.11 In its 1997 *Report on Family Provision*, 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 in the estate of the deceased person.[16] 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

11 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 delay; the deceased's only significant assets might pass outside the estate (for example, an interest in a joint tenancy); or that 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.

12 Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death,* Law Com. No. 331 (2011), paragraph 7.49.

13 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. The Commission therefore anticipated that consequential changes would be required to the relevant rules of court (the *Civil Procedure Rules 1998*) to ensure that, in proceedings begun before the grant of representation had issued, appropriate directions would be 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), paragraphs 7.53-7.54.

14 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 Dependants) Act 1975*.

15 New Zealand Law Commission, *Succession Law - A Succession (Adjustment) Act*, Report 39 (1997).

16 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) at 35.

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."[17]

4.3 Questions for consideration

In light of the discussion above, the Commission therefore seeks views as to whether section 117(6) of the *Succession Act 1965* should be amended to clarify when the limitation period prescribed in it begins to run. The Commission also seeks views on whether the limitation period should begin from the date of death or some other date.

QUESTION 4

4(a) Do you think that section 117 of the *Succession Act 1965* should be amended to clarify the date on which the limitation period for applications under it commences?

4(b) If so, when do you think the limitation period should begin:

(i) on the date of death or

(ii) on the date of first taking out of representation of the deceased's estate?

4(c) If the limitation period begins to run on the date of first taking out of representation of the deceased's estate, what grants, if any, do you think should be disregarded?

Please type your comments (if any)

17 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) at 35.

ISSUE 5

INFORMING POTENTIAL CLAIMANTS OF RIGHT TO APPLY UNDER SECTION 117

5.1 No current duty to notify potential claimants

5.01 Related to the limitation period in section 117 of the *Succession Act 1965*, discussed in Issue 4, is whether a duty should be imposed on the personal representative of the estate of a deceased person to inform potential claimants of their right to make an application under section 117.

5.02 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*.[1] 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."[2] The Court observed that there is no duty imposed, by legislation or otherwise, which requires the personal representative to notify potential claimants of their right to make an application under section 117. The Court cited with approval the comments of Spierin who had noted that:[3]

> "[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."

5.03 In its 1989 *Report on Land Law and Conveyancing Law: General Proposals*,[4] the Commission noted that one of the submissions received suggested that, given that the class of persons who may apply under section 117 is a narrow and ascertainable

1 [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.

2 [2005] IEHC 28, [2005] 1 IR 416 at 426.

3 *Ibid*, citing Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 3rd ed (Butterworths, 2003), paragraph 744. The 4th edition of the text, Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Butterworths, 2011), paragraph 783, refers to the decision in *Rojack v Taylor* and observes that it strengthens the position that it would be negligent to notify a child of its ability to bring a claim.

4 Law Reform Commission, Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989), at 22.

one, the personal representative should perhaps be under a duty to inform 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.[5]

5.04 Section 18(6) 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, however,[6] 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 provides a similar remedy for spouses following the grant of a decree of judicial separation.[7] Section 115 of the *Succession Act 1965* 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[8] provided for in section 115(1) and (2) of the 1965 Act.

5.2 Duty to notify potential claimants in other jurisdictions

5.2.1 England, Wales and Northern Ireland

5.05 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.[9] The Commission noted that a number of consultees opposed the idea "on the ground that

5 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 which 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."

6 See Spierin, *The Succession Act 1965 and Related Legislation - A Commentary* 4th ed (Bloomsbury Professional, 2011), paragraph 837. The common origins (in New Zealand) 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, above, in Issue 1,

7 See section 15A(6) of the 1996 Act, discussed above.

8 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 his or her share under the intestacy together with any devise or bequest to him 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.

9 See Law Commission of England And Wales, *Second Report on Family Property: Family Provision on Death,* Law Com. No. 61 (1974).

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."[10] On that basis, the Law Commission of England and Wales concluded that it was not in favour of imposing the duty. 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 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*.

5.2.2 New Zealand

5.06 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."

5.07 This is a limited statutory exception to the general practice and does not apply to adult beneficiaries who have decision-making capacity.[11] Although expressed in discretionary terms the New Zealand High Court held in *Re Magson*[12] that the courts had interpreted this provision as an obligation. On appeal, however, 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. [13]

5.08 The 1955 Act does not provide any guidance as to the duties of personal representatives to inform potential claimants of their claims, and there is therefore 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

10 *Ibid* at paragraph 145.
11 *Sadler v Public Trust* [2006] FRNZ 115 at paragraph 35.
12 [1983] NZLR 592.
13 Patterson, *The Law of Family Protection and of Testamentary Promises in New Zealand* (2nd ed, 1994), at 94.

court to determine the most effective means to represent those persons' interests adequately.[14]

5.09 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 inform potential applicants in certain specific circumstances. In *Irvine v Public Trustee*[15] 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.

5.10 In *Re MacKenzie*[16] 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 inquiries 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.

5.11 In *Re Stewart*[17] the testator had specifically prohibited his personal representatives 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.[18] Accordingly if a personal representative was aware of potential beneficiaries, he or she might breach this duty if these 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 inform all potential claimants.[19] 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.[20] 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,[21] 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.[22] The Court of Appeal

14 *Judicature Act 1908*, Schedule 2, Rule 451(2).
15 [1988] NZLR 67.
16 [1998] 16 FRNZ 487.
17 [2002] NZLR 809.
18 *Ibid* at 824.
19 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.
20 [2002] NZLR 809 at 823, 824.
21 *Re Stewart* [2002] NZLR 809 at 824.
22 *Price v Smith* (2003) NZFLR 329 at 334.

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.[23]

5.12 In *Sadler v Public Trust*[24] 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 inform potential claimants of 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 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 which 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.

5.13 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.[25] The 1955 Act potentially provides for claims by: spouses and civil partners,[26] *de facto* partners (cohabitants),[27] grandchildren,[28] stepchildren who are maintained,[29] and parents of the deceased.[30] The Court was of the opinion that if such an onerous burden was to be placed on personal representatives, the Parliament would have specifically provided for it.[31]

5.14 On appeal, the Court of Appeal in *Sadler v Public Trust*[32] 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

23 *Price v Smith* (2003) NZFLR 329 at 334.
24 [2006] FRNZ 115.
25 *Sadler v Public Trust* [2006] FRNZ 115 at paragraph 66.
26 Section 3(1)(a) of *The Family Protection Act 1955*.
27 Section 3(1)(aa) of *The Family Protection Act 1955*.
28 Section 3(1)(c) of *The Family Protection Act 1955*.
29 Section 3(1)(d) of *The Family Protection Act 1955*.
30 Sections 3(1)(e), 3(1A) of *The Family Protection Act 1955*
31 The policy reasons for this position were explained in the subsequent High Court case of *Public Trust v Public Trust* [2009] BCL 285 by Priestly J 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.
32 [2009] NZFLR 937.

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 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."[33]

5.15 The draft Bill appended to the New Zealand Law Commission's 1997 *Report on Succession Law*[34] contained a consolidation, without amendment, of the duties in section 4(4) of the *Family Protection Act 1955*.

5.2.3 Australia

5.16 In *Cartrom v Boesen*[35] 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."

5.17 The Court emphasised the desirability of quick distribution of estates, and merely indicated that it would be good practice to inform potential claimants rather than imposing a positive obligation on personal representatives.

5.18 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,[36] the time limit in the notice has expired and they do not have any notice of any application or intended application for family provision.

5.19 In *Underwood v Gaudron,*[37] 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

33 *Sadler v Public Trust* [2009] NZFLR 937 at 946.
34 New Zealand Law Commission *Succession Law - A Succession (Adjustment) Act,* Report 39 (1997).
35 [2004] NSWSC 1109.
36 Section 17 of the New South Wales *Civil Procedure Act 2005*.
37 [2014] NSWSC 1055.

section 93 of the 2006 Act the Court also noted that the comments in *Cartrom v Boesen* provided useful guidance.

5.3 Questions for consideration

In light of the discussion above, the Commission seeks the views of interested parties as to whether personal representatives should be under a duty to inform potential applications of their right to make an application under section 117 of the *Succession Act 1965*. The Commission also seeks views as to whether, if such a duty were to be imposed, it should be general in nature or limited.

QUESTION 5

5(a) Do you think that a duty should be imposed on personal representatives in the estate of a deceased person to notify potential claimants of their right to make an application under section 117 of the *Succession Act 1965*?

5(b) If the answer to 5.(a) is "Yes", who do you think should be notified where potential claimants are under the age of 18, or potential claimants whose capacity may be in question (within the meaning of the *Assisted Decision-Making (Capacity) Act 2015*)?

5(c) If the answer to 5.(a) is "No", do you think that an obligation should be imposed on personal representatives to make a reasonable attempt to ensure that notice of the death is brought to the attention of potential applicants?

Please type your comments (if any)

Please fill in your name and contact details below. Click submit button to email your submission. If submitting by webmail please check your drafts folder and sent items to ensure that your email has been submitted.

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Surname *	
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