

‘Til death do us part’: Surviving Spouses, Civil Partners & Provision on Intestacy in Ireland

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Introduction

2015 marks the 50th anniversary of the enactment of the Succession Act 1965 in Ireland. The Act, introducing a system of forced heirship protecting surviving spouses against disinheritance and radically altering the rules governing the distribution of an intestate estate, brought a ‘revolutionary change’ in the law of succession to the State (*Re Urquhart* [1974] IR 197 at 208). However, despite the enormous impact it has had on citizens, and its recent extension to provide similar protection for civil partners pursuant to the Civil Partnership and Certain Right and Obligations of Cohabitants Act 2010, in the fifty years since its enactment, the Succession Act has never been subject to a comprehensive review or reform.

This lack of legislative engagement in Ireland stands in marked contrast to a number of other common law jurisdictions. In the past decade alone, the Law Commission for England and Wales (2011), the Scottish Law Commission (2009), the New South Wales Law Reform Commission (2007) and the British Columbia Law Institute (2006) have each placed their respective regimes under the microscope, with legislatures in each jurisdiction undertaking important reforms, particularly in their rules governing intestacy. One common denominator which has emerged in these recent reviews is the overwhelming desire to ensure, where possible, the financial security of the surviving spouse or civil partner on intestacy. By contrast, in Ireland, the extent to which such spouses or civil partners are adequately protected under the quite different fractional share regime applied in the jurisdiction remains under-analysed (although Spierin, 2011 and Brady, 1995 discuss the provisions of the Succession Act 1965 in considerable detail, comprehensive analysis and proposals for reform of the rights of surviving spouses and civil partners on intestacy are glaringly absent). This article seeks to address this gap.¹

The article begins by outlining the rules governing the distribution of an intestate estate in Ireland. It critiques the protection afforded to financially weaker surviving spouses and civil partners pursuant to the Succession Act 1965,² highlighting the potentially serious shortcomings of the current approach. Drawing on the most up-to-date empirical data available in the jurisdiction and identifying key trends emerging on intestacy across the common law world, the article places the weaknesses of the Irish approach in context and highlights the need for improvement. The article then considers the relative merits of rule-oriented and discretion-based approaches to strengthening the financial protection of surviving spouses and civil partners before advancing a proposal for reform.

Distribution on intestacy: The Irish approach

Prior to the introduction of the Succession Act 1965, the law of succession in Ireland largely mirrored the equivalent legislation applied in England and Wales at the time. Freedom of testation was

carefully protected (see Brady, 1995, p211); on intestacy surviving spouses were entitled to a fixed monetary sum of £4,000 (the 'statutory legacy') coupled with a one-half share in the remainder pursuant to the Intestates' Estates Act 1954. Within ten years of the introduction of the 1954 Act, however, the Irish legislature decided to undertake a wide-ranging review of the law governing succession.³ The resulting Succession Act 1965 radically reformed the law of succession applied in the jurisdiction (for an analysis of the women's rights movement in the 1960's and its influence on the legislative developments during this period, see Connolly, 1998).

On testacy, the Act effectively introduced a system of forced heirship for spouses, akin to that applied in civil law jurisdictions, through what is known as the legal right share.⁴ Although the Act did not oblige testator's to make provision for their children, children may apply to the court under section 117 for 'proper provision' where the testator has, in the opinion of the court, failed in their moral duty to make such provision for them. Moreover, moving away from the former approach based on the provision of a statutory legacy and share of the remainder, the Succession Act 1965 introduced a new, quite different, scheme of distribution on intestacy. Section 67 provides that where an intestate dies leaving a spouse and no issue, the spouse is entitled to the entire estate. By contrast, where an intestate dies leaving a spouse and issue, the spouse takes two-thirds of the estate with the remainder distributed among the issue.⁵

Civil partners now also enjoy largely comparable provision to spouses pursuant to the Succession Act 1965. In addition to the extension of similar protections on testacy through the provision of a legal right share,⁶ section 67A of the Succession Act 1965, as inserted by section 73 of the 2010 Act, provides that if an intestate dies leaving a civil partner and no issue, the civil partner takes the whole estate. If an intestate dies leaving a civil partner and issue, the civil partner takes two-thirds of the estate with the remainder distributed among the deceased's issue. However, unlike in the case of a spouse, the provision in either situation is not guaranteed for a civil partner. Section 67A(3) provides that the children (although not remoter issue) of a deceased civil partner can seek increased provision at the expense of the surviving civil partner's entitlement. No portion of the surviving civil partner's share is protected from such a claim.⁷ In exercising its discretion when considering such an application, the court is required to consider all the circumstances, including the extent to which the intestate made provision for that child during their lifetime, the age and reasonable financial requirements of that child, the intestate's financial situation and the intestate's obligations to the civil partner. However, the court must make an order for provision if it would be unjust not to do so.

A critique of the rules governing the distribution of an intestate estate in Ireland

At first blush, the Succession Act 1965 appears to provide surviving spouses or civil partners with considerable protection on intestacy. Depending on whether the deceased was also survived by issue or not, and in the absence of a successful application under section 67A(3), the surviving spouse or civil partner will take the entire estate or a seemingly substantial share – two-thirds – thereof. In addition, as Waggoner, Alexander, Fellows and Gallanis (2002) note 'even for those people who die intestate, intestacy is not the prevailing form of family property transfer' (p35). Joint tenancies, with the associated right of survivorship, are often considered will substitutes. Where the family home is held by a couple under a joint tenancy, and the deceased dies intestate, the surviving spouse or civil partner takes the family home (and any other assets held by the couple in a joint tenancy) by virtue of the right of survivorship, in addition to their entitlements under the Succession

Act 1965. Indeed, the possibility of surviving spouses or civil partners in Ireland benefitting from such combined provision appears reasonably high. Reflecting the historical patterns of tenure in Ireland over the second half of the twentieth century which were 'dominated by the growth of owner occupation, both in absolute and relative terms' (Fahey and Nolan, 2005, pp69-71), home-ownership remains popular with 69.7% of homes owner-occupied (Central Statistics Office [CSO], 2012, p12). In line with much of the common law world, co-ownership has also become quite common in Ireland. Anecdotal evidence suggests that most newly purchased homes are co-owned by spouses or civil partners in a joint tenancy while legislative initiatives incentivise spouses or civil partners to transfer solely-owned homes into a joint tenancy.⁸

However, to assess the overall effectiveness of the entitlements on intestacy purely from the perspective of the 'average' co-(home)owning surviving spouse or civil partner is to tell but half a story. A key difficulty in the adoption of a fractional share approach is the fact that the extent of the share to which a surviving spouse or civil partner is entitled depends on the overall value of the deceased's estate. This presents an especially serious problem where the estate is modest, a situation where the need for legislative protection is most acute. In short: the smaller the estate, the smaller the share. Three cohorts of surviving spouse or civil partner appear particularly vulnerable.

First, the danger posed by a regime founded on a fractional approach is especially serious where the family home is the principal family asset and the title to it was held solely by the deceased spouse or civil partner. Conscious of its importance in Irish society, the legislature did seek to prioritise the protection of the family home through the enactment of section 56 of the Succession Act 1965, as amended by section 70 of the 2010 Act. Section 56 allows the surviving spouse or civil partner, subject to limited restrictions, to require appropriation of the home in or towards satisfaction of any gift under the will, legal right share or share on intestacy to which they are entitled (see O'Sullivan, 2013a).⁹ Nevertheless, difficulties still remain. If the value of the share on intestacy to which the surviving spouse or civil partner is entitled is less than the value of the home, they could potentially be forced to sell the family home in order to meet the entitlements of the children in relation to the intestate estate. In such a scenario, as Spierin (2011) observes, it is further possible that a surviving spouse (or civil partner) may 'be left with an inadequate capital sum to purchase other accommodation' (p203; see also Burns 2012 for comparable weaknesses in the Singaporean regime). Although comparatively rare, tenants-in-common are also potentially vulnerable, particularly where they only hold a limited interest in the property. When a tenant-in-common dies, their interest in the property falls into their estate. If the tenant-in-common dies intestate, the surviving, co-owning, spouse or civil partner's share on intestacy combined with their own interest may not, in all circumstances, secure the family home.¹⁰

The Irish legislature was not, however, blind to this weakness of the regime. Where the share on intestacy (legal right share or gift under a will) is insufficient to effect the appropriation of the family home, section 56 affords the surviving spouse or civil partner three options:

- a) They may meet the difference in value by paying money into the estate pursuant to section 56(9).
- b) Under section 56(3), they may exercise the right to appropriate the family home in respect of the share of any 'infant' for whom they are a trustee, adding it to their own share in order to appropriate the property.

- c) They may apply to the court pursuant to section 56(10)(b) to waive or reduce the balance between the share to which they are entitled and the value of the family home where the payment of the outstanding money into the estate would result in hardship to the surviving spouse or civil partner.

Nevertheless, despite their apparent utility, these ‘protections’ may, in practice, be merely illusory. Where the surviving spouse or civil partner was financially dependent on the deceased and/or the value of the home is considerable, they may not be in a position to pay sufficient money into the estate to offset the difference in value and/or retain enough cash on which to survive. Moreover, the surviving spouse or civil partner will not, in many cases, be a trustee for the share of any infant rendering section 56(3) of limited value.¹¹ Although section 56(10)(b) appears, on face value, to be especially beneficial to financially vulnerable surviving spouses or civil partners, how effective it is in practice is also debateable. Despite being in place for almost 50 years, there remains a dearth of reported judgments arising from applications taken thereunder resulting in a lack of foreseeability from a potential applicants’ perspective as to the likelihood of success of any claim. In circumstances where the surviving spouse or civil partner is at risk of losing the family home and in an otherwise vulnerable financial position, they may also be less likely to risk pursuing an action while the potential to create or amplify family tensions acts as a further deterrent to the instigation of litigation. Indeed, it appears these fears may go a long way towards accounting for the lack of case law arising under this section: even in an apposite case, it seems surviving spouses or civil partners may be reluctant to take litigation to increase their share.

The second cohort of surviving spouses or civil partners who appear especially vulnerable are those where the couple did not own a family home. In such circumstances, the surviving spouse is limited to receiving two-thirds of the intestate estate, however modest its value, while such minimum provision is not even guaranteed for civil partners in light of section 67A(3). Moreover, surviving spouses or civil partners cannot seek an augmentation of this share pursuant to section 56(10)(b) given the provision’s asset-specific nature.¹² The third category of vulnerable surviving spouses or civil partners is that where, although the surviving spouse or civil partner does take the family home by survivorship, the provision of two-thirds of the intestate estate does not provide them with sufficient sums on which to live due to its limited value. Again, such surviving spouses or civil partners are excluded from applying for an augmentation of their share on intestacy.

Therefore, notwithstanding the lack of attention afforded to these provisions to date in Ireland, it is clear that the regime as currently applied is liable to leave financially vulnerable spouses or civil partners without sufficient protection on intestacy.

A time for reform – Key trends on intestacy

On the 50th anniversary of the Succession Act 1965, the need for a comprehensive review and reform of the statutory entitlements of surviving spouses or civil partners on intestacy in Ireland is pressing. In addition to the shortcomings which exist in the current regime, a number of social and legislative trends, at home and abroad, also serve to highlight the comparative weakness of the Irish approach on intestacy and support the call for reform.

- *Trend 1: Intestacy continues to be prevalent in Ireland and appears more likely to arise in lower value estates*

Intestacy remains a serious issue in many common law jurisdictions (Law Commission for England and Wales, 2011, para1.3; New South Wales Law Reform Commission, 2007, paras1.12-1.14) and continues to be a significant feature, in particular, of Irish probate practice. On the introduction of the Succession Bill in 1964, Minister Lenihan, the then Minister for Justice, noted that half of all deaths resulted in intestacies.¹³ Although this figure has fallen substantially, almost one-quarter – 3,149 – of all grants of representation issued and recorded in the Irish Circuit and High Courts in 2012 concerned intestate estates (Courts Service, 2012, p48). Indeed, it appears probable that the true rate of intestacy is even higher. Grants may not be required in certain circumstances, notably where a person dies leaving small amounts of money in a bank or building society, and these smaller estates appear more likely to give rise to intestacy. In 1978, it was noted in an American context: ‘Persons who die with wills tend to be older, wealthier, and with higher occupational status and higher yearly incomes than those persons who die without wills’ (Fellows, Simon, Rau, 1978, p325). By corollary, as the Law Commission for England and Wales (2011) recently observed, ‘Intestate estates generally are of a lower value than estates where there is a will’ (para1.3). A similar pattern has been identified by the Scottish Law Commission (2009, para2.1). Although it is difficult to say in an Irish context whether or to what extent this trend is also in evidence, research for MyLegacy.ie in 2012 which engaged 1,000 participants did highlight that 7% less participants from more disadvantaged groups had made a will when compared to higher socio-economic groups.¹⁴ Intuitively, it would seem reasonable to assume that at least a significant proportion of intestate estates in Ireland are of small or modest value given that such estates would often be least capable of meeting the transaction costs involved in obtaining legal advice and making a will (see Hirsch, 2004-5).¹⁵ This trend serves to amplify the weaknesses of the current regime: the fractional share approach is especially harsh on surviving spouses or civil partners in lower value estates yet it is precisely in these situations that intestacy is more likely to arise.¹⁶

➤ *Trend 2: The rights of surviving spouses and civil partners are increasing across the common law world on intestacy*¹⁷

Legislative schemes for the distribution of an intestate estate across the common law world almost invariably place the surviving spouse, and increasingly civil partners or their equivalent, as the primary beneficiary (see Burns, 2013a). As in Ireland, where the deceased is survived by a spouse or civil partner but no issue, most jurisdictions ensure the entire estate goes to the surviving spouse.¹⁸ However, unlike in Ireland, the rights of surviving spouses and civil partners are also intensifying even where the deceased is survived by issue. In such circumstances, most common law jurisdictions make provision for surviving spouses or civil partners through an entitlement to a statutory legacy, combined with a share in the remainder of the estate. Recent increases in the quantum of statutory legacies applied in several jurisdictions have effectively resulted in such spouses or partners receiving the *entire* estate in the majority of cases.¹⁹

In England and Wales, pursuant to section 46 of the Administration of Estates Act 1925, as amended by section 71 of the Civil Partnership Act 2004 and section 1 of the Inheritance and Trustee’s Powers Act 2014, surviving spouses and civil partners are entitled to a fixed monetary sum, known as a statutory legacy, equivalent to £250,000 where the deceased is also survived by issue:²⁰ a staggering 90% of intestate estates are worth less than this threshold (Law Commission, 2011, para2.6). In Scotland, following the most recent increases, a surviving spouse or civil partner has a series of prior rights on intestacy valued at £502,050 where the deceased is also survived by issue. It is again likely

that, in the majority of cases, the surviving spouse or civil partner will take the entire estate.²¹ Similarly, under the Wills, Estate and Succession Act 2009 in British Columbia, Canada, the statutory legacy, known as the preferential share, was dramatically increased from \$65,000 to \$300,000 where the deceased's descendants are common descendants.²² Moreover, the New South Wales Law Reform Commission (2007), as part of the Australian National Committee for Uniform Succession Laws, recently recommended that where the deceased was survived by a spouse or 'domestic partner'²³ and issue, the surviving spouse or partner should take the whole intestate estate unless there were issue from a former relationship; in the latter case, however, the outcome would still, in most cases, ensure 'all to spouse or partner' with the recommended statutory legacy set at \$350,000 (New South Wales Law Reform Commission, 2007).²⁴

There appear to be two principal driving factors in this intensification of the rights of surviving spouses and civil partners (or equivalent) across the common law world. First, one of the chief purposes of the law of intestacy is to produce a default or substitute will which reflects the presumed distributive preferences of the deceased. To ascertain the likely intention of the deceased, empirical research has been carried out in a number of jurisdictions to investigate testator behaviour and to gauge public opinion as to how an intestate estate ought to be distributed. These studies demonstrate widespread support for the incorporation of generous provision for surviving spouses and civil partners. Reflecting to some extent the findings of research conducted in the United States of America thirty years ago which found that 'a majority of the public would allow the spouse to inherit the entire estate' (Simon, Rau, Fellows, 1980, p1270), Douglas, Woodward, Humphrey, Mills and Morell's large-scale study of public attitudes to inheritance law in England and Wales (2011), as well as wills surveys carried out in Australia (Dekker and Howard, 2006), each recorded strong support for the devolution of the entire intestate estate to the surviving spouse or partner, particularly where any surviving children were children of the relationship.

Yet, it is increasingly clear that 'intestacy law is no longer anchored only in will substitution' (Burns, 2013a, p114). The second driving factor in the intensification of the rights of surviving spouses and civil partners is the 'clear societal trend' which has emerged towards an ageing population (Cooke, 2009, p433). In light of this demographic shift, the need to ensure that the entitlements of surviving spouses and civil partners are adequate assumes greater significance. As Cooke (2009) noted: 'There are good reasons for keeping resources with the older generation rather than passing it downwards, in order to provide the older generation with what they need for their care in later life' (p433). Similarly, as the New South Wales Law Reform Commission explained in 2007, 'There is no doubt that needs of the surviving spouse or partner have become more and more important over time. This is partly a result of changing demographics which make spouses and partners more reliant on the intestate's estate in their later years and the children less reliant' (para1.37). Although similar demographic changes have taken place in Ireland, with the number of people aged over 65 in the jurisdiction increased by 14.4% in 2011 compared to 2006 (CSO Part I, p15), the Irish legislature has, thus far, failed to respond, leaving surviving spouses and civil partners in modest intestate estates, in particular, in a potentially vulnerable financial position on intestacy.

- *Trend 3: The importance of securing the family home for the surviving spouse or civil partner continues to be of paramount importance across the common law world*

Despite the undisputed growth in co-ownership rates throughout much of the common law world, and contrary to public perception, title to the family home may still be vested in one spouse or civil partner as sole-owner. There are a number of different reasons why this may continue to arise. Upon inheritance or receipt of a gift of property, a family home may be placed in the sole name of the beneficiary. Alternatively, a spouse or civil partner may have purchased or built the property prior to the marriage or civil partnership and failed to transfer the property into joint names after the wedding or registration of the civil partnership. Moreover, the growth in co-ownership of the family home over the past number of decades primarily protects younger generations – many middle-aged and older individuals, for whom succession law is of particular importance, remain in traditional situations whereby the home is in the sole name of one spouse, often the husband.

Although there appears to be no statistical data on the way in which title to the family home is held in Ireland, such research has been carried out in other jurisdictions and demonstrates the continued incidence of sole ownership across the common law world. In England and Wales, the Department of Constitutional Affairs (2005) suggested in 2006 that 35% of married households were owned by one spouse (p23; *cf.* Kerridge, 2007). Similarly, the Scottish Law Commission suggested in 2009 that approximately 43.5% of households in the jurisdiction were solely-owned with only 42% owned in common by spouses or civil partners (para2.10). It has also been observed in Western Australia that even though co-ownership of the family home is ‘the norm amongst married couples’, sole-ownership ‘is by no means uncommon’ (Crago, 2000, p198), while a recent survey undertaken in New South Wales by Dekker and Howard (2006) appeared to indicate that only 12% of intestates owned property as joint tenants. As a result, the importance of securing the family home for the surviving spouse or civil partner has remained a central focus of intestacy reform initiatives throughout the common law world. Indeed, debunking the myth that such protection is no longer required, Cooke (2009) observed in relation to England and Wales that the increase in co-ownership

‘...might be said to argue for a *greater need* to ensure that a surviving spouse [or civil partner] who does not take the family home by survivorship has the resources to buy out the deceased’s share. It may also mean that the value placed on home ownership in our society is so great, that the risk of having to move is seen as correspondingly tragic, perhaps to a greater extent than it was in the early years of the twentieth century before we became a “property-owning democracy”’ (p433).

Consequently, the level at which provision is set in most common law jurisdictions applying a regime founded on a statutory legacy remains inextricably (though no longer exclusively) linked to the need to facilitate surviving spouses or civil partners remaining in the home and, where possible, retaining a sufficient surplus on which to live. The Law Commission for England and Wales (2011) recently reiterated that ‘one function of the statutory legacy is to enable a surviving spouse [or civil partner] to remain in the family home (insofar as that is possible without giving the whole estate to the spouse [or civil partner] in every case)’ (para2.122). In light of the generous statutory legacy which applies, they viewed the risk of a surviving spouse or civil partner losing the home as a ‘very rare outcome arising only from unusual circumstances’, such as where there was a ‘high value estate solely owned by the deceased spouse [or civil partner]’ (para3.26). Moreover, the Law Commission noted that even if the spouse or civil partner had to move out of the family home, they would have received such provision as to allow them to secure alternative accommodation (para3.26).

The comparative vulnerability of non-owning spouses or civil partners vis-à-vis the family home in Ireland is, by contrast, much more acute. The fractional share approach adopted pursuant to the Succession Act 1965 means it is considerably more likely that a surviving, non-owning, spouse or civil partner will not be able to appropriate the family home. This danger is most serious where the estate is modest and the home represents the principal family asset. Furthermore, if the surviving spouse or civil partner is forced to sell the home, they are not endowed with a minimum level of provision on which to survive in the absence of a floor of support.

This lack of protection is surprising when viewed in the context of the wider protection afforded to the family home in Ireland. Unlike many common law jurisdictions, section 3 of the Family Home Protection Act 1976 and section 28 of the 2010 Act provide robust, *automatic*, protection to non-owning spouses and civil partners inter vivos, severely restricting the owner spouse or civil partner's ability to unilaterally dispose of the family home (see O'Sullivan, 2013b). A desire to protect non-owning spouses in the home was also central to the attempted introduction of automatic beneficial co-ownership of the home through the Matrimonial Home Bill 1993.²⁵ Pursuant to the Succession Act 1965, however, a potentially serious lack of protection is evident. In light of comparative weakness of the protection afforded to financially weaker spouses and civil partners on intestacy in Ireland, the need for reform appears pressing.

Avenues for Reform: Fixed rules or discretionary provision?

The first step towards better ensuring the protection of surviving civil partners, specifically, must necessarily involve the removal of section 67A(3) which is inherently discriminatory (see Mee, 2009; cf. Ryan 2008).²⁶ However, such reform, though necessary, is insufficient without more to remedy the weaknesses of the broader regime as currently applied. Therefore, the question arises: what direction ought this reform take? Should the Irish legislature pursue rule-based reform to better protect surviving spouses or civil partners on intestacy or an approach founded on the provision of discretionary justice?

At first blush, a discretionary regime akin to that applied in England and Wales pursuant to the Inheritance (Provision for Family and Dependents) Act 1975 appears especially attractive. Section 1 provides that a surviving spouse or civil partner may apply for additional provision on the grounds that the disposition of the deceased's estate effected by the law relating to intestacy 'is not such as to make reasonable financial provision' for them.²⁷ Crucially, in the context of spouses and civil partners, although the legislation 'cannot be used to redistribute the estate on the basis of fairness, desert, or what the deceased is supposed to have wanted' (Law Commission, 2011, para1.62), 'reasonable financial provision' is not limited to maintenance.²⁸ The court moreover may make a range of orders from the estate in favour of an applicant including periodical payments orders, lump sum payments orders or orders transferring specific property in the estate (such as the family home) to the applicant.²⁹ On initial examination, such an approach appears especially apt to address the financial vulnerability of surviving spouses or civil partners on intestacy by directly facilitating the granting of individualised justice: provision and thus protection may be 'moulded to fit the circumstances of the particular case' (Miller, 1986, p474; for further discussion of the 1975 Act, see Law Commission, 2011, 2.141-2.153).

However, a discretionary regime founded on flexibility is not without significant shortcomings. Indeed, while the ability to deal with each case on an individualised basis is undoubtedly its trump

card, it may also be its greatest weakness. The principal difficulty with discretionary provision, as exemplified by the lack of developed case law in relation to section 56(10) of the Succession Act 1965, is that in the absence of a fixed entitlement to greater provision, vulnerable surviving spouses or civil partners may be unwilling to risk incurring the substantial costs associated with litigation or to create or fuel family tensions following the death of a spouse or civil partner. Moreover, given the lack of foreseeability which often characterises discretionary schemes, and has plagued the discretionary ancillary relief regime applied on divorce in Ireland pursuant to the Family Law (Divorce) Act 1996 (see O’Sullivan, 2015; Crowley, 2013), many potential litigants who are genuinely in need may be reluctant to make such an application. This risk is arguably most acute where the estate is modest and the need for protection is most required. Therefore, as in other areas of law regulating the division of family finances, the need for certainty remains pressing (see Deech, 2015). Notwithstanding that more rule-oriented or entitlement-based approaches do provide somewhat ‘crude’ justice (Shapo, 1993, p711), such schemes appear preferable to provide better *automatic* protection for vulnerable surviving spouses and civil partners.

A seemingly obvious entitlement-based approach which could be considered in overcoming the current difficulties would be by affording surviving spouses or civil partners the right to take the intestate’s interest in the family home, irrespective of its value or up to a specified value, in lieu of monetary provision (see Reid, 2010, p321). Such an approach is adopted in a number of Australian jurisdictions³⁰ and was mooted by the Law Commission for England and Wales in its 2009 Consultation Paper. Nevertheless, despite its apparent simplicity and focus on securing the family home, the asset-specific nature of this approach would not be ideal. Such reform would not protect surviving spouses or civil partners where the intestate estate did not include a family home nor would it ameliorate the situation for those in modest estates who take the property by survivorship but remain with little else on which to live.³¹

An approach providing surviving spouses or civil partners with a statutory legacy plus a share of the remainder, however, represents a particularly interesting option for Ireland. The crux of the problem is that there is no floor of support for vulnerable, financially weaker spouses or civil partners. A statutory legacy, by definition, provides such protection by front-loading provision in favour of the surviving spouse or civil partner. Indeed, the adoption of such an approach would not be new in Ireland. As noted above, a system based on a statutory legacy did formerly apply in the jurisdiction pursuant to the Intestates’ Estates Act 1954. Interestingly, although this approach was abandoned with the enactment of the Succession Act 1965, the change in the law governing intestacy received surprisingly little attention and stimulated little debate. Nonetheless, the then Minister for Justice, Mr. Lenihan, did note his dislike for an approach based on a statutory legacy:

‘This device of giving the surviving spouse a minimum sum plus a fraction of the remainder of the estate is not being proposed in the Bill. In the first place, to give a wife with children a sufficient monetary sum in Irish circumstances would, in fact, mean giving her two-thirds or more of the average estate. Furthermore, monetary sums are not satisfactory, as they need to be revised from time to time to take account of changing money values.’³²

In light of this distaste for such an approach, the legislature instead opted for a fractional share system. Nevertheless, it is abundantly clear from the above analysis that there are potentially serious weaknesses in the protection it affords which could result in an important lack of support

where it is most needed. While Minister Lenihan claimed that a ‘sufficient monetary sum’ would equate to two-thirds of the average estate, this may often not be true. The Minister himself recognised that two-thirds was the minimum appropriate fraction noting ‘two-thirds *or more*’ would be apt. In modest estates, the family home, if present, will frequently represent the primary family asset. The provision of two-thirds of such an estate may not suffice to protect the property and could leave many non-owning surviving spouses or civil partners in a precarious position. Moreover, the ability to obtain ‘more’ of the intestate estate is of limited practical usefulness for those who wish to augment their share in relation to the home and is not available to co-owners in modest estates or non-home-owning surviving spouses or civil partners.

A regime based on a statutory legacy plus a fraction of the remainder, on the other hand, contains many of the same strengths as the Irish approach allowing for foreseeability, clarity and certainty. Yet, unlike the current Irish approach, it also ensures a minimum floor of support for a surviving spouse or civil partner where the deceased dies intestate. In addition, depending on the level at which it is set, a system founded on a statutory legacy may ensure that, in modest or average estates, the entire estate will often go to the spouse or civil partner. Even where the entire estate is not captured by the statutory legacy, it may, in many cases, better allow the family home to be protected where it was in the sole name of the deceased spouse or civil partner. It is suggested, therefore, that the most appropriate avenue for reform in Ireland, providing more robust protection for vulnerable financially weaker spouses or civil partners, may be the reintroduction of a modified statutory legacy scheme on intestacy.

Statutory legacy for Ireland – A proposal

Level of the statutory legacy

In designing a proposal based on a statutory legacy, a number of key practical questions must be addressed. First, at what level should the statutory legacy be set and how regularly should it be reviewed? In relation to the former issue it is submitted that, having regard to the role of the statutory legacy in securing the family home for a surviving spouse or civil partner in most common law jurisdictions, the level at which any statutory legacy should be set ought to be linked to the average house price in Ireland. To this end, it is suggested that a statutory legacy in the region of €180,000 could be applied in the jurisdiction, with the surviving spouse or civil partner also taking a half share in the remainder of the intestate estate.³³ In relation to the latter issue, learning from the difficulties encountered in other jurisdictions which did not have a detailed statutory review procedure in place, it is proposed the statutory legacy ought to be reviewed biennially.³⁴ Although the Law Commission for England and Wales (2011, para.2.128) recommends a review at least every five years, given the changeable nature of the Irish property market, a two year time frame is considered more appropriate.

Inclusion of offset for the family home

A second, more controversial, question which must be tackled is what recognition, if any, should be given to the growth in popularity of co-owned family homes. Should the statutory legacy and share of the remainder be available automatically to all surviving spouses or civil partners irrespective of how the family home is held, or, alternatively, should it be subject to some accounting exercise which offsets the statutory legacy by the value of the home passing by survivorship? The answer to

this issue has proven particularly contentious in a number of recent statutory reviews (see Barr, 2010; *cf* Law Commission for England and Wales, 2011, paras.2.46-2.47).

On one hand, it could be queried why it should be taken into consideration. After all, co-owning surviving spouses or civil partners are entitled to their share in the home by virtue of their status as joint tenants – an independent arrangement, separate and distinct from the rules of succession. On the other hand, where an approach based on a statutory legacy is adopted and automatically applied to all surviving spouses or civil partners, with no account taken of the destination of the family home, it can lead to many surviving spouses being arguably over-provided for to the simultaneous detriment of the entitlement of children and without supporting social policy reasoning. Indeed, it has been noted that the statutory entitlements of children in many common law jurisdictions operating a statutory legacy regime are now ‘merely symbolic in most cases, rather than real’ (Burns, 2013b, p494). Yet, this practical reality for many children is itself juxtaposed by emerging empirical evidence which demonstrates the continued desire of parents to leave something to their children where the estate can withstand it (Douglas et al, 2011; Dekker and Howard, 2006). Consequently, it is submitted there is much to recommend taking into account the realities of modern property ownership, considering the position of the surviving spouse and civil partners in a somewhat more holistic manner and adopting a more ‘nuanced’ variant of the statutory legacy approach.

To this end, it is proposed that the statutory legacy and share of the remainder ought to be offset by the value of the share in the home held by the surviving spouse or civil partner following the death of their spouse or partner (for similar though distinct proposals in relation to offset, see Kerridge, 2007, p61).³⁵ If the value of the home is less than the €180,000, the surviving spouse or civil partner would be entitled to the balance and half the remainder.³⁶ If, however, the value of the home exceeds the statutory legacy, the amount by which it exceeds it, would be deducted from the half share of the remainder to which the surviving spouse or civil partner is entitled. Where the deduction would result in a negative figure, the surviving spouse or civil partner would not be compelled to pay into the estate but also would not take any share in the remainder.³⁷ In many cases of joint ownership, therefore, no benefit would accrue from these proposals. Consequently, it is proposed that surviving spouses or civil partners should be allowed to choose between *either* these proposals based on a statutory legacy plus one-half of the remainder *or* the fixed share of two-thirds which would be retained, albeit it subject to the removal of section 67A(3). Thus, section 67, as amended, would survive as an alternative to the proposals based on a preferential share. Reform on this basis would eliminate the weakness of the fractional share system in more modest estates through the inclusion of a floor of support for those most in need, while simultaneously ensuring that those protected by the right of survivorship are not adversely affected. Moreover, where spouses or civil partners do not own a family home, the surviving spouse or civil partner would be entitled to the full statutory legacy and a half share in the remainder – this would ensure that such spouses or civil partners are treated comparably with their home-owning equivalents and would recognise the often considerable costs incurred in meeting accommodation needs in the absence of home ownership.³⁸

Impact on the entitlement of children

The inclusion of offset in this proposal seeks to ensure a balance between the interests of surviving spouses or civil partners and children. However, the impact on children where the full statutory legacy and share of the remainder is claimed must also be considered. Currently, on intestacy, a surviving spouse or civil partner is entitled to two-thirds of the estate: the issue shares equally in the remaining one-third.³⁹ Pursuant to these proposals, the surviving spouse or civil partner would be entitled to receive the first €180,000⁴⁰ and half the remainder. The deceased's children (or wider issue) would be confined to receiving a share in the other half of the remainder, a considerable diminution of their current entitlements.⁴¹ Does this pose a serious impediment to the proposal? On initial analysis it appears it may.

The entitlement of children to share in the estate, intestate or otherwise, of a deceased parent has traditionally received robust protection in Ireland. In its original format, in addition to proposing a system of forced heirship for the surviving spouse, the Succession Bill intended to also provide children of the deceased with an entitlement to a fixed share in the testate estate. Although this proposal was subsequently withdrawn, the inclusion of section 117 of the Succession Act nonetheless provides deeper protection for children on testacy than that afforded in many other common law jurisdictions. The extent of the provision which a court may, in its discretion, order under section 117 is not limited to the maintenance requirements of the claimant and even self-sufficient adult children may succeed in a claim. Moreover, on intestacy, unlike many other regimes, children will *always* share in a deceased parent's estate, irrespective of its size. Indeed, the preferential treatment afforded to children seeking further provision from the intestate estate of a deceased parent where the deceased is also survived by a civil partner pursuant to section 67A(3), could arguably be seen as a further manifestation of the legislature's wish to afford greater weight to the interests of children.

Nevertheless, it is submitted the strong claim of children in Ireland does not constitute an insurmountable obstacle to the reform advanced. To consider this more fully, it is necessary to address the different parental relationships which may arise.⁴²

a) A nuclear marital family

For many of the reasons discussed above, the desire to prioritise, in particular, the protection of the surviving spouse above all others has long been recognised in Ireland. On intestacy, they receive the largest portion of the estate and under the rules of testate succession they are the only ones who possess an automatic entitlement to a guaranteed share of the estate. This prioritisation of spouses over children is considered justifiable on the basis that the initial transfer of property between spouses is generally viewed as an intermediate, transitional stage. Pursuant to the 'conduit theory', on the surviving spouse's death the property will usually be passed on to the next generation: the child's share is really only deferred or postponed, in many cases, rather than exhausted (see Waggoner, 1990-91, pp232-233). Where the property is not passed on to the next generation, and, as a result, proper provision is not made for the child by the parent, they may apply under section 117 of the Succession Act for such provision to be made for them, albeit at the discretion of the court. Alternatively, if the surviving parent dies intestate, the children are the only ones with an entitlement to the entire estate. This justification also supports the proposal advanced in so far as it may limit the entitlement of children in a nuclear marital family.

b) Mixed or blended marital family

Potentially serious difficulties do emerge, however, in circumstances where at least some of the deceased's children are not common to both spouses. In light of the emergence of mixed or blended families in a now multiple marriage society (the most recent figures available from the CSO Profile 5, 2012, p14 show that 42,960 people were re-married following divorce or annulment in Ireland in April 2011), the ramifications of succession law for children from a former relationship are undoubtedly of particular practical significance.⁴³ In such circumstances, the deceased's surviving spouse may not have had a parental relationship with, or felt any obligation towards, the children of the former relationship and are, therefore, often considered a less reliable 'conduit'. The situation is exacerbated by the fact that section 117 restricts the application of the provision to 'children of the testator' and although this does include adopted and non-marital children, there is no legal requirement to make provision for stepchildren. Moreover, stepchildren are not entitled to a share of the intestate estate of a stepparent.⁴⁴ In these circumstances, proposals which seek to ensure a surviving spouse receives the vast majority of an intestate estate must be questioned and certain adjustments ought to be considered to ensure adequate provision for the deceased's children from a previous relationship where appropriate.

Recognising the prevalence of mixed families in the jurisdiction and the potential injustice of a statutory legacy regime for children from a former relationship, the British Columbia Law Institute (2006) explained, 'In the case of a mixed family, it may be assumed the surviving spouse's children will inherit ultimately from their own parent. If the full preferential share is paid to that spouse, there is a potential for benefitting stepchildren to a greater extent than the intestate's biological children' (p14).⁴⁵ As a result, the Wills, Estates and Succession Act 2009 halved the preferential share (to \$150,000) where the deceased's descendants are not common descendants of both the deceased and the surviving spouse. All children of the deceased will now, therefore, be entitled to a one-half share in the remainder which will be considerably larger than the remainder left where the full preferential share is applied. This it was felt 'would provide a better chance of achieving fairness between the intestate's own issue and step-children' (British Columbia Law Institute, 2006, p14). Similar provisions are also incorporated into the Uniform Probate Code applied in many parts of the United States of America (see Shapo, 1993, p716).⁴⁶

However, law reformers are not unanimous in their support for such provisions protecting the children of a former relationship to the detriment of a surviving spouse from a later relationship. The problem was recently considered by the Scottish Law Commission (2009) who recognised the 'scenario raises difficult issues' (para2.29). Despite proposing an approach based on a statutory legacy for a surviving spouse, the Scottish Commission remained 'convinced that no distinction should be made between different types of surviving spouse [or civil partner]' (para2.30). Similarly, although the Law Commission for England and Wales observed in their 1989 Report that 'children of former marriages could end up inheriting none of what was originally their parent's property' (para41-45), it too concluded that this was not sufficient reason to make special provision for the children of other relationships. This position was recently upheld in the Law Commission's 2009 Consultation Paper (para3.106) and 2011 Report (para2.67-2.82).⁴⁷

Nevertheless, notwithstanding the reluctance of these legislatures to act, as Norrie (2008) has noted, in mixed family situations arguably 'the balance of interests ... needs to be struck differently from the balance in those intra-familial competitions which will presumably be the norm' (pp79-80). Provisions better protecting children from a former relationship on the intestate death of a parent

would also appear to be in line with public opinion as evidenced in a number of studies across the common law world.⁴⁸ Therefore, although it could be argued that to make provision for children from a former relationship goes against the primary social goal of the Succession Act 1965, namely the protection of a surviving spouse, and in spite of the clear lack of support across the Irish Sea for the introduction of such measures, it is submitted that regard ought to be had to the different contexts arising with blended families in Ireland.

To this end, the introduction of discretionary provision on the basis of need, or the level of responsibility accepted by a stepparent towards a stepchild, would not be appropriate. Similarly, an entitlement to a fixed share of the stepparent's estate is not proposed. Instead, it is submitted that sufficient protection could be provided through the automatic reduction of the statutory legacy in the case of children from a former relationship, similar to the approach recently adopted in British Columbia, thereby allowing such children, and any other children of the deceased, to participate in the division of a half share of the remainder. Reducing the figure to €90,000, equivalent to the ratio applied in British Columbia, however, may be considered unduly harsh on the surviving spouse and could leave them vulnerable where the home is in the sole name of the deceased spouse. As a result, it is provisionally proposed that where the children of the deceased are not all common children of the surviving spouse, the statutory legacy would be reduced to approximately €120,000.⁴⁹

c) Civil partnership family

Finally, the legal context in which civil partnership families exist and in which the application of these proposals should be assessed is currently in a phase of important transition. Pending the commencement of the Child and Family Relationships Act 2015, civil partners are currently not permitted to adopt children jointly. Although in practice both civil partners may act as parents for a child, at law, the relationship between the 'social', non-adoptive/non-biological, parent and child, is akin to that of stepparent and stepchild. Thus, where the 'social' parent dies, the child, at present, possesses no entitlement to a share of their intestate estate and does not constitute a 'child of the testator' for the purposes of section 117. However, if this 'social' parent was the second civil partner in the relationship to die, they may have inherited considerable sums from the already deceased adoptive/biological parent of the child. In the absence of reform, therefore, the introduction of proposals such as those suggested here would arguably have required the equation of civil partner families with a mixed or blended family situation where the surviving civil partner was a mere 'social' parent to any child/children of the relationship. This would have dramatically reduced the protection available to such civil partners on what may simply have been a matter of chance.⁵⁰

Thankfully, however, the soon-to-be-commenced Child and Family Relationships Act 2015 is due to close this legislative lacuna in the coming months. Once commenced, section 33 of the Adoption Act 2010 as amended by section 114 of the Child and Family Relationship Act 2015 will, for the first time, afford civil partners the right to apply jointly to adopt a child. Thus, given the imminent commencement of the 2015 Act, the proposed reform of the intestacy regime outlined above ought to apply equally to civil partners as to married couples, with a full statutory legacy available to both legal parents. Where there is a mixed or blended civil partnership, with the deceased civil partner survived by children from a former relationship, the reduced statutory legacy ought to apply.

Conclusion

As we mark 50 years of the Succession Act 1965 in Ireland, it is clear that the time has come for a comprehensive re-evaluation of its provisions. As illustrated here, the need for reform appears especially compelling in relation to the rules governing the distribution of an intestate estate. The protection afforded to surviving spouses or civil partners in intestacy in Ireland appears much more porous than that applied in many other common law jurisdictions and may leave an important cohort of surviving spouses or civil partners in a particularly vulnerable financial position.

Evaluating the relative merits of intestacy regimes founded on fractional share and statutory legacy approaches, Burns (2012) observed, ‘the interests and well-being’ of the surviving spouse (or civil partner) under the former approach are ‘*not given the same practical prominence and protection*’ as they are they are pursuant to the latter (p385 emphasis added). In seeking to afford this ‘prominence’ and ‘protection’ to surviving spouses and civil partners in Ireland, it is submitted a rule-oriented regime based on a modified statutory legacy approach ought to be given serious consideration in the jurisdiction. Moreover, recognising that intestacy laws tend to negatively affect those in lower value estates more significantly than those in higher value estates, the implementation of scheme, akin to that presented here, would respond specifically to the vulnerability of surviving spouses or civil partners in modest estates, as well as those who lack security of tenure in the family home, while simultaneously preserving the current fractional share framework for situations where less protection is required.⁵¹

Admittedly, the proposal would involve the incorporation of a more complex scheme of provision on intestacy. However, the proposed provision would only be availed of in situations where it would prove more beneficial to the surviving spouse or civil partner than the current fractional share scheme: in many ‘average’ cases, it is unlikely that the proposal would be more beneficial, particularly where the home is co-owned by the spouses or civil partners. In any case, it is contended the importance of simplicity ought not to be overstated. As Cooke (2009) noted albeit in relation to England and Wales, ‘we need to find a method of sharing that is not merely simple to calculate or to administer, but also is targeted at the people we really want to protect’ (p442). This proposal seeks to do just that.

Introducing his proposed new Succession Bill to the Irish Parliament, *Dáil Éireann*, in 1964, the then Minister for Justice, Brian Lenihan, noted: ‘The Bill intimately concerns every member of the community and I think I can say that it is one of the most important measures of law reform ever to be brought before this House.’⁵² On this the 50th anniversary of the resulting 1965 Act, it is clear that Minister Lenihan’s assessment of the ‘intimate’ impact of the legislation was indeed accurate. However, it is equally clear that there are potentially serious weaknesses in its application. It is hoped that the opportunity will now be seized to re-evaluate the legislative scheme and eradicate its shortcomings, particularly in the protection of surviving spouses or civil partners on intestacy.

(Note this research was published in the Journal of Social Welfare and Family Law (2016))

Acknowledgements

The author would like to thank Dr Una Woods, School of Law, University of Limerick and the anonymous reviewers for their feedback in relation to this article.

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¹ This article does not consider the position of cohabitants. Although a 'qualified cohabitant' may apply for provision to be made for them from the estate of a deceased cohabitant under section 194 of the 2010 Act, cohabitants generally do not enjoy rights to share in the intestate estate of a deceased cohabitant in Ireland. Consequently, notwithstanding that surviving cohabitants may be equally vulnerable on intestacy, the issues arising in such circumstances are outside the scope of this article.

² Note, in May 2015 the Thirty Fourth Amendment to the Irish Constitution (*Bunreacht na hÉireann*), (the Marriage Equality Referendum) was passed, amending Article 41 and allowing for the introduction of legislation facilitating same-sex marriage in the jurisdiction. Although at the time of writing no draft legislation had yet been presented, it is widely believed such legislation is due to be introduced imminently. Once enacted, therefore, the definition of 'spouse' for the purpose of the Succession Act 1965 will include a same-sex spouse.

³ The decision to initiate succession law reform in Ireland in the early 1960s, so soon after the introduction of the 1954 Act, was heavily influenced, from a political perspective, by the personal interest taken in the area by the then Minister for Justice, Charles J. Haughey.

⁴ Under section 111, where a testator leaves a spouse and no children, the surviving spouse has a right to one-half of the entire estate; where the testator leaves a spouse and children, the spouse is entitled to one-third of the estate.

⁵ If all the children are in equal degree of relationship to the deceased the distribution will be in equal shares among them; if they are not, it will be *per stirpes*, see section 67(4).

⁶ Section 111A as inserted by section 81 of the 2010 Act. However, unlike surviving spouses, this share is not guaranteed and may be affected by any provision made for a child under section 117(3A) as inserted by section 86 of the 2010 Act.

⁷ Section 67A(4) ensures provision made under this section shall not affect the entitlement of any other issue and the amount provided shall not be greater than the amount to which the applicant would have been entitled had the intestate died leaving neither spouse nor civil partner. No such discretionary provision is available to children of a marital relationship.

⁸ See section 14 of the Family Home Protection Act 1965 and section 38 of the 2010 Act.

⁹ Section 56(1) provides: 'Where the estate of a deceased person includes a dwelling in which, at the time of the deceased's death, the surviving spouse was ordinarily resident, the surviving spouse may, ... require the personal representatives in writing to appropriate the dwelling ... in or towards satisfaction of any share of the surviving spouse.' The term 'dwelling' is defined in section 56(14) as 'an estate or interest in a building occupied as a separate dwelling or a part so occupied, of any building and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling'. In *Hamilton v Armstrong* [1984] ILRM 306, a five acre field was appropriated with a family home. Despite not being used for 'amenity and convenience' nor constituting part of the 'garden', as the field held a septic tank and piped water for the house, it was considered 'attached' to the land.

¹⁰ See section 31 of the Land and Conveyancing Law Reform Act 2009.

¹¹ Although a surviving civil partner would have been less likely to be a trustee for the share of an infant in light of the restrictions on joint adoption which applied in the jurisdiction, the newly enacted Child and Family Relationships Act 2015 will, once commenced, permit joint adoption by civil partners, see below.

¹² Nor can a civil partner use section 67A(3) to increase their share.

¹³ Dáil Deb 15 December 1964, vol 213, col 1066.

¹⁴ It also showed that almost 20% of respondents over the age of 65 had not made a will.

¹⁵ Although DIY wills are possible there is arguably a higher probability that such wills may be found to be invalid.

¹⁶ It is worthwhile to note that the vulnerability of a surviving spouse or civil partner may be even more acute where the deceased drafts a will and chooses to disinherit them. In such circumstances, a surviving spouse is limited to merely receiving their legal right share outlined above at note 4. For proposals to remedy this potential weakness, particularly for small or modest estates, see Kathryn O'Sullivan, 'Spousal Disinheritance Protections under Irish Law: A proposal for reform' (2012) *Common Law World Review* 41(3) 246.

¹⁷ Given the relatively recent recognition of civil partnership in many jurisdictions, it is hard to say that there has been an 'intensification' over time in the intestacy entitlements of civil partners. However, civil partners are increasingly viewed as equivalent to spouses (notably in jurisdictions where same-sex marriage is not permitted) and therefore the trend towards the intensification of the rights of surviving spouses is dealt with in conjunction with civil partners.

¹⁸ This was most recently achieved in England and Wales, pursuant to section 1 of the Inheritance and Trustees' Powers Act 2014.

¹⁹ One of the key influencing factors in determining the level at which statutory legacies are set in a number of jurisdictions is the average house price in that jurisdiction, see below.

²⁰ Spouses or civil partners are also entitled to one-half share of the remainder and may seek to increase their overall entitlement at the discretion of the court pursuant to the Inheritance (Provision for Family and Dependents) Act 1975 discussed below.

²¹ Albeit depending on its composition. The prior right to the dwelling is £473,000, the prior right to furniture is £29,000 and the prior right to the monetary estate is £50,000 where there are issue or £89,000 where there are no issue. These figures were last set by the Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SI 2011/436) and were effective from 1 February 2012. They are also entitled to one third of the remaining intestate estate after the prior rights have been satisfied. See section 8 of the Succession (Scotland) Act 1964 as amended by the Civil Partnership Act 2004.

²² See section 21. Surviving spouses also take a half share in the remainder. See below for discussion of the rules applicable where the deceased is survived by children from a former relationship. Note also, section 20 provides that where the intestate dies leaving no surviving descendent, the surviving spouse, including same-sex spouse, will take the entire estate.

²³ 'Domestic partner' includes de facto same-sex spouses.

²⁴ Spouses or domestic partners would also be entitled to a half share in the remainder.

²⁵ Notwithstanding the considerable legislative and public support it enjoyed, on referral to the Supreme Court, the Bill was found to be unconstitutional. See *Re Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993* [1994] 1 ILRM 241.

²⁶ This section was presumably introduced to better allow children to share in the estate of a legal parent where they were less likely to share in the devolution of the surviving civil partner's estate with whom they enjoyed no legal relationship due to the restrictions which, until recently, applied to joint adoption by civil partners. As this limitation is soon to be removed on the commencement of the Child and Family Relationships Act 2015, discussed below, there appears no justification for the retention of the section.

It is worthwhile to note, moreover, that a similar situation does arise (and will continue to arise) on remarriage between a deceased's children from a former relationship and their stepparent. Yet, in these circumstances, there is no equivalent to section 67A(3). While it may seem harsh to limit children to a share in one-third of the intestate estate such provision broadly reflects the findings of American research (Fellows et al., 1978) 7 which indicated: 'A statute that provides a second or subsequent spouse with 60 to 70 percent of the deceased's estate with the residue being shared equally by the decedent's children or their issue would mirror most intestate decedent's preferences and best accommodate societal needs' (p36).

²⁷ As amended by section 71 of the Civil Partnership Act 2004.

²⁸ See sections 1(2)(a) and 1(2)(aa).

²⁹ See section 2.

³⁰ Such as the Northern Territory, Queensland, Victoria and Western Australia.

³¹ Moreover, such an approach would arguably be liable to unduly impact on the rights of children where the home is very valuable and the surviving spouse takes the full value, leaving nothing for the children in which to share.

³² Dáil Deb 2 December 1964, vol 213, col 332 (emphasis added). However, a fractional share, irrespective of its size, does not always provide a sufficient monetary sum for a surviving spouse. Moreover, the perceived inconvenience of updating the monetary sum ought not to be sufficient reason to reject such an approach as the difficulties which might be liable to arise could be minimized through the introduction of a detailed statutory review procedure, see below.

³³ This figure is based on calculations which suggest that the average selling price of houses in Ireland in May 2014 was €182,911. This figure was obtained by applying the national Residential Property Price Index (RPPI) for May 2014 which was 71.7, to the Permanent TSB/ESRI House Price Index for January 2005 which showed an average house price of €255,107. These dates were chosen as the RPPI is designed to measure the change in the average level of prices paid for residential properties sold in Ireland since 2005. For the RPPI see, Central Statistics Office (CSO), 'Residential Property Price Index' (Central Statistics Office). Central Statistics Office Online. Available at

<http://www.cso.ie/en/releasesandpublications/er/rppi/residentialpropertypriceindexmay2014/> [Accessed 9 July 2014]. For the 'Permanent TSB/ESRI House Price Index', see

<https://www.permanenttsb.ie/aboutus/housepriceindex/> [Accessed 03 January 2012]. Unfortunately, this House Price Index which was based on the agreed sale price and calculated using data from mortgage drawdowns ceased production in May 2011.

³⁴ The most common difficulty which is liable to arise in the absence of a specified statutory review procedure is that the statutory legacy, by virtue of its fixed nature, may lose its value over time due to inflation in the wider economy. Where no review is scheduled, the statutory legacy may not be updated to take account of inflation rates for often considerable lengths of time. See above, for example, text to note 24.

³⁵ Whether held in a joint tenancy or tenancy-in-common. Kerridge's proposal differs from the proposal advanced here in two ways. First, Kerridge's proposals do not seek to reduce the statutory legacy by any share held under a tenancy-in-common as is suggested here. Second, Kerridge's proposal sought to reduce the statutory legacy by the value of the right of survivorship only, not the full interest held by the surviving spouse. It is submitted the wider application of offset in this proposal is justifiable on the grounds that this is an *alternative* to the current provision under the Succession Act and allows the parallel new regime to be directed at those most requiring protection. As the current regime would continue to apply, the share of the estate which owning or co-owning surviving spouses or civil partners would receive would not be diminished. The new alternative scheme would, however, better assist those co-owning spouses or civil partners most in need. It is, moreover, possible that the proposal could be extended to allow surviving sole-owners to claim the statutory legacy offset by the value of the home, where to do so would be more beneficial than the current fractional scheme. This, again, would only benefit those in the most modest estates.

Note also, the home is specifically chosen for offset in this proposal as it is usually the single most important asset held by spouses. In the interests of simplicity, it is not suggested that provision on intestacy should be offset by other assets which pass to the surviving spouse by the right of survivorship. However, an alternative rendering of this proposal could be the introduction of a system of offset for all assets passing to a surviving spouse over a certain value limit.

³⁶ Although this may appear to go beyond meeting the primary objective of the proposal, specifically the protection of a surviving spouse in the family home, it is argued such provision is necessary. Where a surviving spouse acquires or holds a family home of average or greater than average value, they have the option of selling the family home and relocating to new, lower value house should the family finances require that the liquidity of the property be accessed. Where the home is worth less than the average value, such liquidity may be considerably reduced. In these circumstances, the family may be placed unnecessarily in serious hardship where additional resources exist outside of the family home up to the value of the preferential share.

³⁷ For practical examples of how this would work in practice, see Scottish Law Commission, *Report on succession*, Scot. Law Com. No.215, (Edinburgh: The Stationary Office, 2009) para.2.23.

³⁸ It also operates to counteract the imbalance created by section 56(10) whereby non-owning spouses are incapable of receiving further provision from the intestate estate. The need to avoid property-specific entitlements has received considerable attention in Scotland, see Scottish Law Commission, 2009. Note, in the case of partial intestacy, gifts or bequests made to a surviving spouse or civil partner under a will ought to be treated in the same manner as the benefit arising by virtue of the right of survivorship and set-off ought to apply.

³⁹ However, this entitlement to two-thirds is not guaranteed in the case of a civil partner, see above.

⁴⁰ In the case of sole ownership or where there is no family home.

⁴¹ Although, following the current approach, any reform ought to be premised on allowing the 'issue' of the deceased to participate in the devolution of the estate where the deceased's children have already died, the discussion here focuses on the entitlement of 'children' of the deceased.

⁴² For the reasons explained below, spouses and civil partners are considered separately.

⁴³ The different balance which needs to be struck in such circumstances is recognized in section 117(3) of the Succession Act 1965 which notes, that an order under section 117 'shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.' Thus, the entitlement of a stepparent is much more open to attack. Under the current intestacy regime, no specific difference is recognized between nuclear and mixed families but this is in the context of a regime which ensures sharing with the children in all cases. However, the inclusion of section 67A(3) discussed above does seem to show the recognition of the legislature of the different balance which may need to be struck where a child is (or, more correctly in light of introduction of the 2015 Act, was) less likely to inherit from a surviving civil partner. Similar logic would seem to apply to stepparents.

⁴⁴ Note that whilst section 44 of the Child and Family Relationships Act 2015 amends section 6C of the Guardianship of Infants Act 1964 allowing a stepparent to apply to be appointed a guardian of a stepchild, a stepchild is not a 'child' within the meaning of the Succession Act 1965.

⁴⁵ Note the term 'spouse' in British Columbia includes same-sex spouses, see above.

⁴⁶ A modified version of the Uniform Probate Code has been adopted by 19 states. On intestacy, where all the deceased's children are common children of the deceased and the surviving spouse and the surviving spouse does not have any other children, the surviving spouse inherits the entire estate. By contrast, where either the deceased is survived by children from another relationship or the surviving spouse has children of another relationship, the surviving spouse is entitled to a statutory legacy and a one-half share in the remainder of the estate. The other half of the remainder is divided between the deceased's descendants.

⁴⁷ The main reasons advanced in both jurisdictions for not making special provision for these situations was a desire for simplicity, doubts over the relevance of the conduit theory in all cases and a belief that parents were best placed to decide whether to leave something to their children. However, it is submitted these arguments are weak. A parent will rarely chose to die intestate so as to exclude children; the conduit theory is not meant to be absolute and merely states it is *more likely* a stepparent will be a less reliable conduit; and simplicity should not be a determining factor when issues of fairness and justice appear to be at play. However, a full discussion of these issues is outside the scope of this paper.

⁴⁸ See above.

⁴⁹ All children of the deceased would then share equally in a half share of the remainder in excess of €120,000.

⁵⁰ Only the surviving legal parent of the child would have been able to claim the full statutory legacy, yet who occupied that legal role may have been a matter of luck.

⁵¹ Although undoubtedly the proposal would not solve all the housing difficulties, in particular, of a surviving spouse or civil partner, it would at least afford a spouse or civil partner potentially much more robust financial protection than currently exists.

⁵² Dáil Deb 02 December 1964, vol 213, col 320.