Reform of section 117 of the Succession Act 1965: Implications and opportunities for the protection of surviving spouses

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- Introduction

Two centuries have passed since Selleck Osborn (1782-1826) first cautioned: ‘What you leave at your death, let it be without controversy; else the lawyers will be your heirs.’¹ Despite the passage of time, the value of the warning remains unchanged. In Ireland, the relatively frequent reliance placed on the discretionary family provision scheme applied under the Succession Act 1965 by children seeking to contest a deceased parent’s will is generating ever increasing controversy.² Pursuant to section 117, a child may apply to the court for ‘proper provision’ where a testate parent has, in the opinion of the court, failed in their moral duty to make such provision for them.³

In 2013, cognisant of the debate surrounding various aspects of the scope and application of section 117, the Law Reform Commission of Ireland committed to considering the section as part of its Fourth Programme of Law Reform.⁴ Honouring this commitment, and conscious of the changing demographic context in which the Succession Act is operating, the Commission recently addressed the issue of family provision under section 117 in its 2016 Issues Paper which is currently under consideration.⁵

The Issues Paper highlighted five key areas for possible reform. For the purposes of this article, two issues appear to be of particular importance. First, the paper questioned whether section 117 of the Succession Act 1965 should be repealed, retained as it is or amended. In particular, if it is to be retained and amended, the Commission sought views on the factors, if any, to which the court should have regard in deciding whether to grant such an order and in determining the quantum of any order so granted.⁶ The Commission also questioned whether it would be appropriate to extend section 117 to facilitate claims by children of parents who die intestate.⁷

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² Although a relatively small number of cases make it to a final determination, anecdotal evidence suggests that many more such cases are settled short of trial. The pressure on an estate to settle, whatever the strength of the applicant’s case, is heightened given that costs are likely to be awarded to an unsuccessful litigant who challenges a will provided there was a reasonable ground for the litigation and it was conducted bona fide, see Elliot v Stamp [2008] IESC 10.
³ Section 110 of 1965 Act provides that any questions of deducing any relationship for the purposes of Part IX of the Act (which includes section 117), are to be determined by the Legitimacy Act 1931, and s 26 of the Adoption Act 1952, as those provisions apply in relation to succession on intestacy. Provision may therefore be made for children whether born inside or outside marriage and adopted children.
⁶ Note, while the ‘Questions for consideration’ at p46 of the Issues Paper explicitly makes reference to the issue of quantum (‘the Commission...seeks views on the factors, if any, to which the courts should have regard
The engagement of the Law Reform Commission in undertaking this review and examining the entitlement of children under the 1965 Act is to be welcomed. This article, however, reserves judgment on the central questions concerning the potential restriction or extension of section 117. Instead, it reconsiders certain aspects of the Issues Paper from an entirely different perspective than that presented therein. Specifically, it highlights the potential implications of possible law reform in this area for the entitlements of surviving spouses – ripple effects which could easily be overlooked.8 In the context of the review of the family provision scheme applied under section 117, this article moreover emphasises the need for the extension of such a regime, akin to that applied under section 117, to surviving spouses. In light of demographic trends towards an ageing society evident across the Western World, various law reform commissions including the Law Commission for England and Wales,9 the Scottish Law Commission,10 the New South Wales Law Reform Commission11 and the British Columbia Law Institute12 have each investigated their succession law regimes with an explicit view to better ensuring the financial protection of surviving spouses. It is submitted that the current engagement of the Irish Law Reform Commission in re-visiting section 117, presents a valuable opportunity in this jurisdiction to also undertake a review of the position of surviving spouses pursuant to the 1965 Act with a view to overcoming some of the weaknesses inherent in the regime.

Part I briefly considers the entitlements of surviving spouses under the Succession Act 1965. Part II analyses the implications of possible reform of section 117 on these entitlements and, in particular, the implications for surviving spouses in a non-nuclear family context. Placing the financial protection of surviving spouses in Ireland in an international context, Part III of this article then presents an argument for, at a minimum, a legislative amendment to facilitate discretionary financial provision applications by surviving spouses. It argues that such reform responding to the potential financial vulnerability of such spouses is required to respond to the demographic exigencies noted in deciding whether to grant such an order and the amount so ordered’) (emphasis added), in the summary of the questions to be addressed in the following page, no reference to ‘amount’ or ‘quantum’ is included.

7 The three other areas of consideration concerned were: 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; whether the date from which the time limit in section 117 begins requires clarification or reform; and 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.

8 The impact of section 117 orders on the entitlements of spouses and civil partners is only briefly touched on, see Law Reform Commission of Ireland, Issues Paper: Section 117 of the Succession Act 1965 (LRC IP9-2016) p14. There is no discussion of how any reform extending section 117 to situations of intestacy would impact on surviving spouses. Note a full consideration of the entitlements afforded to civil partners under the Succession Act 1965 is outside the scope of this paper. In light of the recent introduction of the Marriage Act 2015 facilitating same-sex marriage, it is likely many civil partners will wish to become spouses and thus avail of the entitlements of spouses pursuant to the 1965 Act. It is equally possible that civil partners who do not marry are doing so by choice and do not wish to be spouses, preferring a now lower level of commitment. In this context, the currently weaker protection afforded to civil partners under the 1965 Act may be more acceptable than was previously the case. A full consideration of the position of cohabitants is also outside the scope of this paper.


by the Law Reform Commission in its latest publication and should be introduced as a matter of priority.

- **Part I: The entitlements of surviving spouses under the Succession Act 1965**

Pursuant to section 111 of the Succession Act 1965, a surviving spouse is entitled to a ‘legal right share’ on the testate death of their deceased spouse. If a deceased is survived by a spouse and no children, the surviving spouse is entitled to one-half of the estate. If a deceased is survived by a spouse and children, the surviving spouse is entitled to one-third of the estate. An order under section 117 in favour of an applicant child may not affect the surviving spouse’s legal right share, nor may it affect any devise or bequest to which the surviving spouse is entitled or any share to which they are entitled on intestacy. This protection is, however, subject to the condition that the surviving spouse is a parent of the applicant child. If the surviving spouse is a stepparent of the applicant child, although an order in favour of the child may reduce a gift or share on intestacy to which the stepparent is entitled, the surviving spouse’s legal right share remains untouchable. Regarding intestacy, section 67 of the Succession Act 1965 provides that where a deceased dies intestate and is survived by a spouse and no issue, the surviving spouse takes the entire estate. Alternatively, where a deceased dies intestate leaving a spouse and issue, the surviving spouse is entitled to two-thirds of the estate. The deceased’s issue share in the remaining one-third.

Unlike children, nowhere in the Succession Act 1965 do surviving spouses possess a general entitlement to seek further discretionary provision from the estate of their deceased spouse. The family provision scheme adopted pursuant to section 117 applies exclusively to claims made by applicant children. The only avenue for a surviving spouse to indirectly seek a greater share of the deceased’s estate arises under section 56. Pursuant to section 56, a surviving spouse may seek to appropriate a family home where the title to the property was held by the deceased. Where the share of the estate to which the surviving spouse is entitled is less than the value of the home they seek to appropriate, section 56(10)(b) provides that a surviving spouse may apply to the court to waive a payment of the difference due to the hardship which meeting the shortfall would cause. Thus, in this manner, a spouse may benefit from a larger share of a deceased’s estate. However, the right to appropriate a family home and access discretionary provision under section 56(10)(b) is

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14 Section 117(3) of the Succession Act 1965 provides 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’.
15 This would appear to be a reflection of what later became known as ‘conduit theory’, see below. See also L Waggoner, “The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code” (1990-1991) 76 Iowa Law Review 223.
16 Section 67(4).
17 Section 56(10)(b) provides ‘On any such application, the court may, if of opinion that, in the special circumstances of the case, hardship would otherwise be caused to the surviving spouse …order that appropriation to the spouse shall be made without the payment of money provided for in subsection (9) or subject to the payment of such amount as the court considers reasonable.’ Alternative remedies in this scenario are also set out by section 56. Section 56(9) provides that the surviving spouse may offset the difference in value by making a payment to the estate. Alternatively, section 56(3) provides that if there are infant children, defined as children under 21 years of age, who are entitled to a share in the deceased’s estate, and the surviving spouse is a trustee for them for such shares as they are entitled to, this may be added to the surviving spouse’s share on intestacy, legal right share or gift under the will in order to appropriate the home.
limited in a number of situations. Restriction apply in scenarios (a) where the dwelling forms part of a building, and an estate or interest in the whole building forms part of the estate; (b) where the dwelling is held with agricultural land an estate or interest in which forms part of the estate; (c) where the whole or a part of the dwelling was, at the time of the death, used as a hotel, guest house or boarding house; and (d) where a part of the dwelling was, at the time of the death, used for purposes other than domestic purposes. Section 56(5)(b) provides that the appropriation of such family homes may only take place where the court is satisfied that the appropriation is unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in the due course of administration.18 Furthermore, where there is no family home to appropriate, there is no legislative provision in the 1965 Act for a surviving spouse to seek a greater share of the deceased’s estate, nor is there in situations where the surviving spouse takes the family home under the right of survivorship. Surviving spouses in these situations have no mechanism by which to increase their share of the deceased’s estate, notwithstanding that they may be in considerable need.

- **Part II: Law Reform Commission Issues Paper and the implications for surviving spouses**

In its *Issues Paper*, the Commission provided a detailed overview of section 117 and the approach adopted in various jurisdictions to family provision claims made by children. In this context, as noted, the Commission sought responses as to whether section 117 should be repealed, retained as it is or amended. Furthermore, conscious of the support voiced in various quarters for the reform of section 117 to facilitate applications on *intestacy* – including its own recommendations on the issue almost 30 years ago – the Commission sought the views of the public on the appropriateness of such an amendment.19 In neither case, however, were the implications of such reform on the entitlement of surviving spouses afforded in depth consideration.

Let us assume, therefore, that the lack of attention afforded to the implications of such reform on the entitlement of surviving spouses speaks to the Commission’s view that, if retained and amended, any reform of section 117 along the lines considered would be undertaken in the context of the current protections afforded to the entitlement of surviving spouse, where present.20 In practical terms, this would mean that where an order is made under any reformulated version of section 117 on testacy, the entitlement of a spouse who is a parent of the applicant child – whether a legal right share, gift under a will or share on intestacy – would not be affected. By contrast, where a surviving spouse is not the parent of an applicant child, only their legal right share would be guaranteed.21 Moreover, should section 117 be extended to cases of intestacy, while the share to which a surviving

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20 Note, this is merely speculative.
21 See above. For this category of surviving spouse, any amendment or change in the interpretation of section 117 as part of the current review is liable to have a significant effect. Insofar as the Law Reform Commission, on the basis of the various international examples presented in the *Issues Paper*, arguably appear to be leaning in favour of in some way re-clarifying the factors to be considered under section 117 with a view to perhaps restricting the likelihood of success of seemingly less meritorious claims, the entitlement of stepparents may benefit from better protection.
spouse who is a parent of the applicant child is entitled might be deemed untouchable, in replicating the current approach pursuant to section 117(3), the protection afforded to the entitlement of a surviving spouse who is a stepparent of the applicant child would appear much more vulnerable to attack. Although, at present, the share on intestacy of a surviving spouse who is not the parent of an applicant child may be reduced to zero, this is only available in the case of partial testacy where such spouses would, in any event, continue to be entitled to their legal right share. On this view, it might be considered that such minimum provision would continue to be made available where an order under section 117 would be made on intestacy with such spouses entitled to an untouchable share of one-third of the estate.

The distinction between different categories of surviving spouses under the Succession Act 1965 has attracted minimal attention or comment to date. However, if the current review results in reforms such as those under consideration, notably the extension of section 117 to cases of intestacy, important policy decisions in this regard will have to be made. Continuing with the current distinction between spouses on testacy and, in particular, extending it to situations of intestacy, has clear potential to generate controversy, especially given the increasingly fluid nature of family structures in Irish society.

On one hand, on intestacy, such a distinction may be considered justifiable on the basis of ‘conduit theory’. First coined by Waggoner, ‘conduit theory’ proposes that a surviving spouse who is a parent of the deceased’s children, may be viewed as a ‘conduit’ or medium through which a deceased’s estate may ultimately be devolved to the children of the relationship. Generous provision to such a spouse is therefore justified on intestacy as the child’s interest in the estate is really only deferred or postponed, in many cases, rather than exhausted. However, where the deceased has children from a previous relationship, this theory is considered to be somewhat more uncertain. The belief that stepparents are less likely to leave anything to their stepchildren in their will appears well-entrenched. Moreover, depending on how the applicable legislation is framed, stepchildren may possess little, if any, entitlement to share in the intestate estate of a stepparent or enjoy little ability to seek family provision from their testate estate. Conscious of this apparent threat to the interests

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22 This would be in keeping with the current approach adopted on partial testacy.
23 According to the Central Statistics Office, there were 2,442 marriages involving at least one divorced person in 2015 in Ireland, including 486 marriages where both parties were divorced, see http://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015/ [Accessed 24 November 2016].
25 The New South Wales Law Reform Commission, Uniform succession laws: intestacy (Report No 116–2007) para 3.48 observed: ‘The basic problem is that the children would have expected, in the normal course of events, to receive something of the estate upon the death of the surviving spouse, so long as the surviving spouse was their parent. Such an expectation is unlikely to be fulfilled on the death of the surviving spouse who is only a step-parent. This is because people are less likely to leave anything in their wills to stepchildren…’ (emphasis added). Douglas et al, ‘Enduring Love? Attitudes to Family and Inheritance Law in England and Wales’ (2011) 38(2) Law and Society 245, 259 also noted, on the basis of the qualitative interviews undertaken as part of their research, a sense that ‘a second spouse would not necessarily have the interests of the deceased’s children sufficiently at heart and so could not be trusted to provide for them’ (emphasis added). See also O’Sullivan, ‘Distribution of intestate estates in non-traditional families: A way forward?’ (2017) Common Law World Review (forthcoming).
26 In Ireland, for example, a stepchild may not make an application under section 117 against a stepparent’s estate. Moreover, where a stepparent dies intestate, a stepchild will not be considered ‘issue’ within the
of children from a former relationship, a distinction between the entitlements of different categories of surviving spouses on intestacy is now applied in a number of common law jurisdictions including in British Columbia, Canada, in a number of US states and in New South Wales, Australia. In these jurisdictions, where a deceased is survived by children from a former relationship, the entitlement of a surviving spouse is significantly reduced.

Yet, whether such differential treatment in the provision afforded to different categories of surviving spouses on intestacy on the basis of parentage is sustainable in an Irish context is debateable. To the contrary, it is strongly arguable that if section 117 is extended to intestacy, the full intestate entitlement of a surviving spouse should be guaranteed and considered untouchable – even in circumstances where they were not the parent of an applicant child. Limiting the claim of a deceased’s children from a former relationship in this way would appear in line with findings of American research 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.’

While it is by no means certain that comparable findings would be reported in Ireland vis-à-vis ‘intestate decedent’s preferences’ in the context of a non-nuclear family, the need to have regard to demographic changes and to ensure the financial protection of all surviving spouses, whether a parent of an applicant child or otherwise, ought arguably to ensure minimum spousal provision of two-thirds of an intestate estate is retained. Moreover, the fractional share approach in Ireland

meaning of section 67 and will thus not benefit from the distribution of the estate. Similar limitations limit the claim of stepchildren in a stepparent’s estate in many other jurisdictions.

27 Section 21(3) of the Wills, Estate and Succession Act 2009 provides that where a deceased dies leaving a surviving spouse and descendants who are also the descendants of the surviving spouse, the surviving spouse is entitled to the first $300,000 and one half of the remainder of the estate. The descendants share in the other half of the remainder. Where the deceased dies leaving a surviving spouse and descendants, including those from a former relationship, however, section 21(4) provides the preferential share of the spouse is reduced to $150,000.

28 The Uniform Probate Code is adopted, at least in part, by 18 states in the United States of America, see National Conference of Commissioners on Uniform State Laws (2014) Amendments to Uniform Probate Code, http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf (accessed 02 March 2016). Where the deceased has children from a previous relationship the surviving spouse receives $150,000 and a half-share in the balance of the estate. The remaining half-share of the balance is divided between the deceased’s children. Where the deceased has children which are all common descendants of the deceased and the surviving spouse, but the surviving spouse also has children from another relationship, the surviving spouse receives $225,000 and a half share in the balance of the estate. Where the deceased had no children or all the children were also the children of the surviving spouse, the surviving spouse is entitled to the entire estate. See section 2-102 of the UPC, as revised in 2008.


31 The provision of a mere one-third of an intestate estate in favour of a spouse would seem wholly insufficient. The need to ensure the financial position of surviving spouses in England and Wales, for instance, appears to have been a major factor in the Law Commission’s refusal to recommend any reform better facilitating a deceased’s children from a former relationship sharing in the intestate estate of their deceased
differs quite significantly from the statutory legacy regimes applied in most of the common law world where such distinctions are becoming increasingly popular. A major consideration in introducing a dual scheme of provision on the basis of parentage in jurisdictions applying a statutory legacy regime is the desire to ensure children from a former relationship get to share something from their deceased parent’s estate – an outcome which is no means guaranteed under such regimes in light of the front-loading of provision in favour of the surviving spouse. These difficulties do not arise under the fractional share approach adopted in Ireland. All children receive a share in the intestate estate of a deceased parent irrespective of size. The need for drawing such a distinction between different categories of spouses on intestacy in this jurisdiction would thus seem less pressing.

Whether the current distinction in the protection afforded to the entitlements of different categories of surviving spouses in the context of testacy ought to be retained is equally liable to elicit polarised views. It may reasonably be argued that where a testator has exercised their testamentary freedom to make gifts or bequests to a surviving spouse, in excess of their legal right share, this ought to be respected, irrespective of whether the surviving spouse is the parent of all the deceased’s children or not. Yet, viewed in a different light, affording such freedom to a parent in a non-nuclear family context might appear to go too far. It would, for example, appear potentially unfair that a child from a former relationship could not make an application for ‘proper provision’ from a deceased parent’s testate estate where a testator had left their entire estate to the surviving spouse, the child’s stepparent. In such a scenario, in light of the different dynamics liable to be at play and given the fact that a child does not possess an automatic entitlement to a share of the testate estate of a deceased parent, it is strongly arguable that scope is required to reduce the provision made under a will to such surviving spouses in excess of their legal right share.

- Part III: The need to extend the family provision scheme to surviving spouses

In considering the possible extension of section 117 to situations of intestacy, the Commission referred to its previous endorsement of such reform as formerly carried in its 1989 Report on Land Law and Conveyancing Law. Notwithstanding the then Minister of Justice’s concerns that the extension ‘would increase the prospects of estates being whittled away on legal costs’, the benefits of the reform, in the eyes of the Commission, outweighed the negatives. In its 1989 Report, the Commission noted its view that the policy underlying section 117 was that ‘persons with the means

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32 Objectively, the likelihood of a stepchild benefiting from a stepparent’s estate is smaller, see above.

33 Note, however, the need to have clear parameters on the exercise of section 117 would be of the utmost importance in ensuring an appropriate balance was struck between the interests of the applicant child and surviving spouse. Moreover, although it may be argued that scope to reduce the entitlement of surviving spouses is also required in a nuclear family scenario, the increased vulnerability of a deceased’s child from a previous relationship, as noted above, would seem to heighten the risk to their interests in this context and more strongly support the need for such protection.

to do so should make proper provision for their dependants.'

On this basis, it argued that both 'justice and logic' required that discretionary family provision should be available to applicant children whether the person concerned died testate or intestate. The Commission concluded

‘...it should be remembered that the manner in which an intestate’s estate is shared among the next-of-kin cannot be regarded as more than a rough and ready attempt to do justice between them’.

Ultimately, it noted that the lack of discretionary family provision legislation on intestacy gave rise to a 'real possibility of serious injustice' being suffered by children of an intestate.

It is submitted that any scheme premised on the provision of pre-defined fractional shares with no general provision for the exercise of judicial discretion may rightly be characterised as 'rough and ready' and liable to give rise to 'serious injustice'. However, while the Commission’s focus was understandably on the ‘injustice’ this might cause to children, it is equally clear that these same weaknesses of the fractional share approach adopted also undermine the protection afforded to surviving spouses on both testacy and intestacy. Indeed, it is hard to overstate the vulnerability that the absence of a general provision facilitating discretionary family provision claims by surviving spouses in Ireland can produce. The extent to which the fractional share approach meets the needs of surviving spouses is essentially fortuitous, yet unless they fit into the very narrow criteria of section 56(10), they have no ability to seek further provision from a deceased spouse’s estate.

Relative to other common law jurisdictions, the level of protection afforded to the interests of surviving spouses in Ireland shows some striking shortcomings. Admittedly, the Succession Act provides comparatively strong protection against spousal disinheritance by ensuring an automatic minimum level of provision for surviving spouses. However, the lack of a floor of support in Ireland, particularly on intestacy, further compounded by the absence of family provision legislation for surviving spouses, has the capacity to leave such spouses in a very vulnerable financial position. In England and Wales, where a deceased dies intestate leaving a surviving spouse and issue, the spouse receives all personal chattels, a statutory legacy of the first £250,000 of the estate and one-half of the remainder absolutely. Latest figures show that an incredible 90% of intestate estates are worth

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41 See 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 201. Where there are no issue, the
less than this statutory legacy with the surviving spouse taking the entire intestate estate in an overwhelming majority of cases.\textsuperscript{42} Even where spouses do not take the entire estate under the rules of intestacy, they may seek further provision at the discretion of the court pursuant to the Inheritance (Provision for Family and Dependents) Act 1975.\textsuperscript{43} In New South Wales, Australia, where the deceased is survived by a spouse and issue, the surviving spouse takes the entire intestate estate unless there were issue from a former relationship. In the latter situation, however, the outcome would still, in the majority of cases, ensure ‘all to spouse’ with the statutory legacy set at $350,000.\textsuperscript{44}

High statutory legacies in favour of surviving spouses are also applied in Scotland pursuant to the Succession (Scotland) Act 1964 as amended by the Civil Partnership Act 2004\textsuperscript{45} as well as in many other common law jurisdictions.\textsuperscript{46}

Despite the lack of attention afforded to the issue in Ireland, there is a clear trend emerging across the common law world towards the further intensification of the provision afforded to surviving spouses on intestacy, particularly in a nuclear family scenario. There are a number of factors which explain why a surviving spouse is increasingly viewed as ‘a significant and even imperative heir to the intestate estate’.\textsuperscript{47} As Burns outlines:

‘Spousal relationships are companionate so that both spouses assume reciprocal obligations of care and maintenance and intestate succession ought to reflect such obligations. Generally, the surviving spouse has contributed to the assets used commonly by the couple, so the surviving spouse deserves to inherit a significant portion of the estate. Moreover, it is likely that the surviving spouse will need to rely on the intestate’s assets because the surviving spouse may be economically vulnerable.’\textsuperscript{48}

The potential economic vulnerability of surviving spouses appears to be an ever more important driving factor. In recommending reform of its intestacy regime, the New South Wales Law Reform Commission recently noted the significance of giving ‘more recognition to the needs of the surviving spouse or partner’.\textsuperscript{49} Likewise, having noted its increasingly ageing population, Cooke noted in relation to England and Wales:

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\item surviving spouse or civil partner now takes the entire estate, see section 1 of the Inheritance and Trustees’ Powers Act 2014.
\item Law Commission for England and Wales, \textit{Intestacy and family provision claims on death} (Law Com. No.331-2011) para.2.6.
\item In fact, there appears to be considerable support within the Law Commission for going even further and giving ‘all to spouse’ even if there are children. In 1989, the Law Commission voiced their support for proposals advocating ‘all to spouse’. More recently, in 2011, the Commission again supported the further intensification of the rights of spouses, see Law Commission for England and Wales, \textit{Intestacy and family provision claims on death} (Law Com No 331–2011) as noted above.
\item In light of the most recent increases, the combined value of prior rights afforded to surviving spouses or civil partners where the deceased is also survived by issue equates to £502,050.
\item See above
\item Burns, ‘The Changing Patterns of Total Intestacy Distribution’ (2013) 36(2) UNSW Law Journal 470, 509
\item Burns, ‘The Changing Patterns of Total Intestacy Distribution’ (2013) 36(2) UNSW Law Journal 470, 509
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‘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. Typically a parent dies in old age when their children are middle-aged and well established in life; it may well be that the surviving spouse’s needs are far more pressing than those of the younger generation.’

Across the board, it seems recognition of these demographic shifts in the Western World have informed the ‘inexorable trajectory of reforms in favour of the spouse’. Unfortunately, although such demographic changes were also noted by the Law Reform Commission of Ireland – and notwithstanding that in all but the largest intestate estates surviving spouses in Ireland do worse (potentially significantly worse the smaller the estate) than their counterparts in many other common law jurisdictions – no meaningful reform to better provide for surviving spouses has been considered in the jurisdiction. Although robust reform of the provision afforded to surviving spouses in Ireland on both testacy and intestacy has been proposed and could be implemented to offset the weaknesses of the regime, such reform seems unlikely to be undertaken in the foreseeable future. Viewed in this context, it is strongly arguable that at a minimum the introduction of family provision legislation for surviving spouses ought to be introduced.

**Conclusion**

It goes without question that the current review of section 117 is to be welcomed. However, as this paper has shown, the importance of considering the implications for surviving spouses of any law reform in this area must be borne in mind as the review proceeds. In this regard, as highlighted above, important policy choices will have to be made in determining how to deal with different

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51 Burns, ‘The Changing Patterns of Total Intestacy Distribution’ (2013) 36(2) UNSW Law Journal 470, 486. In British Columbia, Canada, the British Columbia Law Institute, Wills, Estates and Succession: A Modern Legal Framework (BCLI Report No 45–2006) xvii has also recognised the paramount position of the surviving spouse, noting ‘the need to secure the position of a surviving spouse who may well be advanced in years at the time of the intestate’s death’. In establishing the new preferential share, reference was made at 14 to typical estate values in British Columbia and to ‘contemporary social standards that favour a generous provision of an estate for the surviving spouse’ (emphasis added).

Similarly, as the Australian National Committee on Uniform Succession Laws explained in framing its 2007 Uniform Succession Laws (2007) para 1.37: ‘There is no doubt that needs of the surviving spouse ... have become more and more important over time. This is partly a result of changing demographics which make spouses ... more reliant on the intestate’s estate in their later years and the children less reliant. This report therefore considers the surviving spouse ... as the primary concern of distribution on intestacy. This reflects a trend in most comparable jurisdictions towards giving more recognition to the needs of the surviving spouse ...’


53 Discretionary provision is not the optimum solution in overcoming the vulnerability of surviving spouses in Ireland, see O’Sullivan, ‘Til Death do us Part’: Surviving Spouses, Civil Partners & Provision on Intestacy in Ireland’ (2016) 38(2) Journal of Social Welfare and Family Law 118. Much more comprehensive reform could be undertaken to support those most in need. However, the introduction of discretionary family provision legislation for spouses would at least go some way towards offsetting a major weakness of the current scheme.
categories of surviving spouses, particularly if the Commission ultimately recommends reform extending section 117 to cases of intestacy.

While the Issues Paper understandably focused on the family provision regime applied pursuant to section 117 from the perspective of applicant children, it is submitted the current review of the regime also presents an important opportunity to re-consider the need to extend family provision legislation to surviving spouses. As noted, in considering the extension of section 117 to intestacy, the Commission implicitly recognised the shortcomings of a fractional share regime. Precisely the same arguments may be made to support, at a minimum, the extension of a discretionary family provision scheme to surviving spouses in Ireland. Although surviving spouses do enjoy automatic entitlements to a deceased’s estate whether testate or intestate, there is no guarantee that such provision will ensure their financial protection. Nevertheless, as currently framed, such spouses do not possess any general entitlement to seek extra provision in these circumstances. This lacuna in the Succession Act, could, it would appear, be easily remedied.

Responding to demographic shifts and an ever-growing awareness of the needs of surviving spouses, a number of key common law jurisdictions have revised their succession law regimes and dramatically augmented the entitlements of such spouses.54 As the Law Reform Commission considers its next step in this current review of the family provision regime applied under section 117, it is to be hoped that the need to ensure the continued protection of vulnerable surviving spouses in Ireland will be prioritised in any recommendations advanced.

54 See above.