

**An Evaluation of the Succession Law Changes
Introduced by the Civil Partnership and Certain
Rights and Obligations of Cohabitants Act 2010**

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May 2011

ABSTRACT

The Succession Act 1965 introduced a curb on a person's freedom of testation and gave protection to spouses and children on the death of a husband/wife, mother or father. As a result, certain relationships took precedence over others in the distribution of an estate, e.g. a surviving spouse's legal right share to a deceased spouse's estate is absolute. Since that legislation was enacted Irish society has changed greatly with a new variety and complexity of family structures. The provisions introduced by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 are an attempt to keep pace with the changes which have taken place in modern society. As a result of the succession law provisions in the Act of 2010 certain relationships take priority over other competing interests in an estate. Thus, a new hierarchy of claimants to an estate is created. For example, a biological child can make an application which can have the effect of eroding the legal right share of a surviving civil partner but not that of a surviving spouse, their step-parent.

I plan to review the succession law provisions contained in the Act of 1965 and the amendments made to the 1965 Act by the Act of 2010 and analyse and examine which competing interests in an estate will take precedence, the varying degrees of protection afforded to individuals in the newly recognised family structures, the rationale behind these variations and the possible ramifications in the future.

DECLARATION

I certify that this thesis which I now submit for examination for the award of Master of Arts in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

This thesis was prepared according to the regulations for postgraduate study by research of the Dublin Institute of Technology and has not been submitted in whole or in part for an award in any other Institute or University.

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ACKNOWLEDGEMENTS

I would like to thank Dr. Fergus Ryan for all his encouragement and invaluable advice and guidance on this thesis topic.

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CHAPTER 1: INTRODUCTION

The issues which will be addressed in this thesis include whether the new succession law provisions in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 are adequate to deal with the succession needs of the varied range of family units now in Ireland. When considering these new provisions, the new hierarchy of claimants to an estate will be identified. Certain categories of claimants will take precedence over others in this hierarchy and the reasons for such priority will be investigated.

In this thesis I will firstly address the changing nature of family law in Ireland by looking at the concept of the 'family' in Irish law and by examining the statistical evidence of the evolving composition of family units in Ireland. Then I will outline the nature of succession law up to 2010, followed by a general discussion of civil partnership. The specific succession law provisions of the new Act of 2010 will be set out and discussed. Finally then the possible outcomes of future applications under the Act of 1965, as amended, will be considered by analysing previous case law. Also various scenarios which may arise in the distribution of estates in the future will be outlined to illustrate the new hierarchy of claimants to an estate.

METHODOLOGY

This thesis involves a critical review and analysis of the succession law entitlements introduced by the Act of 2010 which will involve a black letter theorising approach to research. The current law will be outlined and the new provisions will be set out. In each

chapter of the thesis the categories of succession law entitlements will be organised into subheadings of spouses, children, civil partners, cohabitants and other miscellaneous relations. Testate and intestate succession law will be treated separately.

Sources & Resources

In order to facilitate a comparison between the law up to 2010 and the new provisions my primary source will be legislation such as the Succession Act 1965, amending legislation and the Act of 2010.

Secondary sources used to examine the current law and to assist in analysing how the new provisions may operate in the future are leading textbooks on succession law in Ireland, reviewing case law and articles published and contained on legal databases.

As there are no textbooks published as yet or case law specifically addressing the new provisions, my secondary sources in this regard to assist in understanding the new legislation and to identify the main debates will be journal articles, conference papers, Law Reform Commission Reports, Submissions by the Ombudsman for Children, newspaper articles, information booklets, websites and publications by academics and interest groups such as Marriage Equality, Treoir - The National Federation of Services for Unmarried Parents and their Children, Irish Council for Civil Liberties and the Gay and Lesbian Equality Network (GLEN).

Oireachtas debates which took place when the Succession Bill 1965 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Bill 2009 were going through the Houses of the Oireachtas will be reviewed on www.oireachtas.ie.

CHAPTER 2: CHANGING FACE OF FAMILIES IN IRELAND

The traditional family unit of the marital family is no longer as pervasive as it once was in Irish society. Many family units include parents with children who are not married or were once married to someone else. Single-parent families are now much more common than they once were. Although marriage is still very popular in Ireland, Irish couples are getting married later in life. Coupled with this is the increasing tendency for non-marital couples to live together, both on a long term basis without marriage and prior to marriage. These changes in family structure in Irish society were not catered for in the succession law provisions in the Act of 1965. Succession law had not kept pace with these changes up to 2010. Only married couples had automatic succession rights on the death of a spouse.

The evolution of these changes and the underlying concept of the 'family' in Irish law are considered below.

2.1 BACKGROUND - CONCEPT OF THE 'FAMILY' IN IRISH LAW

Article 41 (as amended¹) of the Constitution of Ireland 1937, provides that the State recognises the family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. Under this Article the family is afforded particular protection when the State guarantees to protect the family as the necessary basis of social order and as indispensable to the welfare of the Nation and the State. Article 1.3.1^o pledges to guard with special care the institution of marriage, on which the Family is founded, and to protect

¹ 15th amendment to the Constitution, 1995

it against attack. In so doing, the Constitution makes it clear that these provisions only apply to marital families.

Brazil² notes that Articles 41 and 42 of the Constitution recognise the family as the most important social unit within the State and the “family” referred to in those articles, although not defined within the Constitution itself, has been held by the courts to be confined to the family based on marriage: *State (Nicolaou) v. An Bord Uchtála*³. The decision in *Nicolaou* confirmed that non-marital families cannot invoke Article 41 for protection and ensured that such families were not seen as on a par with marital families as regards recognition.

In relation to the changing nature of Irish society Brazil observes that “[w]hile the exclusion of non-marital families (including cohabiting couples) from constitutional recognition was unremarkable in 1937 having regard to the social realities of that time, this exclusion has become increasingly problematic in recent years as the numbers of such families increased.”⁴

Murphy J. said in *W.O’R. v. E.H.*⁵:

“For better or for worse, it is clearly the fact that long-term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted.”

² Brazil, “Who is a qualified cohabitant for the purposes of the 2010 Act?” at *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 1

³ [1966] I.R. 567 – see also *J.McD. v. P.L. and B.M.* [2009] I.E.S.C. 81

⁴ Brazil, *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 2

⁵ [1996] 2 I.R. 248 at 286

Nonetheless, the court in *W O'R* confirmed the constitutional position as described in *Nicolaou*.

Brazil refers to the decision in *G.T. v. K.A.O.* wherein McKechnie J. cited these remarks and acknowledged “that even in the past decade, such relationships have multiplied and continued to so do.”⁶

The observations of Kelly J. in the case of *Ennis v. Butterly*⁷ are a stark illustration of the lack of recognition of cohabiting couples prior to the Act of 2010. The defendant and the plaintiff had been cohabiting together for about eight years, although both were married to other people. When the relationship broke down, the plaintiff instituted proceedings claiming damages for breach of contract, negligent misrepresentation and fraudulent misrepresentation, on the basis that she and the defendant had entered into an agreement to marry and an agreement to cohabit as man and wife until such marriage would be possible; she further pleaded that, in consideration of these arrangements, she had discontinued her business and had lived with the defendant as a full-time wife and homemaker. On the issue of the cohabitation agreement and the right of the plaintiff to maintenance, Kelly J. held⁸:

“Given the special place of marriage and the family under the Irish Constitution, it appears to me that the public policy of this State ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage. ... I am therefore of opinion that, as a matter of public policy, such agreements cannot be enforced.

⁶ [2007] 3 I.R. 567 at 602

⁷ [1997] 1 I.L.R.M. 28

⁸ [1996] 1 I.R. 426 at 438-439

I am strengthened in this view by the fact that, notwithstanding the extensive reform of family law which has taken place in this country over the last 20 years, nowhere does one find any attempt on the part of the legislature to substantially enhance the legal position of, or to confer rights akin to those of married persons upon the parties to non-marital unions e.g. a right to maintenance.”

This judgment confirmed once again that there was a clear differentiation between the rights accorded to marital families as opposed to non-marital families in Irish law.

Brazil highlights the recent case of *E.McE. v. J.O'S.*⁹. The applicant and respondent were in a relationship for a total of almost four years. They were not married, and they had one child together. When the relationship broke down the applicant sought maintenance and a lump sum order to fund the purchase of a home for herself and the dependent child of the parties. The Circuit Court directed the respondent to pay a lump sum of €500,000 to facilitate the purchase of appropriate accommodation for the applicant and child, but on the respondent's appeal the High Court set aside that order on the basis that the Circuit Court had no jurisdiction to make such an order pursuant to s 11 of the Guardianship of Infants Act 1964, having regard to inter alia the decisions of *State (Nicolaou) v. An Bord Uchtála* and *Ennis v. Butterly*.

In the Supreme Court in the case of *McD. v. L.*¹⁰ one of the issues to be adjudicated was whether any legal status attaches to the concept of a “de facto family” and it was held that “there is no institution in Ireland of a de facto family. References in case law to a de facto

⁹ [2009] 4 I.R. 670

¹⁰ [2010] 1 I.L.R.M. 461

family are a shorthand method of referring to the circumstances of a settled relationship in which a child lives.”¹¹

The Law Reform Commission in their Report on the Rights and Duties of Cohabitants noted¹² that in the Report of the Constitution Review Group of 1996 that the Review Group favoured the retention of the pledge by the State to protect the family based on marriage but also recommended that, “the Oireachtas should provide protection for the benefit of family units based on a relationship other than marriage”. It is noted that in the European Convention on Human Rights a number of articles deal with and relate to family life and that the European Court on Human Rights does not require adherence to a uniform position on matrimony, and has indicated that contracting states are not required to treat spouses and cohabiting couples in the same manner¹³. The Court has, however, recognised that ‘family life’, protected under Article 8 of the Convention, encompasses other de facto family forms, including those of unmarried cohabiting couples. The Court in *Johnston v. Ireland*¹⁴ held that family life within the meaning of Article 8 existed between a heterosexual couple that had cohabited for approximately 15 years.

The Law Reform Commission noted that in relation to the objectives of reform in this area, notice had to be taken of the right of individuals in cohabiting relationships to opt-out of state regulation of their affairs in their decision not to enter marriage. There was also “the danger of applying a blanket assumption about the level of commitment and the intentions of the parties involved.”¹⁵

¹¹ *Ibid.* (Murray C.J., Denham, Hardiman, Geoghegan and Fennelly JJ.) per Denham J. at 488

¹² Law Reform Commission, *Report on the Rights and Duties of Cohabitants*, LRC 82-2006 (Dublin, 2006) at 12

¹³ See *Saucedo Gomez v. Spain* (Appl. No. 37784/97, ECHR, 26 January 1999), *Mata Estevez v. Spain* (Appl. No. 56501/00, ECHR, 10 May 2001) and *Fretté v. France* (Appl. No. 36515/97, ECHR, 26 February 2002)

¹⁴ (1986) 9 E.H.R.R. 203

¹⁵ Law Reform Commission, *Report on the Rights and Duties of Cohabitants*, LRC 82-2006 (Dublin, 2006) at 16

In the case of *Zappone v. Revenue Commissioners*¹⁶ the plaintiffs sought recognition of what they claimed was their legally valid marriage, solemnised in Vancouver, British Columbia. The plaintiffs had been cohabiting in a lesbian relationship since 1981. They subsequently married in Canada in 2003. The court had to decide the recognition of their marriage under Irish law. In their pleadings, the plaintiffs referred to a number of provisions of the Tax Code and pointed out that they would benefit financially under the Tax Code if recognised as a married couple living together. The plaintiffs also claimed that the defendant wrongfully and in breach of the plaintiffs' constitutional rights interpreted Irish tax law and in particular the provisions relating to married couples as applying only to husband and wife. It was claimed that the failure to recognise the marriage of the plaintiffs and the refusal to apply the provisions in tax law relating to married persons to the plaintiffs as a married couple was a form of direct discrimination against the plaintiffs on the grounds of their gender and/or sexual orientation in breach of Art.14 of the European Convention on Human Rights and Fundamental Freedoms and a violation of their right to respect for their private and family life and their right to marry under Arts 8 and 12 of same. The plaintiff conceded that she and the second-named plaintiff were not treated any differently in relation to taxation provisions than heterosexual cohabiting couples that were not married. The defendant relied upon s.2(2)(e) of the Civil Registration Act 2004 , which precludes marriage by same sex couples under Irish law and argued that the plaintiffs' marriage was, therefore, invalid in this jurisdiction and the plaintiffs were not married.

The High Court held that the plaintiffs had not been discriminated against by the respondent on the grounds of sexual orientation, that there was no difference in the tax treatment of unmarried cohabiting couples who were either heterosexual or homosexual. Co-habiting couples, regardless of their gender, were treated differently to married couples.

¹⁶ [2007] 4 I.C.L.M.D. 55

The plaintiffs were legally incapable of marrying each other in this jurisdiction. Undoubtedly, people in the position of the plaintiffs, be they same sex couples or heterosexual couples, can suffer great difficulty or hardship in the event of the death or serious illness of their partners. The court noted that it was to be hoped that the legislative changes necessary to ameliorate those difficulties would not be long in coming. Ultimately, however, it was for the legislature to determine the extent to which such changes regarding who can marry should be made. This case is under appeal to the Supreme Court.

Siobhán Wills observed that “both the Constitution, in Article 41, (particularly Article 41.2 giving special recognition to a woman’s life within the home) and case law, endorse the view that marriage in Ireland does not reflect modern relationship values.”¹⁷ Over the past few decades citizens were challenging the State policy of legal recognition of only marital families. Until there was legislation recognising such diverse non-marital family units, the courts could not grant recognition to such families in light of the provisions of Article 41 of the Constitution. It was essential for the legislature to grant any such legal recognition and rights to the various forms of non-marital family units.

¹⁷ Wills, “Protecting the Rights of Cohabitees – Recommendations for Reform” (2002) 5(3) *Irish Journal of Family Law* 8 at 11

2.2 IRELAND'S CHANGING SOCIETY - STATISTICS

Succession law should adequately address the realities of family life in 21st century Ireland. Family structures have altered in Ireland over the past few decades since the Act of 1965 was enacted. The recent census on 10 April 2011 will give even more insight into current trends when the results are compiled and released¹⁸. One area in which the Central Statistics Office data reveals this changing nature of Irish society is in the birth rates data.

Recent data available for the second quarter of 2010¹⁹ indicates that of the 18,844 births registered in Ireland in this quarter, 6,205 were registered as outside marriage. This accounted for 32.9% of all births.²⁰ Of these 3,381 were to unmarried parents with the same address, 17.9% of all births.

The 2006 census results on the marital status of the population revealed some interesting insights into the make-up of Irish family units at the time. Of a total 4,239,848 population 2,317,676 were single (55%) and 1,565,016 were married (37%). Of those married, 1,523,527 were married for the first time while 9,694 were married following widowhood and 31,795 were married following dissolution of a previous marriage. 107,263 were separated, 59,534 were divorced and 190,359 were widowed²¹. Almost 10% of the total population of the country were either remarried, separated, divorced or widowed. This phenomenon has the potential to lead to varying degrees of complexity in succession law terms as they fall outside the standard model of first time married persons with no additional or subsequent relationships.

¹⁸ Of note is the fact that the census form 2011 did not have 'civil partner' listed in the options to the question on relationship to other persons in the household apparently because the legislation had not been enacted when the forms were being planned. Instead, 'partner (incl. same-sex partner)' is the option given.

¹⁹ Central Statistics Office Vital Statistics Second Quarter 2010 Report available at www.cso.ie

²⁰ The figure for Q2 of 2010 is more or less in line with figures for each year going back at least to 2000

²¹ 2006 census available at www.cso.ie

This complexity of family structure includes blended families, which are made up of adults and children born as a result of more than one relationship. Divorce has also created overlapping categories of potential claimants, former spouses and current spouses, who can both claim from the estate of a deceased.

The census results are considered in *Families in Ireland, An Analysis of Patterns and Trends*²² by Fahey and Field where they note that the decline in marriage rates among young adults has been off-set to some degree by a rise in cohabitation. Cohabiting couples in 2006 accounted for 11.6% of all family units, and 33% of these cohabiting couples had children. They concluded that in general cohabitation is more often either a transient arrangement that dissolves or a stage on the road to marriage rather than a long-term alternative to marriage.

The increase in cohabitation rates can be seen by comparing the fact that in the 1996 census there were 31,300 cohabiting couples, amounting to 3.9% of all family units. By 2006, the incidence of cohabitation had increased fourfold in absolute numbers (to 121,800 couples) and by almost as much as a share of all family units (to 11.6%).²³ Fahey and Field also look at the proportion of same sex couples in Ireland. Such couples account for a small proportion of all cohabiting couples but of significance is that the proportion rose fourfold between 1996 and 2002 and then showed much slower growth up to 2006. In 1996, 0.4% of cohabiting couples were in same-sex partnerships, but by 2002 that had risen to 1.67% and by 2006 to 1.71% (the absolute increase was from 150 couples in 1996 to 2,090 in 2006). It is concluded that this increase between 1996 and 2002 may have reflected changing behaviour and the greater social acceptance of same-sex relationships, but it is

²² Fahey and Field, *Families in Ireland, An Analysis of Patterns and Trends*, Department of Social and Family Affairs, Government Publications, (Dublin, 2008) available at www.welfare.ie at 7

²³ *Ibid.* at 18

pointed out that it may also have been influenced to by a small change in the way cohabitation was recorded between the censuses of 1996 and 2002. The 2006 figure may be an underestimate of cohabiting couples in same-sex partnerships as there may have been a reluctance on the part of some couples to reveal their status.

The report concludes that while there has been an increase in marriage rates since the mid-1990s “non-marriage has a very different meaning today than it had in previous generations since sex, childbearing and cohabitation are now available outside marriage to a degree unknown in the past”. Generally “marriage still occupies a dominant role in family formation”. It is, however, of note that people are getting married later in life and marriage “is less of a critical gateway to family formation than it was even a generation ago”²⁴.

2.3 THE NEED FOR REFORM

The Law Reform Commission in its 2006 Report on Rights and Duties of Cohabitants²⁵ proposed that a surviving cohabitant should be given a limited discretionary remedy where inadequate or no provision has been made in the deceased cohabitant’s will, a redress model. It is an opt-in scheme. A surviving cohabitant must first be a qualified cohabitant. The term “qualified cohabitants” is defined in the Report as cohabitants who have been living together for at least three years, or two years if they had a child together.

The different forms of cohabitation include first-time cohabitation, pre-marital cohabitation (where the parties intend to marry in the future), cohabitation as an alternative to marriage, and post-marital cohabitation (where one or both parties were previously married to someone else).

²⁴ *Ibid.* at 28

²⁵ LRC 82-2006 (Dublin, 2006)

In Chapter 5 of the Report, the Commission recommended that an application by a qualified cohabitant could be made on the net estate of the deceased. An existing spouse will, the Commission suggested, retain his or her legal right share and will not be affected by a qualified cohabitant's application under the redress model in the Report. The Commission also recommended that a claim pursued by a former spouse be considered by the court when addressing any entitlement to the estate by a qualified cohabitant. The Commission also recommended that a claim by surviving children must also be taken into account by the court when addressing any entitlement to the estate by a qualified cohabitant. These recommendations formed the basis for Part 15 of the Act of 2010 in relation to cohabitants with some alterations, which are set out in detail at 5.3.5 below.

In the next chapter the provisions of the Succession Act 1965 are set out and as will be evident, these provisions were not adequate to deal with the changing nature of Irish families outlined above and were framed in a very different social era.

CHAPTER 3: CURRENT SUCCESSION LAW UP TO 2010

This chapter will set out the current state of succession law up to 2010. The provisions contained in the Act of 1965 (as amended up to 1996) will be outlined. As will be seen from those provisions, a hierarchy of claimants existed and certain protections were introduced by the Act of 1965 which meant that certain categories of claimants took priority over others. Surviving spouses took priority over children in that their legal right share was absolute, including step-parents. Moreover, if the surviving spouse was the child's parent, a child's application for provision under s.117 could not affect any devices or legacies or shares on intestacy of the surviving parent.

Firstly though, the background to the introduction of the Succession Act 1965 is outlined which includes a discussion the then legislature's objectives in introducing the new legislation. In addition, a brief description of the previous succession law regime will be given and the relevance of the principle of freedom of testation in Irish succession law will be highlighted.

3.1 BACKGROUND TO THE INTRODUCTION OF THE SUCCESSION ACT 1965

Spierin notes that before the coming into operation of the Act of 1965 on 1 January 1967, succession law in Ireland was comprised of a body of common law and a plethora of statutes, some of which dated back more than 700 years. The enactment of the 1965 Act was a significant step forward in attempting to lay down an almost codified system of

succession law.²⁶ There had been few amendments to the Act of 1965 up until the Status of Children Act 1987.

The old statute law was repealed and Spierin submits that the legislature sought “to bring Irish succession law more into line with modern conditions as they were perceived in the Ireland of the mid-1960’s”.²⁷

The provisions of the Act of 1965 are set out in more detail later in this chapter, however, Spierin outlines that the major reforms introduced by the Act of 1965 were²⁸:

1. With the introduction of this first reform, real estate and personal estate devolved in the same way. Previously, they would have devolved separately which could lead to complications.²⁹
2. New rules relating to intestate succession were introduced and these were significantly different from those that applied prior to the Act of 1965.
3. Significant restrictions on testamentary freedom were established by introducing the concept of the legal right share of the spouse, which is also accorded a special priority, and conferring on children a right to bring an action to court where they believe that their parent has failed in his or her moral duty to make proper provision for them in accordance with his/her (the parent’s) means.

²⁶ Spierin with Fallon, *The Succession Act 1965 and Related Legislation, A Commentary* (Dublin, 3rd ed., 2003) at 2

²⁷ *Ibid.* at 2

²⁸ *Ibid.* at 2-3

²⁹ Such complications included that real property and personal property passed under separate rules of intestate descent, namely the Rules of Inheritance and the Rules of Succession respectively. There were also separate rules for the devolution of the beneficial interest in registered land under the Local Registration of Title Act 1891 under which leasehold land still descended on death under the rules applicable to personalty.

Spierin compliments the drafters of the Act of 1965 when he says that “[i]t is a testament to its framers that the 1965 Act has performed its function well. It has brought certainty to distribution on intestacy, which some might feel is unduly inflexible.”³⁰

The objectives of and background to the new legislation can be seen in the Dáil debates which took place at the time. As will be seen, the aims of the legislature were naturally confined to addressing the pertinent issues of the mid-1960s. The issues raised in the Oireachtas debates are indicative of the social norms at the time.

The Principle of Freedom of Testation

In relation to Parts IX and X of the Bill of 1965 and the provisions protecting the spouse and children of a testator from disinheritance, the then Minister for Justice, Mr. B. Lenihan stated that “[t]he right to disinherit one's spouse and family is not a fundamental right inherent in property and, as I hope to show, there is no real basis, moral or historical, for the view that it is.”³¹ The then Minister discusses the historical basis to the notion of freedom of testation and refers to an old Irish law, the Custom of Ireland, in relation to the entitlement of a wife and children to certain portions of an estate, which was abolished in the 17th century. He notes that the existing statutory law governing succession to property on death was spread over more than 70 enactments, the earliest of which dated back to 1226.

Brady considers the concept of freedom of testation and describes it as “an inseparable incident of the law of succession which we inherited from the English, [which] meant in effect that a testator was free to dispose of his property as he saw fit.”³² This principle of

³⁰ *Ibid.* at 2

³¹ 215 *Dáil Debates* 2016 (25 May 1965)

³² Brady, *Succession Law in Ireland* (Dublin, 2nd ed., 1995) at 211

freedom of testation meant that a person could be as unpredictable and impulsive in his testamentary dispositions as he liked and the will would stand. The civilian systems of mainland Europe curtailed testamentary freedom by providing a fixed share of a deceased's estate for his surviving spouse and children. The drafters of the Bill of 1965 "were impressed by the greater equity of the civilian systems" and sought to imitate particular provisions in Part IX of the Succession Act.³³

The Minister was highly critical in the Dáil debates of the notion of complete freedom of testation and described it as "a peculiarly English idea".³⁴ The concept of the family and the ideals of 1960's Ireland are evident in the Minister's comments on the reasoning for the introduction of the legislation:

"In a country such as ours which recognises the very special position of the family "as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law", so-called freedom of testation is a paradox which cannot be defended on any ground."³⁵

The Minister comments on the existence of a problem of disinheritance in the country and remarks "[i]t was clear from the discussion in this House and from the views expressed outside the House that there is general acceptance of the need to restrict a testator's right to disinherit his family."³⁶ Reference is made in the debate to people who seek to control their family from the grave and that the proposed legal right share of a widow eliminates this danger.

³³ *Ibid.* at 211

³⁴ 215 *Dáil Debates* 2017 (25 May 1965)

³⁵ *Ibid.*

³⁶ 215 *Dáil Debates* 2018 (25 May 1965)

The mainly rural population in the 1960's and the thinking regarding the contribution of women to Irish society is reflected in the Minister's following remarks.

“I think it ought to be remembered that in Irish circumstances the wife plays a particularly important part in the affairs of the family. More often than not she has to engage in hard physical labour. In rural Ireland she is the joint manager of the home and farm, and very often, where her husband takes to drink or neglects his duty, she is the sole manager. It may, perhaps, be a platitude to say that the wife and mother is the very foundation of family society, but it is, nevertheless, true.”³⁷

On the legal right share introduced in the Bill of 1965 the Minister defended the absolute nature of it saying “I am not going to force into court every Irish widow who is wronged by her deceased husband. Admittedly, there may be the occasional widow wealthy in her own right, but we have to legislate for the normal.”³⁸

He noted that “[t]he widow's third has, in the past, been a feature of every legal system in the world. In the form of dower, it was part of the common law system for centuries. To that extent, therefore, what I am proposing under Part IX of the Bill represents a step backward into history.”³⁹

The discretionary system in relation to children contained in s.117 was discussed as having “the merit of avoiding the anomalies that are inevitable under a system based on any arbitrary definition of dependency”.⁴⁰

³⁷ 215 *Dáil Debates* 2020 (25 May 1965)

³⁸ *Ibid.*

³⁹ 215 *Dáil Debates* 2022 (25 May 1965)

⁴⁰ *Ibid.*

Brady notes that “[w]hile there was general agreement on all sides in Dáil Éireann on the need to place some restrictions on testamentary freedom, there was disagreement on the method to be employed, whether it should be one based on judicial discretion as in the English and Commonwealth systems, or one based on fixed shares in the deceased’s estate as in the civil law systems.”⁴¹ A compromise was effected between the competing systems in Part IX of the Succession Act in the form of the discretionary system contained in s.117 under which a child can apply to court for provision out of the deceased’s estate and the fixed shares on intestacy and the spouse’s legal right share.

Cooney also refers to the combination of the fixed share system adopted in civil law jurisdictions and the discretionary system to make proper provision modelled on the legal system in most Commonwealth countries.⁴²

3.2 THE SUCCESSION ACT 1965 (AS AMENDED UP TO 1996)

Below the succession law provisions contained in the Act of 1965 (as amended) are set out. These provisions are still in operation today, now with the amendments and insertions made by virtue of the Act of 2010. Importantly, the Act of 2010 does not alter the entitlements of the categories of persons referred to below but instead adds another layer of persons entitled to a share in an estate and potential claimants to an estate.

⁴¹ Brady, *Succession Law in Ireland* (Dublin, 2nd ed., 1995) at 212

⁴² Cooney, “Succession and Judicial Discretion in Ireland: The section 117 Cases”, Vol. XV (n.s.) Pt I (1980) *The Irish Jurist* 62

3.2.1 SPOUSES AND CHILDREN – INTESTATE ESTATES

Under the Succession Act 1965 (as amended) where a person dies having made no will, leaving a spouse and no issue then the spouse shall take the whole estate⁴³. Issue includes marital children, non-marital children⁴⁴, adopted children, grandchildren and other lineal descendants. If the deceased dies leaving a spouse and issue, then the spouse shall take 2/3 of the estate and the remaining 1/3⁴⁵ shall be distributed equally among the issue if they are in equal degree of relationship to the deceased. If they are not, it shall be divided according to *per stirpes*. The *per stirpes* rule allows grandchildren to step into the place of their parent, if the parent predeceased the deceased, and divide that share equally among them⁴⁶.

For example, if A and B have two children, C and D. However, D dies in an accident aged 30 years leaving a wife and one child, E. A dies intestate one year later aged 70 years. The *per stirpes* rule allows E, A's grandchild, to step into his parent's place in the order of entitlement. Therefore, C and E (as child of predeceased child D), will share equally 1/3 of A's estate.

If a person dies intestate leaving issue but no spouse, the estate is distributed equally among the issue if they are in equal degree of relationship to the deceased⁴⁷. If they are not, it shall be divided according to the *per stirpes* rule above.

If a person dies intestate leaving neither spouse nor issue, then the estate is distributed between his/her parents in equal shares if they both survive the deceased. If only one parent survives, that parent takes the whole estate.⁴⁸

⁴³ S.67(1) of the Succession Act 1965

⁴⁴ As amended by Status of Children Act 1987 (on the position prior to 1987, see *O'B. v. S.* [1984] I.R. 316)

⁴⁵ S.67(2) of the Succession Act 1965

⁴⁶ Ss.3(3) and 67(4) of the Succession Act 1965

⁴⁷ S.67(3) of the Succession Act 1965

Under s.69 of the Act of 1965 if a person dies intestate leaving neither spouse nor issue nor parents alive at his/her death then any brothers or sisters of the deceased share all equally. Nephews and nieces are allowed to step into the place of any predeceased parent who was a brother/sister of the deceased. In the event that there are also no brothers or sisters alive at the time of the deceased's death, then their nieces and nephews share the estate equally.

S.70 of the Act of 1965 provide that if a deceased dies leaving neither spouse nor issue nor parent nor brother nor sister nor children of any deceased brother or sister, the estate is distributed among his/her next-of-kin according to the rules set out in s.71. Grandparents are first in this order of entitlement of next-of-kin. Degrees of blood relationship of a direct lineal ancestor are computed by counting upwards from the intestate to that ancestor.

3.2.2 SPOUSES AND CHILDREN – TESTATE ESTATES

Spouse's Legal Right Share

If the deceased has left a will then the spouse of the deceased under s.111 of the Act of 1965 is entitled to a legal right share of the estate. The quantity of the legal right share in the estate if there are no children will be 1/2; if there are children the spouse will have a right to 1/3⁴⁹. The legal right share once established will take priority over devises, legacies or bequests and shares on intestacy⁵⁰. The reason why intestacy is mentioned is because a testator may die partially intestate thus making the rules of intestacy applicable to that part of his estate not disposed of by his will. Although the legal right share is expressed to take priority over testamentary gifts and shares arising out of a partial intestacy, it is not

⁴⁸ S.68 of the Succession Act 1965

⁴⁹ S.111(1) & s.111(2) Succession Act 1965 and Keating, *Probate Causes and Related Matters* (Dublin, 2000)

⁵⁰ S.112 of the Succession Act 1965

expressed to take priority over the debts and liabilities of the deceased⁵¹. Under s.115 of the Act of 1965 a surviving spouse may elect to take either a devise or bequest (if any) made under their spouse's will or the share to which he is entitled as a legal right.

3.2.3 EXTINGUISHMENT OF SPOUSE'S LEGAL RIGHT SHARE / SHARE ON INTESTACY

3.2.3.1 Extinguishment Orders – Judicial Separation and Divorce

Keating⁵² provides a summary of the provisions in relation to the inheritance matters on divorce or judicial separation, referred to below. The court, at the time of granting a decree of judicial separation, or at any time thereafter may make an order extinguishing the legal right share of a spouse or the share to which that spouse is entitled on an intestacy (Family Law Act 1995, s.14). There is no need for the court to make any such order in the case of a decree of divorce being granted as a spouse ceases to be a spouse from the date of the decree.⁵³ The court will have regard to all the circumstances of the case when deciding to make an extinguishment order and will endeavour to ensure when making such an order that it is made in the interests of justice (ss.16(1) and (5)).

3.2.3.2 Application for Provision from Estate of Deceased

When a decree of divorce is granted the marriage, the subject of the divorce, is dissolved. However, under s.18 of the Family Law (Divorce) Act 1996, a divorced spouse may apply to the court for provision to be made for him or her out of the other divorced spouse's estate. When considering such applications by divorced spouses, the court will have regard

⁵¹ S.109(2) of the Succession Act 1965

⁵² Keating, *Keating on Probate* (Dublin, 3rd ed., 2007) at 133-136

⁵³ S.10 of the Family Law (Divorce) Act 1996

to the rights of all persons who have an interest in the estate of the deceased. The provisions of s.18 have been extended to include spouses who are separated by virtue of a decree of judicial separation by s.52(g) of the 1996 Act, by inserting a new s.15A in the Family Law Act 1995. The Court must be satisfied that proper provision was not made for the applicant during the lifetime of the deceased when the court was making ancillary orders under Pt. III of the 1996 Act, and that this was not because of the misconduct of the applicant. The time limit for making such applications is six months from the first taking out of representation to the deceased's estate. The court, having regard to the circumstances of the case, may order provision to be made out of the deceased's estate as it considers appropriate. Under s.18(3) of the Act of 1996, the kind of circumstances which the court will have regard to in making such orders will include the payment of any lump sum or property adjustment order made in favour of the applicant and any testamentary gifts given by the testator to the applicant in his will. However, an applicant is prevented from receiving any such provision should they be remarried⁵⁴.

Under s.18(4) the total share in the estate to which an applicant will be entitled cannot exceed the amount to which a spouse would be entitled if no decree of divorce had been granted. The criterion provided by s.18 is that the court may make such provision for the applicant as it considers appropriate and, accordingly, any sums paid already to the applicant or an adjustment order made in favour of the applicant, or any devise or bequest given to the applicant in a will, will be taken into account by the court when deciding on an appropriate provision for the applicant (s.18). Where an application is made under s.18, all persons with an interest in the estate of the deceased will be taken into account and this includes a current spouse of the deceased if the deceased has married again, and such other

⁵⁴ S.18(2) of the Family Law (Divorce) Act 1996

persons as the court may consider appropriate⁵⁵. The court may further order at the time of granting the decree of divorce, if it considers it just to do so, that on the death of either divorced spouse the survivor will be entitled to make an application under s.18 of the 1996 Act.

3.2.3.3 Blocking Orders

On the other hand, when a decree of divorce is being granted, or at any time thereafter during the lifetime of the divorced spouses, either of them may apply under s.18(10) to the court for a blocking order to the effect that either or both spouses will not be entitled to apply for provision to be made out of each other's estate. Keating suggests that it appears unlikely that the court would make an order under s.18 arising out of divorce proceedings if a spouse has voluntarily renounced his rights to the other spouse's estate, or where an extinguishment order has been made under s.14 of the Family Law Act 1995 ancillary to a decree of judicial separation.

It is worth noting that there is no explicit provision in the Act of 1996 declaring the current spouse of the deceased's legal right share absolute and protecting it from such an application by a former spouse of the deceased.

3.2.3.4 Renunciation

Section 113 of the 1965 Act allows a spouse to renounce their legal right share in an antenuptial contract made in writing between the parties to an intended marriage or may be renounced in writing by the spouse after marriage during the lifetime of the testator.

⁵⁵ S.18(5) of the Act of 1996

Brady discusses such ante-nuptial contracts and notes that if the contract is entered into prior to marriage the renunciation of the legal right might well be the other spouse's price for undertaking the marriage, but such condition would raise questions of public policy, not least those which undergird the existence of a legal right in the surviving spouse. An example he gives of a benign circumstance in which a spouse would be asked to renounce his or her legal right is one where a couple, the female member of which is past the age of child-bearing, enter into a second marriage after the death of their former partners and intend the children of their first marriage to succeed to their respective estates.⁵⁶

3.2.3.5 Exclusion of Persons from Succession

Section 120 of the Act of 1965 sets out the circumstances under which a person is unworthy to succeed or inherit. These circumstances include the exclusion from inheritance of a sane person who has been guilty of murder, attempted murder or manslaughter of the deceased, except in relation to a share arising under a will made after the act constituting the offence. Such a person additionally shall not be entitled to make a section 117 application. A spouse who is guilty of desertion which has continued up to the death for two years or more shall be precluded from taking their legal right share or any share on intestacy. This also applies to a spouse who was guilty of conduct which justified the deceased in separating and living apart from him shall be deemed to be guilty of desertion. A person who has been found guilty of an offence against the deceased, or against the spouse or any child of the deceased punishable by imprisonment for a maximum period of at least two years or more shall be precluded from taking any share in the estate as a legal right or from making an application under s.117.

⁵⁶ Brady, *Succession Law in Ireland* (Dublin, 2nd ed., 1995) at 213-214

Section 120(1) is an example of a very explicit bow to freedom of testation where a person can still receive a gift in a will made after the act constituting the offence, should the testator decide to do so.

Recently a case came before the High Court brought by the daughter, Sasha Keating, of a murdered woman, Meg Walsh. Ms. Keating was claiming a one-third share of the former marital home owned by her stepfather, Mr. John O'Brien, and her mother. Her stepfather had been cleared in 2008 of her mother's murder. Ms. Walsh died intestate and after Mr. O'Brien was acquitted of her murder, he inherited sole ownership of the family home. Ms. Keating received no share of her mother's main assets. Ms. Keating claimed during the application that Mr. O'Brien had agreed to give Ms. Walsh sole possession of the home they shared before her murder in exchange for her not seeking a barring order against Mr. O'Brien and for not making a formal complaint to Gardaí about an assault to which he had subjected her. There was apparently an authority document signed by both parties transferring ownership to Ms. Walsh however it was only after Ms. Walsh went missing that this document had been processed by the bank concerned and no further work to further the agreement was done.

Ms. Keating's lawyer stated that "this case is not about retribution, this case is about the fact that the plaintiff (Ms. Keating), as the only child of Meg Walsh, receives her just share of the estate". This civil action settled and so there was no judgment handed down on the merits of this case.⁵⁷

⁵⁷ Riegel, "Meg's girl fights for family home", *Irish Independent*, 25 March 2011 & Riegel, "Murdered woman's daughter settles case over family home", *Irish Independent*, 28 March 2011

The circumstances of this case illustrate the application of s.120 where unless a person has been found guilty of the offences prescribed that person will succeed either under the will or on intestacy. It is also a stark reminder of the lack of statutory provision for applications to be made by the child of a deceased where they died intestate and some of the valuable assets of the deceased fall outside the estate. Applications under s.117 of the Act of 1965 cannot be made where a parent dies wholly intestate. Ms. Keating had to make an application for the equitable remedy of specific performance.

3.2.4 CHILDREN – SECTION 117 APPLICATIONS

Under s.117 of the Act of 1965 where a testator has failed to make proper provision for his children by will or otherwise in accordance with his means they may apply to the court to have such provision made for them out of the estate as the court thinks just. A testator has a moral duty to make proper provision for his children and the court will assume the role of a prudent and just parent when deciding whether he had failed to fulfil this duty (s.117(1)). Where it is established that a testator has failed in his moral duty to make proper provision for his children in accordance with his means, the court in deciding the extent of the provision for any child of a testator, may take into the situation in life of each child and any other circumstances which the child to whom the application relates, and to the other children.

Importantly, an order made by the court under s.117 will not affect the legal right of a surviving spouse or, if the spouse is the father or mother of the child, any devise or legacy to the spouse or any share to which the spouse is entitled on intestacy. Such provision for a child can only be made out of estate remaining after first deducting the value of the legal right of a surviving spouse, or any testamentary gift to the parent of a child or a share on an

intestacy⁵⁸. As noted by Keating “the relationship of testator and spouse thus takes precedence over the relationship of testator and child and this is reflected in the absolute nature of the right which a spouse has to a share in the estate”⁵⁹. An application under s.117 must be made within six months from the first taking out of a grant to the estate⁶⁰. Section 117 is not limited to minors and dependent children.

An important element of s.117 is noted by Ryan in that “if the deceased left the entire estate to his spouse, who is also a parent of the child, the child cannot seek a s.117 order against the estate”⁶¹.

Section 117 of the Act of 1965 is the section which has generated the most case law in this area. The main authorities are considered in more detail in Chapter 6 and how the legal principles will be applied to the new s.117(3A) applications and others will be discussed.

3.2.5 TAX

3.2.5.1 Capital Acquisitions Tax

The tax free thresholds in relation to the Capital Acquisitions Tax⁶² payable for 2011 on an inheritance after indexation are as follows:

Where recipient is:

Group A (son/daughter/step-child/parent in certain circumstances) €332,084

Group B (Parent/Brother/Sister/Niece/Nephew/Grandchild) €33,208

⁵⁸ S.117(3) of the Succession Act 1965

⁵⁹ Keating, *Probate Causes and Related Matters* (Dublin, 2000) at 131

⁶⁰ S.46 as amended by the Family Law (Divorce) Act 1996

⁶¹ Ryan, “Civil Partnership – A Guide for Practitioners”, at *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 21

⁶² Capital Acquisitions Tax Consolidation Act 2003, as amended

Group C (Relationship other than A/B) €16,604⁶³

For the purpose of Gift and Inheritance Tax, the relationship between the person who provided the gift or inheritance (i.e. the disponent) and the person who received the gift or inheritance (i.e. the beneficiary), determines the maximum tax free threshold – known as the “group threshold”. The group threshold sums are the maximum tax free amount one may receive from all persons in the relevant category over a lifetime and so are cumulative. If the maximum tax free threshold is exceeded, capital acquisitions tax must be paid on the inheritance. The tax rate is currently 25%.

So a cohabitant or a same sex partner would fall under category C under this tax regime. They would effectively be dealt with as strangers in tax terms. Civil partners will be treated differently once the Finance No. 2 Bill 2011 is enacted

3.2.5.2 Tax Exemption for Dwelling House

Section 86 of the Capital Acquisitions Tax Consolidation Act 2003⁶⁴ provides that gifts or inheritance of a dwelling-house taken on or after 1 December 1999 will be exempt from capital acquisitions tax provided the following conditions are complied with. Importantly no blood relationship or marriage is required.

- a. The recipient must have occupied the dwelling-house continuously as his/her only/main residence for a period of 3 years immediately prior to the date of the gift/inheritance. Where the dwelling-house has directly/indirectly replaced other property owned by the disponent, particular conditions must be satisfied;

⁶³ Contained in Finance Act 2011

⁶⁴ As amended by s.116 of the Finance Act 2007

- b. The recipient must not, at the date of the gift/inheritance, be beneficially entitled to any other dwelling-house or to any interest in any other dwelling-house;
- c. Gifts taken on or after 20 February 2007: Any period during which a donee occupies a house that was during that period the disponent's only or main residence will be disregarded as a period of occupation in that house unless the disponent is compelled, by reason of old age or infirmity, to depend on the services of the donee for that period. Old age refers to a person aged 65 or over;
- d. Gifts taken on or after 20 February 2007: The house must be owned by the disponent during the 3 year period prior to the gift and, where the gifted house has replaced another property, each house must be owned by the disponent for the relevant part of the 3 year period that it was occupied by the beneficiary;
- e. The recipient must continue, except where such recipient was aged 55 years or more at the date of the gift or inheritance or has died, to occupy that dwelling-house as his/her only/main residence for a period of 6 years commencing on the date of the gift/inheritance. A recipient absent during any time through working abroad is considered to remain in continuous occupation of that dwelling-house.⁶⁵

3.2.6 COHABITANTS

When referring to cohabitants in this section, I am referring to both cohabiting heterosexual couples and cohabiting same-sex couples.

⁶⁵ www.revenue.ie/en/tax/cat/leaflets/cat10.html

Keating notes the current situation in relation to cohabiting couples when he states:

“cohabiting couples are of course free to leave each other gifts by will but, apart from testamentary gifts, they have no succession rights to each other’s estates. The only form of legal redress that a surviving cohabitant may have against the estate of the deceased cohabitant is where a claim can be based on an equitable concept like proprietary estoppel, or perhaps, under a “new model” constructive trust.”⁶⁶

Proprietary estoppel, Keating states, “was designed by equity to furnish a remedy to a person who acts on foot of expectations in relation to land owned by another and as a result of which the person in whose favour the expectations were created expended money on the land.”⁶⁷ Walsh and Ryan caution that proprietary estoppel “is not, however, a reliable means of transferring property and, while useful in some cases, should not be considered as a substitute for the creation of a valid will.”⁶⁸ The advantage of relying on this concept is that if successful the result will be that the said property cannot be disposed of by will or distributed under the rules of intestacy. In cases such as *Smyth v. Halpin*⁶⁹ the court held that money expended on land on foot of expectations created by the owner of the land will be sufficient to establish the equity. Murphy J. in the Supreme Court case of *McCarron v. McCarron*⁷⁰ indicated that the doctrine may extend further when he stated (*obiter*) that:

“In principle I see no reason why the doctrine should be confined to the expenditure of money or the erection of premises on the land of another. In a suitable case it may well be argued that a plaintiff suffers as severe a loss or

⁶⁶ Keating, *Keating on Probate* (Dublin, 3rd ed., 2007) at 136

⁶⁷ Keating, *Equitable Succession Rights* (Dublin, 2005) at 139

⁶⁸ Walsh and Ryan, *The Rights of De Facto Couples*, Irish Human Rights Commission (Dublin, 2006)

⁶⁹ [1997] 2 I.L.R.M. 38

⁷⁰ (Unreported, Supreme Court, 13 February 1997)

detriment by providing his own labours or services in relation to the lands of another and accordingly should equally qualify for recognition in equity.”

A “new model” constructive trust, Ronan Keane explains, “in its traditional form, arises because of equity’s refusal to countenance fraud: in this wider guise it is imposed by law whenever justice and good conscience require it,” and that it “is imposed by the court as an equitable remedy intended to restore the plaintiff the benefit of which he has been deprived.”⁷¹

It is also possible to derive an interest in a property through a purchase money resulting trust if the cohabitant has contributed financially to the purchase of the home.

Walsh and Ryan⁷² highlighted the reality of the situation facing cohabitant couples when they observed that “a non-marital partner may, of course, make a will providing for the surviving partner. If however the testator was a party to a valid and subsisting marriage, he or she would effectively be obliged to make provision for the surviving spouse at the expense of the surviving non-marital partner.” The legal rights of spouses as always took precedence over devises, bequests and shares on intestacy.

The situation was far worse in the case of intestacy of the deceased as the deceased’s estate (or the portion that is not dealt with by will) falls to be distributed in accordance with the rules of intestacy set out in Part VI of the Succession Act 1965. The surviving cohabitant will not be entitled to any portion of the deceased’s estate.

⁷¹ Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Dublin, 1988) at 186-187

⁷² Walsh and Ryan, *The Rights of De Facto Couples*, Irish Human Rights Commission (Dublin, 2006) at 99

Where property is held by a joint tenancy by the cohabiting couple, however, then on the death of one party the survivor is deemed to take the entire property. However, if the property is held subject to a tenancy in common, the proportion of the property belonging to a deceased owner will pass to their estate.⁷³

Cohabitants were effectively strangers at law and s.86 (tax exemption for dwelling house referred to above) was one of the only tax reliefs available.

An illustration of the inheritance problems which can be encountered on the death of a partner can be seen in the recent case which came before the High Court this year, *Lennon v. Smith*⁷⁴. A woman claimed that the deceased, a retired publican who she claimed was her partner, cut her from his will and left everything to his son claiming she was only his housekeeper.

The deceased, Mr. Smith, in 2001 had given a copy of his will to Ms. Lennon, the will leaving the house they lived in together to her. Despite this, in 2002, and unknown to Ms. Lennon, he made a second will leaving everything to his son,. Ms. Lennon applied to the High Court to order that Mr. Smith's son, as executor of his father's will, comply with or specifically perform the agreement reached between her and Mr. Smith. Mr. Smith's son claimed his father told him that Ms. Lennon was his housekeeper. Ms. Lennon began working for Mr. Smith in 1977, had a room above the pub and cooked for his children. When Mr. Smith left the family home later that year and moved into the pub she claimed they developed a close personal relationship. Nine years later in 1986 Mr. Smith leased out the pub and he and Ms. Lennon moved into his family home where they bred greyhounds

⁷³ See *O'Connell v. Harrison* [1927] I.R. 330 and *Twigg v. Twigg* [1933] I.R. 65 re tenancies in common

⁷⁴ (Case settled, High Court Record No. 2006/3251P, Murphy J., 4 April 2011)

and stayed there until his death in 2005. In evidence she stated “[i]f you choose to live with somebody, you hope they will be good to you at the end of the day”. This case settled so there was no judicial decision on the facts of this case.⁷⁵

The changes introduced by the Act of 2010 are an attempt to recognise these relationships and grant rights and entitlements to same-sex couples who wish to enter a civil partnership and cohabitants who qualified under the redress scheme included in the Act. The new provisions of the Act of 2010 help to ameliorate some of the difficulties outlined above on the death of a cohabitant or same-sex partner.

⁷⁵ Healy, “Publican cut lover from will and said she was housekeeper, court told”, *Irish Independent*, 7 April 2011

CHAPTER 4: GENERAL DISCUSSION OF CIVIL PARTNERSHIP

The civil partnership provisions contained in the Act of 2010 allow same-sex couples to enter into a registered civil partnership. This will mean that civil partners will be treated analogous to spouses as regards social welfare, tax (yet to be enacted), pensions, shared home protection, maintenance and succession law rights (with some notable exceptions). The objectives of the Act of 2010 and its operation are considered below.

4.1 OBJECTIVES OF CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS BILL 2009 & OIREACHTAS DEBATES

The objectives of and parameters placed on the Bill of 2009 can be seen in the debates which took place as the Bill made its way through the Houses of the Oireachtas in 2009 and 2010. The evolution and development of the objectives of the Bill compared to those of the Act of 1965 discussed earlier reflect the changes in Irish society. Also the limits on the recognition and equality being granted to same-sex couples is evident from the debates.

On Ireland's changing society Senator Eugene Regan stated "the Bill reflects changes in society, the extent of same-sex couple and cohabitee relationships and the acceptance by the vast majority that civil union relationships should be given legal recognition and protection. It is also an attempt to end victimisation, discrimination and hostility which has been shown to the gay community over the years." Minister for Justice, Equality and Law Reform, Dermot Ahern acknowledged that what he "had not appreciated was that other people are directly affected by the lack of rights and duties available to gay and lesbian

people. They include family members and friends who are affected as a result of the difficulties associated with a person coming out as gay or lesbian.”⁷⁶

The objectives of the Bill of 2009 in relation to civil partnerships were set out by the Minister when he outlined that

“[t]he Bill takes nothing from anyone but what it gives is profound and is positive. It creates for the first time in Irish law a scheme under which a same sex couple can formally declare their allegiance to each other, register their partnership under new provisions in the Civil Registration Act 2004, commit themselves to a range of duties and responsibilities and at the same time be subject under new law to a series of protections in the course of their partnership in the event of a failure of either party to maintain the other and in the event of disputes between them as to ownership of property”.

The changing attitude of the State to recognition of same-sex couples was evident when the Minister added:

“The absence of official recognition and affirmation of same-sex relationships only help to reinforce prejudice and inequality in society.”⁷⁷

The Minister made it clear that the differentiation between civil partnership and marriage, which was strived at in the drafting of the Bill, was an attempt to comply with the Constitutional protection of marriage in Article 41. The Bill of 2009 was accordingly framed to balance any potential conflict between the right to equality under Article 40.1 with the special protection of marriage under Article 41.⁷⁸ The legislature was very mindful

⁷⁶ 204 *Seanad Debates* 368 (8 July 2010)

⁷⁷ 697 *Dáil Debates* 107-108 (3 December 2009)

⁷⁸ 697 *Dáil Debates* 109 (3 December 2009)

not to grant civil partnership equal recognition to marriage as this could have led to constitutional challenges. The Constitution was not being amended to alter the special position of marriage in Irish law.

Deputy Brendan Howlin criticised the fact that the Bill was not introducing same-sex marriage and stated that it “does not achieve equality, it gives same sex couples rights that are long overdue...We are not legislating for true equality in this important measure.” In relation to the deficiency in the Bill as regards the lack of any rights provided to the non-biological children of civil partners he stated “[i]t cannot be that we will allow a Bill to be enacted that is silent on this critical issue, particularly that a child in such a relationship will not be able to seek maintenance from the non-biological parent and will have no succession rights if the civil partner of the child’s biological parent dies. The civil partner will not be able to adopt the child jointly.”⁷⁹

The Minister stated in the Seanad in response to criticism of the Bill’s lack of provision for children of civil partnerships that he would be proposing a comprehensive review of children’s rights in other legislation to come. Subsequently, the Law Reform Commission’s *Report on Legal Aspects of Family Relationships*⁸⁰ published in December 2010 noted that the Act of 2010 does not address the relationship between same-sex couples and their children. In the report, draft legislation, the Draft Children and Parental Responsibility Bill 2010, is put forward which would regulate on these issues (see 5.4.5).

⁷⁹ 697 *Dáil Debates* 117 (3 December 2009)

⁸⁰ Law Reform Commission, *Report on Legal Aspects of Family Relationships*, LRC 101-2010 (Dublin, 2010)

The lack of rights and protection under the existing law for cohabitants prior to the Act of 2010 was highlighted by the Minister when he noted that many cohabiting couples were under the misapprehension that a long term relationship ensured certain rights. However, this was not the case. Some people mistakenly presume that there is such a thing as ‘common law’ marriage which guarantees certain rights, when there is not.⁸¹

4.2 LAW IN OPERATION– REGISTERED CIVIL PARTNERSHIPS

On 5 April 2011, Barry Dignam and Hugh Walsh, after 17 years together, became the first gay couple in Ireland to become legal partners without receiving a court exemption to do so.⁸² *The Irish Times* reported that Walsh said that the couple were aware of cases where the sudden death of one gay partner had left the other in a position where, on top of dealing with bereavement, they faced homelessness or a large tax bill because of legal issues relating to a shared home. It was to avoid these difficulties which had led them to enter a civil partnership. According to Muriel Walls, a solicitor and board member of GLEN, the broader issue of children is one that the civil partnership legislation does not deal with adequately. Dignam and Walsh told the paper that while they do not intend to have children, even leaving aside gay couples who wish to have children in the future, there are already many children being raised in households where both parents are gay. “It’s like a new form of illegitimacy,” Walsh says. “Even if it was one child it needs to be addressed, but there are lots of kids out there, and they deserve the security of both parents.”⁸³

⁸¹ 697 *Dáil Debates* 109 (3 December 2009)

⁸² Duncan, “Partners on the road to equality”, *The Irish Times*, 9 April 2011

⁸³ *Ibid.*

Some of the first couples to enter civil partnerships lamented the fact that full same-sex marriage was not introduced.⁸⁴

According to *The Irish Times* up to 7 April 2011, eight civil partnerships had been officially registered, including six civil partnerships entered into under court-granted exemptions removing the usual three-month notice requirement. 280 couples had given notice of their intention to enter into one. They will join up to 1,000 couples who had their foreign civil partnerships or civil marriages recognised in January.⁸⁵

In relation to cohabitation, while the numbers of cohabitants is much higher than the numbers of same-sex couples who may enter into civil partnerships, there has not been much public comment on the new provisions in the Act of 2010. However, a public information campaign has been recently initiated regarding these provisions by the organisation Treoir, The National Federation of Services for Unmarried Parents and their Children, which is funded by the Family Support Agency. Treoir have produced an information booklet, radio advertisements and have information on their website.⁸⁶

⁸⁴ Duncan, "Couple happy to play part in Ireland's 'big step'", *The Irish Times*, 5 April 2011

⁸⁵ Duncan, "Partners on the road to equality", *The Irish Times*, 9 April 2011

⁸⁶ Treoir, *Cohabitants, New Legal Rights and Obligations for Opposite and Same Sex Couples* (2011) available at www.treoir.ie

CHAPTER 5: SUCCESSION LAW CHANGES INTRODUCED BY THE ACT OF 2010

In this chapter the new succession law provisions are outlined in relation to civil partnerships and cohabitants. Firstly, the statutory implementation of these changes is set out. Later in this chapter the debates and commentary on the introduction of the new provisions are discussed.

5.1 STATUTORY IMPLEMENTATION

The 1 January 2011 was assigned as the commencement date for the Act except section 5 (recognition of registered foreign relationships), and so much of the other provisions of the Act as are necessary for the purposes of giving effect to section 5, which came into operation on the 13 January 2011. These operation dates are contained in Statutory Instrument No. 648 of 2010, The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010.

Statutory Instrument No. 666 of 2010, Civil Registration (Delivery of Notification of Intention to Enter into a Civil Partnership) (Prescribed Circumstances) Regulations 2010, came into operation on the 1 January 2011 and sets out the circumstances under which a notification of an intention to enter into a civil partnership can be sent to the registrar under s.59B(5) of the Civil Registration Act 2004.

Statutory Instrument No. 671 of 2010, Civil Registration (Civil Partnership Registration Form) Regulations 2010, sets out in its Schedule the registration form that is to be used when applying for civil partnership and it too came into effect on the 1 January 2011.

Section 16 of the Act of 2010 inserted a new Part 7A into the Civil Registration Act of 2004 on the registration of civil partnerships. The new s.59B(1) sets out a notification period of three months. Therefore by virtue of S.I.s No. 666 and No.671 notifications were allowed from the 4 January 2011 and the first date that a full-notice civil partnership was registered in Ireland was on the 5 April 2011. This timeline was also subject to the provision contained in Regulation 3(b) of S.I. 666 of 2010 which allows for a shorter notification period in the event of ill-health of one of the parties. The first civil partnerships were celebrated on the 7 February 2011 on foot of this exemption. (See chapter 4 for details on some of the first civil partnerships registered in the State).

The Social Welfare and Pensions Act 2010 (Sections 15 to 26) (Commencement) Order 2010, S.I. No. 673 of 2010 appoints the 1 January 2011 as the commencement date of certain sections of the Social Welfare and Pensions Act 2010, which make a range of amendments to the social welfare code to accommodate the introduction of civil partnership. The effect of these sections of the Act is that civil partners are treated in the same manner as spouses for the purpose of the social welfare code. Additionally, same sex couples who are not civil partners will be treated the same as unmarried couples of the opposite sex for social welfare purposes.

5.2 TAX

The same capital acquisitions tax thresholds are still in place as are set out at 3.2.5.

The government has committed to treating civil partners ‘in the same way’ as spouses under the tax and social welfare codes, and had indicated that necessary legislation to give effect to this would follow the Civil Partnership Bill in a separate Finance Bill dealing with

stamp duty along with other tax issues.⁸⁷ It is hoped that tax changes will come into operation before June and be retrospective to January 2011⁸⁸. The Bill is not yet published.

5.3 SUCCESSION RIGHTS

The entitlements of spouses and children of married parents remain unchanged. The legislative changes to succession law regarding civil partners and cohabitants introduced by the Act of 2010 are mostly in the form of insertions into the Act of 1965 and are as follows.

The following new rights address the position of the children of biological parents only and not of those being parented by persons who are not their biological parents. Such children have been afforded no rights by the Act of 2010 as against the civil partner of a parent if the partner is not also a biological parent of the claimant.

5.3.1 CIVIL PARTNERS AND CHILDREN – INTESTATE ESTATES

The share a surviving civil partner shall receive on the death of their civil partner where no will was made mirrors the entitlements of a surviving spouse⁸⁹. A civil partner is entitled to the entire estate if the deceased has no issue. If the deceased had issue, then the civil partners is entitled to 2/3 of the estate with the remaining 1/3 share divided equally between them(in accordance with the same rules as outlined in Chapter 3 (3.2.1)). A new s.67A(3) inserted into the Act of 1965 allows a court to make provision for a child out of the deceased's estate where there is a surviving civil partner and children if it would be unjust not to make the order. There is no provision protecting the share on intestacy of a

⁸⁷ Department of Justice and Law Reform Press Release, 20 May 2010 available at www.justice.ie

⁸⁸ *The Irish Times*, 9 April 2011

⁸⁹ S.67A of the Succession Act 1965 as inserted by s.73 of the Act of 2010

surviving civil partner but the section instead states “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”⁹⁰ hence allowing the surviving civil partner’s share to be eaten into. There is no equivalent provision allowing such an application by a child where a deceased left a spouse and children as s.117 of the 1965 Act does not apply in cases where the deceased dies entirely intestate. Ryan⁹¹ notes that the new s.67A is “an innovation in the Act”.

The Law Reform Commission recommended extending s.117 to intestacies on the basis of justice and logic, however, this has not happened in relation to children of a married couple⁹² or the children of parents who are not married or civilly partnered for that matter.

In deciding whether it would be unjust not to make an order under s.67A(3) the court must consider all the circumstances including the extent of the provision made by the deceased for that child during their lifetime. Also the age and reasonable financial requirements of the claimant child and the financial situation of the deceased are considered. Importantly, the deceased’s obligations to the civil partner must be considered, however, this falls far short of guaranteeing the protection of the civil partner’s share on intestacy.

Section 67A(7) provides that applications under this section shall be made within 6 months from the first taking out of representation of the deceased’s estate.

Inge Clissmann S.C.⁹³ observes that by the insertion of the new rights to children in s. 67A “it appears to etch a subtle inequality into succession law”. She notes that in relation to

⁹⁰ S.67A(4)(b) of the Succession Act 1965 as inserted by s.73 of the Act of 2010

⁹¹ Ryan, *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 22

⁹² Law Reform Commission, *Report on Land Law and Conveyancing Law*, LRC 30-1989 (Dublin 1989) at 24

such legislative techniques such as s.117(3A) and s.67A “it remains to be seen how these as yet untested provisions will operate in practice, they appear to be fair and considered.”

The applicable hurdle to be overcome or standard to be met by a child making a s.67A(3) application is that it would be unjust not to make the order. This is quite an onerous standard to be met as presumably evidence of injustice would have to be shown to the court in order to succeed in such an application.

5.3.2 CIVIL PARTNERS AND CHILDREN – TESTATE ESTATES

A legal right share for civil partners is introduced with the same priority and share as the legal right share of spouses⁹⁴. If the testator leaves a civil partner and no children, the civil partner shall have a right to 1/2 of the estate, or if the testator leaves a civil partner and children, the civil partner shall have a right to 1/3 of the estate. The significant difference is contained in s.117(3A) which allows the court to make an order making provision for a child under that section to affect the legal right of a surviving civil partner if the court is of the opinion that it would be unjust not to make the order. This is not analogous to the absolute protection of a spouse’s legal right share in s.117 applications⁹⁵. The court must consider all of the circumstances, including the testator’s financial circumstances and his or her obligations to the surviving civil partner.

The consequences and the various connotations of these provisions in relation to applications which can be made by spouses/civil partners/children/cohabitants of a deceased under the Act of 1965, as amended, are examined in more detail in Chapter 7. In summary, the significant consequences include:

⁹³ Clissmann S.C., “The Rights and Entitlements of Civil Partners”, at *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 17

⁹⁴ S.111A of the Succession Act 1965 as inserted by s.81 of the Act of 2010

⁹⁵ S.117(3) of the Succession Act 1965

If the testator leaves property to a spouse who is a parent of the child, the child cannot in a s.117 application take any of the property left to the spouse. The rationale is that the surviving spouse is likely to provide for that child on his or her death, and if he or she does not, a further s.117 application is possible then. Thus, if the entire estate is left to the spouse who is also a parent of the child, no s.117 application can be made.

However, if the surviving spouse is not a parent of the child (thus a step-parent of the child), the child can make a s.117 application that eats into any legacy left specifically under the will, though the legal right of the spouse cannot be affected.

Under the new provisions of s.117(3A) the safeguard to the legal right share of step-parents does not apply to the legal right shares of civil partners. Their legal right shares can be eaten into by a successful s.117(3A) application by a child of their deceased civil partner.

5.3.3 EXTINGUISHMENT OF LEGAL RIGHT OF CIVIL PARTNER / ENTITLEMENT ON INTESTACY

S.83 inserts a new s.113A into the Act of 1965 which allows the legal right of a civil partner to be renounced in an ante-civil-partnership-registration contract made in writing between the parties to an intended civil partnership or to be renounced in writing by the civil partner after registration and during the lifetime of the testator.

The provisions in relation to exclusion of persons from succession and desertion are identical to the provisions in relation to spouses (outlined at 3.2.3.5 above). S.87 amends s.120 of the Act of 1965 to provide that a deceased's civil partner who has deserted the deceased is precluded from taking any share in the deceased's estate as a legal right or on

intestacy if the desertion continued up to the death for two years or more. This is the same timeframe as applies to spouses.

5.3.4 APPLICATIONS FOR PROVISION FROM ESTATE OF DECEASED CIVIL PARTNER

Where a civil partnership has been dissolved s.127 of the 2010 Act allows a civil partner, after the death of his or her civil partner but not more than 6 months after representation is first granted, to apply for an order for provision out of the estate.

The court may make provision for the applicant that the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard.

Section 127(3) bars the court from making any orders in favour of a civil partner who has registered in a new civil partnership, or has married, since the granting of the decree of dissolution.

In considering whether to make such an order, the court shall have regard to all the circumstances of the case, including such matters as listed in s.127(4) —

- (a) any lump sum order or a property adjustment order made in favour of the applicant, and
- (b) any devise or bequest made by the deceased in favour of the applicant.

The total value of any such provision made by any lump sum or property adjustment order together with an order made under this section shall not exceed any share that the applicant was entitled in the estate of the deceased or, if the deceased civil partner died intestate as to the whole or part of his or her estate, would have been entitled, if the civil partnership had not been dissolved.

The applicant must give notice of an application to any spouse or other civil partner of the deceased and to any other persons that the court may direct and, in deciding whether to make the order and in determining the provisions of the order, the court shall have regard to any representations made by any of those persons.⁹⁶ Once again, as in the case of divorced spouses discussed in Chapter 3, there is no explicit protection of a current civil partner's legal right share from such applications by a former civil partner.

Blocking orders can be made in a similar way those made under the Family Law (Divorce) Act 1996 (outlined at 3.2.3.4 above). S.127(11) provides that on the granting a decree of dissolution or at any other time after it is granted, the court, on application to it by either of the civil partners, may make an order that either or both of the civil partners may not, on the death of either of them, apply for an order for provision from their estate, if the court considers it just to do so.

Section 85 of the Act of 1965 meant that a will is revoked by the subsequent marriage of the testator, unless the will is made in contemplation of marriage. Section 79 of the Act of 2010 extends this section to include the situation of when a civil partnership is entered into.

⁹⁶ S.127(6) of the Act of 2010

5.3.5 COHABITANTS

Under s.194 of the 2010 Act a qualified cohabitant may apply for provision from the ‘net estate’ of a deceased cohabitant. Qualified cohabitants are two adults, who immediately before the time the relationship ended, whether through death or otherwise, were living together as a couple for 2 years or more (if they are the parents of child/children) and 5 years⁹⁷ or more (in any other case)⁹⁸. The legal right share of a spouse is specifically protected under this section⁹⁹ whereas the legal right share of a civil partner is not.

Section 194(11) defines “net estate” as the estate that remains after provision for the satisfaction of—

- (a) other liabilities of the estate having priority over the rights referred to in paragraphs (b) and (c),
- (b) any rights, under the Succession Act 1965, of any surviving spouse of the person, and
- (c) any rights, under the Succession Act 1965, of any surviving civil partner of the person.

Such an application under s.194 must be made within 6 months after representation is first granted in respect of that cohabitant’s estate. This is similar to the timeframe under s.117 applications.

Also if the relationship concerned ended 2 years or more before the death of the deceased, a qualified cohabitant cannot apply unless he/she —

⁹⁷ Note that this timeframe was changed in the 4th stage in the Dáil to address concerns of the IFA and ICMSA regarding the impact of cohabitation. The Law Reform Commission had recommended 3 years.

⁹⁸ S.172(5) of the Act of 2010

⁹⁹ S.194(10) of the Act of 2010

- (a) was in receipt of periodical payments from the deceased, whether under an order made under s.175 or pursuant to a cohabitants' agreement or otherwise,
- (b) had, not later than 2 years after that relationship ended, made an application for an order under ss.174, 175 or 187 of the Act of 2010 or such order was made and a further application under s.173(6) was subsequently made and either—
- (i) the proceedings were pending at the time of the death, or
 - (ii) any such order made by the court had not yet been executed¹⁰⁰.

The court will have regard to the rights of any other person having an interest in the matter¹⁰¹. In deciding whether to make an order the court also has regard to all the circumstances of the case, including previous maintenance or property orders made in favour of the applicant. Also any devise or bequest made by the deceased in favour of the applicant and the interests of the beneficiaries of the estate are taken into account by the court. S.194(4) also provides that the court shall have regard to the factors set out in s.173(3). These factors include the financial circumstances and needs of the parties, the duration of the relationship and the rights and entitlements of any current or former spouses or civil partners.

S.194(5) requires that an applicant must have been financially dependent on the deceased within the meaning of s.173(2) of the Act of 2010 before the death of the deceased. S.173(2) states that if the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances, make an order for redress.

¹⁰⁰ S.194(2) of the Act of 2010

¹⁰¹ S.193(3) of the Act of 2010

In addition s.194(5) makes it clear that if the applicant has married or registered in a civil partnership an order for provision shall not be made.

Section 194(6) states that in deciding whether to make the order and in determining the provisions of the order, the court shall have regard to any representations made by any spouse or civil partner of the deceased and to any other persons the court may direct.

The total value of any provision granted under this section cannot exceed what the cohabitant would have been entitled to had they been a spouse or civil partner of the deceased.¹⁰²

5.4 LITERATURE REVIEW

5.4.1 COMMENTARY & DEBATE

In relation to the Bill of 2009 generally Aylward¹⁰³ notes that “such a three tier system brings with it an incoherent regulation of legal relationships in general”. He recognises that it is argued by some that it is simply a temporary state of affairs to recognise the needs of certain sections of our society until a time comes when same-sex marriage is recognised. Aylward warns that should this be so “the impact which the 2009 Bill may have on the law of succession may leave more permanent marks”.

Inge Clissmann S.C.¹⁰⁴ notes that certain parts of the Act of 2010 have an air of familiarity, including the succession entitlements part, “as formulations employed in the Civil

¹⁰² S.194(7) of the Act of 2010

¹⁰³ Aylward, “Succession Rights in Modern Family Relationships” in *Probate and Succession: Recent Developments Impacting on Practice* (Dublin, 2010) at 27-28

¹⁰⁴ Clissmann, “The Rights and Entitlements of Civil Partners”, at *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 1

Partnership legislation largely echo those of our current matrimonial regime.” However, she notes “there are several noteworthy distinctions between the provisions for married persons and civil partners, most notably where children of the parties are concerned”.

Brazil argues that “[t]he decision to introduce legislation providing for civil partnership and a redress scheme for qualified cohabitants was done under the long shadow of Article 41 of the Constitution” and she asks whether the preferable course might not have been to seek reform of Article 41. She is of the view that this Act of 2010 is not the conclusion of the process of recognition of diverse family forms in Ireland.¹⁰⁵

Clissmann¹⁰⁶ applauds the fact that as a result of the succession law changes that “no longer will bereaved same-sex partners be disinherited by arguably anachronistic common law principles. The bonds of same sex committed relationships are now recognised.”

5.4.2 CIVIL PARTNERS

Organisations such as Marriage Equality argue that the Bill does not go far enough in providing same-sex couples with equal rights.¹⁰⁷ Marriage Equality commissioned Brian Barrington BL to give a legal opinion on the Bill. In a survey carried out by online wedding website mrs2be.ie, who surveyed over 200 same sex couples in long term (greater than 6 months) relationships, it was found that 89% of respondents believe that civil partnerships do not confer the same rights and entitlements as marriage, however, 72% believe that they

¹⁰⁵ Brazil, *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011)

¹⁰⁶ Clissmann, *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 15

¹⁰⁷ Marriage Equality, *Civil Partnership Analysis Summary*, October 2009 available at www.marriagequality.ie

are a step in the right direction and 42% believe that marriage equality will happen within the lifetime of the current government.¹⁰⁸

5.4.3 CIVIL PARTNERS & BIOLOGICAL CHILDREN – INTESTATE ESTATES

In relation to the rights afforded to a biological child of a deceased civil partner who died without leaving a will under s.67A of the Act of 2010, Dr. Ryan argues that this provides important protection to these children but wonders why the law is not being amended in a similar manner to offer similar protection for children whose parent(s) remarry. Barrington echoes these sentiments¹⁰⁹.

As regards the effect on surviving civil partners, Aylward¹¹⁰ describes the possible reduction of a civil partner's share on intestacy as making their position "precarious" and states that "this is the antithesis to the manner in which the rules of intestacy have operated (successfully) for over 40 years" which are reliant on clarity and certainty. He observes that the rules of intestacy intended to avoid litigation and the new provision "injects an unwanted degree of uncertainty into this field."

5.4.4 CIVIL PARTNERS & BIOLOGICAL CHILDREN – TESTATE ESTATES

Ryan¹¹¹ is of the view that s.117(3A) discriminates in favour of the children of civil partners allowing them to eat into the civil partner's legal right share, for reasons that are uncertain,

¹⁰⁸ GLEN, *Same Sex Survey Results*, 28 March 2011 available at www.glen.ie

¹⁰⁹ Barrington, *Analysis of Civil Partnership Bill 2009*, (2009) available at www.marriageequality.ie/getinformed/fulllist/civil-partnership-bill-legal-analysis at 22

¹¹⁰ Aylward, *Probate and Succession: Recent Developments Impacting on Practice* (Dublin, 2010) at 15

¹¹¹ Ryan, *Civil Partnership: Your Questions Answered, A comprehensive analysis of the Civil Partnership Bill*, GLEN (Dublin, 2009) at 47

unlike the position in relation to married spouses.¹¹² Barrington points out that children of surviving spouses should have the same power¹¹³.

Mee¹¹⁴ takes a different approach to this provision and believes that the legal right share of 1/3 of the estate is not too large a share to protect against the claim of others, including children and that “not every proposal which purports to give greater rights to “children” is welcome (especially since the “children” in this context may be adults...)”.

In this regard, Aylward¹¹⁵ contends that the motivation for this lack of protection of a civil partnership’s legal right share “is that a civil partner may not necessarily owe the same moral duty to a child of the relationship, and therefore the child may not recover his/her natural parent’s estate upon the death of the civil partner.” He notes that “it is necessary to safeguard that child’s rights and entitlements upon death of his/her natural parent.” There is an argument of course that the same point may be made in respect of a spouse who is not the parent of a child.

5.4.5 CIVIL PARTNERS & NON-BIOLOGICAL CHILDREN

Marriage Equality¹¹⁶ submits that the Bill of 2009 (Act of 2010) does not protect the children of same-sex couples, in that a child born to a partner but brought up by both partners in a same-sex couple “are written out of the picture in this Bill” and that such children will only inherit if a non-biological parent in a same-sex couple makes a will. Barrington compares the situation of a non-biological child of a deceased civil partner with that of an “illegitimate” child before the Status of Children Act 1987. He states that “this

¹¹² *Ibid.* at 47

¹¹³ Barrington, *Analysis of Civil Partnership Bill 2009* (2009) at 22

¹¹⁴ Mee, “Succession and the Civil Partnership Bill 2009”, (2009) 14(4) *Conveyancing and Property Law Journal* at 89

¹¹⁵ Aylward, *Probate and Succession: Recent Developments Impacting on Practice* (Dublin, 2010) at 18

¹¹⁶ Marriage Equality, *Civil Partnership Analysis Summary* (2009)

may be contrary to Article 8 of the European Convention on Human Rights, for the same reasons as the treatment of “illegitimate” children under Irish succession law was found contrary to Article 8 ECHR.”¹¹⁷ That said, the European Court of Human Rights has not yet recognised the children of same-sex partners as enjoying a family life with the non-biological parent that is protected by Article 8.

The Ombudsman for Children described this lack of provision for children of same-sex couples as “concerning, particularly as no argument based primarily on the interests of children has been advanced by the Government to support its approach to children in the Bill.”¹¹⁸

Ryan in his paper at the ICCL Seminar Series¹¹⁹ contends that the reforms required to address the shortcomings in the legal protection of children of same-sex couples “arguably go beyond equating civil partnership with marriage and require instead a root and branch review of child law, in particular as it applies to step families and ‘blended’ unions”.

The Law Reform Commission’s Report on the Legal Aspects of Family Relationships suggested draft legislation attempting to address these shortcomings. The Commission has recommended that legislative provisions be introduced to facilitate the extension of parental responsibility to civil partners and step-parents. Recommendation include that such parental responsibility could be obtained by way of an agreement with the other parties who have parental responsibility for the child or by application to court.¹²⁰ The

¹¹⁷ Barrington, *Analysis of Civil Partnership Bill 2009* (2009) at 22

¹¹⁸ Ombudsman for Children, *Advice of the Ombudsman for Children on the Civil Partnership Bill 2009* (Dublin, 2010) available at www.marriagequality.ie/getinformed/fulllist

¹¹⁹ Ryan, “‘Benchmarking’ Civil Partnership: Comparing Civil Partnership with Marriage and Considering the Legal Position of Children” in *The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications*, (ICCL Seminar Series) Vol. 1 January 2009 at 15 available at www.iccl.ie

¹²⁰ Law Reform Commission, *Report on Legal Aspects of Family Relationships*, LRC 101-2010 (Dublin, 2010) at 41

Commission was of the opinion that by virtue of the status of being in a civil partnership with or married to the biological parent of the child and thereby being in a parental role in respect of the child it is reasonable to extend parental responsibility to persons in that situation.

5.4.6 COHABITANTS

The limited discretionary remedy available to cohabitants contained in the Act of 2010 matches quite closely the recommendations contained in the Law Reform Commission's Report on Rights and Duties of Cohabitants¹²¹. The timeframe of cohabitation in order to be a qualified cohabitant under the legislation was increased to 5 years, from the 3 years recommended by the Commission for cohabiting couples without a child.

Aylward takes issue with the wording of s.194(7) which states that the maximum share a cohabitant receives cannot exceed that which they would have received had they been a spouse or civil partner of the deceased. He is of the opinion that "it is inappropriate to ascribe to such persons the same standing as civil partners or spouses" when they have chosen not to become so. Aylward describes this subsection as "a stealth amendment" to the rules of intestacy and legal right share provisions¹²².

Brazil¹²³ notes that one likely area of interest in these provisions is the potential overlap between spousal rights and qualified cohabitants' rights. S.172(6) sets out that a person is not a qualified cohabitant if he or she is married and has not lived apart from his or her spouse for four of the previous five years. This applies if *either* cohabitant is married and not separated for the requisite time – neither party may be treated as a qualified cohabitant

¹²¹ LRC 82-2006 (Dublin, 2006) available at www.lawreform.ie

¹²² Aylward, *Probate and Succession: Recent Developments Impacting on Practice* (Dublin, 2010) at 23

¹²³ Brazil, *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011)

in such a case. However, once that limitation period has been passed, a person may simultaneously hold the status of spouse and qualified cohabitant.

John Mee points out that s.194(1) applies equally to testate and intestate succession. In relation to ‘appropriate’ provision referred to in s. 194, where ‘proper provision’ has not been made for the applicant is not the same as ‘adequate provision’ as established by s.117 case law. He notes that the ‘financial dependency’ filter which applies to inter vivos claims is not applicable where the relationship lasted up until the death of the cohabitant.¹²⁴

He discusses the fact that where the relationship ended two years or more prior to death, there are two situations in which an application is permitted under s.194(2) First is where the claimant was in receipt of periodical payments from the deceased, whether under an order granted under s.175 or pursuant to a cohabitants’ agreement – this echoes divorce and judicial separation legislation. The second circumstance is where the claimant had made an application for a property adjustment, maintenance or pension adjustment order within two years of the ending of the relationship and the relevant proceedings were still pending or any order made by the court had not yet been finalised.¹²⁵

Mee identifies an anomaly in respect of blocking orders under s.173(7). Upon making a property adjustment order, a pension adjustment order or order for a lump sum payment under s.175 the court has the power to make an order blocking either or both cohabitants from making a future application under s.194. Mee points out that the court has no power

¹²⁴ Mee, “The property rights of Cohabitants under the 2010 Act” at *Conference on the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, TCD (Dublin, 2011) at 21

¹²⁵ *Ibid.* at 22-23

to make such a blocking order if it has simply rejected an application for relief as unmeritorious nor if it has only made an order for periodical maintenance payments.¹²⁶

Another inconsistency averred to by Mee is in relation to s.206 which states that “[a]n order for redress referred to in s.173” can only be made if it concerns a relationship which ended after the commencement of the Act. However, ‘the time during which two persons lived as a couple before the commencement date is included for the purposes of calculating whether they are qualified cohabitants’. The strange aspect of this section is that it is not phrased so as to cover applications for provision from the estate of a deceased cohabitant under s.194. This suggests that, incongruously, a claim could be made in respect of a relationship which ended in death prior to the commencement of the legislation, provided that the application was brought, as s.194 requires ‘not more than 6 months after representation is first granted’ in respect of the relevant estate.¹²⁷

Mee has suggested that there would have been something to be said for giving cohabitants a fixed share on intestacy but it was not considered palatable.

The Law Reform Commission in its Report on the Legal Aspects of Family Relationships note that where a person is cohabiting with the biological parent of a child but the couple (opposite or same-sex) has not formalised that arrangement (by marriage or civil partnership), a person could be in loco parentis in respect of that child. However, he or she would not be in a position to apply for parental responsibility for that child under the reforms recommended. In such circumstances, the Commission acknowledge, the person in loco parentis has no legally recognised parental role in relation to the child, although he

¹²⁶ *Ibid* at 23-24

¹²⁷ *Ibid.* at 28

or she could apply for contact with the child if the relationship with the biological parent subsequently broke down. Under the Commission's recommendations he or she would also be able to apply for day-to-day care (custody) of the child if the biological parent was unwilling or unable to exercise his or her parental responsibilities in respect of the child. Also, the ability of the biological parent in this situation to appoint his or her partner as a testamentary guardian to care for the child in the event of the death of the biological parent is highlighted.¹²⁸ In such circumstances the testamentary guardian would act jointly with the surviving parent of the child.

How these variations in protection and hierarchy of claimants will be dealt with in the future is now examined.

¹²⁸ Law Reform Commission, *Report on Legal Aspects of Family Relationships*, LRC 101-2010 (Dublin, 2010) at 41-42

CHAPTER 6: CONSIDERATION OF SECTION 117 CASE LAW

Below some of the main authorities in s.117 case law are set out. This body of case law illustrates how the courts have exercised their judicial discretion in the past in relation to these applications for proper provision by children. As such, these judgments may give some guidance as to how the courts will deal with any future applications under s.117(3A) and s.67A(3) by children whose parent had entered a civil partnership.

Keating¹²⁹ sets out the significant case law in this area. He notes, in particular, the case of *In the Estate of A.B.C., X.C. v. R.T.*¹³⁰ in which Kearns J. set out eighteen relevant legal principles derived from the authorities in former cases which illustrate the criteria applied in deciding whether provision has been made for children.

Kearns J. summarised the principles derived from previous cases on the matter and stated that the following legal principles can, as a result of the authorities, be said to derive under s.117¹³¹:

- a. The social policy underlying s.117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents, against the failure of parents who are unmindful of their duties in that area.
- b. What has to be determined is whether the testator, at the time of his death, owes any moral obligation to the children and if so, whether he has failed in that obligation.

¹²⁹ Keating, "Probate and Succession Law" in Byrne and Binchy, *Annual Review of Irish Law 2008* (Dublin, 2009) at 519-525

¹³⁰ [2003] 2 I.R. 250

¹³¹ *Ibid.* at 262-264

- c. There is a high onus of proof placed on an applicant for relief under s. 117, which requires the establishment of a positive failure in moral duty.
- d. Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.
- e. The duty created by s.117 is not absolute.
- f. The relationship of parent and child does not, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.
- g. Section 117 does not create an obligation to leave something to each child.
- h. The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.
- i. Financing a good education so as to give a child the best start in life possible and providing money, which, if properly managed, should afford a degree of financial security for the rest of one's life, does amount to making "proper provision".
- j. The duty under s.117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.
- k. A just parent must take into account not just his moral obligations to his children and to his wife, but all his moral obligations, *e.g.* to aged and infirm parents. (One might now add one's civil partner to these obligations. Also it would appear that such obligations can include cohabitants (see *A.C. (A minor) v. J.F., F.G. & P. McE.* later)
- l. In dealing with a s.117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

- m. Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly. (A proprietary estoppel might arise in such a case. Doctrine discussed earlier at 3.2.6)
- n. Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.
- o. Special needs would also include physical or mental disability.
- p. Although the court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court a power to make a new will for the testator.
- q. The test to be applied is not which of the alternative courses open to the testator the court itself would have adopted if confronted with the same situation but, rather, whether the decision of the testator to opt for the course he did, of itself and without more, constituted a breach of moral duty to the plaintiff.
- r. The court must not disregard the fact that parents must be presumed to know their children better than anyone else.

The balancing of the circumstances and needs of children was considered by O’Sullivan J. in *C.W. v. L.W.*¹³² when he asked:

“[I]n deciding whether the testator discharged his moral obligation to the applicant, do I credit him with the prescient foreknowledge that the applicant will in due course inherit a large sum from her mother?”

¹³² *C.W. v. L.W.* (Unreported, High Court, O’Sullivan J., 23 February 2005)

O’Sullivan J. made an interesting point when considering the issue of the possible inheritance by a child from the other parent and concluded that s.117(3) “does appear to contemplate in certain circumstances the treatment of common parents as having what amounts to a shared obligation.” On the question of whether the testator had discharged his moral obligation to the applicant, he took the testator as having been aware that the applicant would inherit not only the bequest to her under his own will but that she would also inherit a substantial sum from her mother. He took this into account when he went on to consider whether the testator had discharged his moral duty to the applicant. O’Sullivan J. took guidance from s.117 jurisprudence and especially the list of principles set out by Kearns J. in *In the Estate of A.B.C., X.C. v. R.T.*.

In *A. v. C.*¹³³ Laffoy J., when reviewing the law in an application under s.117, bore in mind that the “moral duty” is to make “proper provision” for the applicant in accordance with the testator’s means, not to make adequate provision. She also referred to the judgment of Kenny J. in *In the Goods of G.M.: F.M. v. T.A.M.*¹³⁴ and Kearns J.’s 18 relevant legal principles.

She stated that:

“[T]he court’s function in adjudicating on an application under s.117 is a two-stage process. The first stage is that the court must decide whether the testator has failed in his moral duty to make proper provision for the applicant child and that decision is made by reference to the circumstances which prevailed at the date of death of the testator. It is only when the applicant child overcomes what the Supreme Court has described as the “relatively high onus” of proof that there has been “a positive

¹³³ [2007] I.E.H.C. 120

¹³⁴ (1970) 106 I.L.T.R. 82

failure in the moral duty” (*Re I.A.C.* [1990] 2 I.R. 143) that the court proceeds to the second stage, which is to decide what provision is to be ordered for the applicant child.”

The case of *H. (A Minor) v. H.*¹³⁵ was interesting in that the court had to look at the particular circumstances of the case and the various competing claims in the estate. It involved a s.117 application by the plaintiff H, a minor, who sued in the name of her mother and next friend to make just provision for her out of her deceased father’s estate. The defendant H was the widow and executrix of the deceased’s estate and was also his sole beneficiary. The defendant had been making payments for the education and maintenance of the plaintiff since the death of the deceased. The defendant conceded that the court should make an order making proper provision for the plaintiff and so this was the only matter to be decided by the court.

The deceased had two other children, with the defendant, one of whom was diagnosed with Rett Syndrome, a lifelong condition that required full-time assistance for all of her daily activities and rendered her financially dependent for her lifetime.

Sheehan J. referred to the decision of Kearns J. in *X.C. v. R.T.* and the general principles he set out regarding what amounts to proper provision. He considered the principles set out at (g), (i), (l), (n) and (o) in *X.C. v. R.T.* at 263 to be particularly relevant to the case before him. Sheehan J. also cited the following from the decision of Costello J. in *L. v. L.* [1978] 1 I.R. 288 at 292, which stated:

“The court must make an order that is just. The court is required by s.117, subs.2, to consider the application from the point of view of a prudent and just parent; it is

¹³⁵ [2008] I.E.H.C. 163

required to take into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child or children who are claimants under the section and to the other children. A parent, acting prudently and justly, must weigh up carefully all his moral obligations. In doing so, he may be required to make greater provision for one of his children than for others. For example, one child may have a long illness for which provision must be made; or one child may have an exceptional talent which it would be morally wrong not to foster.”

Having reviewed the valuations of the estate he ordered that the plaintiff be paid a sum of €409,000 out of the estate. The estate included a farm in Ireland valued at between €1.7 - €2 million and US assets totalling approximately \$333,000 including two pensions.

The recent case of *In the Matter of the Estate of M.K., deceased; M.K., P.K. and P.A. v. F.D. and T.D. (and by Order) J.R.*¹³⁶ is of significance. This was an application brought by the plaintiffs pursuant to the provisions of s.117. M.K. (the testator) died testate in 1999 and by his will he had appointed the first and second defendants (the personal representatives) to be executors and trustees thereof.

The testator was survived by two sons M.K. and P.K. and by his daughter P.A., the plaintiffs in these proceedings. All of the plaintiffs were of full age at the date of the testator's death. However, P.A. had had severe epilepsy since infancy and had been confirmed to be a person of unsound mind and incapable of managing her affairs. She lived with her mother A.K.

¹³⁶ [2011] I.E.H.C. 22 (Unreported, High Court, Birmingham J., 21 January 2011)

The testator was a married man but he and his wife were estranged. Judicial separation proceedings involving the deceased and his wife, A.K. were compromised in 1996, as a result of which A.K.'s entitlement to any interest in the estate of the testator was extinguished. No claim against the estate of the testator by A.K. had been advanced.

So far as the defendant J.R. was concerned, as of the time of the deceased's death she was his partner, she had been in a relationship with him for some time, since 1983 according to her testimony. J.R. lived with the testator during the last three years of his life. J.R. claimed to have cared for the testator during his ill health.

Under the terms of the will, the testator devised a house site on lands owned by him to J.R. for her absolute use and benefit. Subsequent to the making of his will, on the 14th November, 1997, the testator transferred the house site to himself and J.R. as joint tenants and subsequently a bungalow was built on that site in which they both resided. On the death of the testator, J.R. became solely entitled to the bungalow, by right of survivorship.

The testator was the owner of about ten acres of agricultural land. By his will, the testator devised a house site of half an acre out of this land to each of his sons, M.K. and P.K. However, he expressly provided that the devise was to be subject to his sons obtaining planning permission within 24 months of the date of his death. The application for planning permission by both sons failed before An Bord Pleanála following an objection which had been lodged by J.R. Subsequently her solicitors confirmed that she was not consenting to the extension of the time set out in the will for procuring planning permission.

By his will the testator had devised a yard comprising three rented commercial units to his sons M.K. and P.K., his daughter P.A. and J.R. in equal shares absolutely. The testator devised the residue of his estate to J.R.

Birmingham J. stated that:

“I am firmly of the view that there was a clear failure on the part of the testator to make proper provision for his daughter. Given his daughter's medical situation and her inability to care for herself and provide for herself, there was a moral imperative for the testator to address his daughter's needs and make proper provision for her.”

So far as the position of the two sons was concerned, it was held that:

“No doubt in making his will the testator believed that he was making proper provision and no doubt it was his intention to do so but his intentions were not realised.”

The judge observed that:

“The testator was obviously very conscious of his obligations in relation to J.R. It is true that he had no statutory obligations towards her but in a situation where they were partners, and where she had reorganised her working and domestic life to support him after he became ill, I believe there was a moral obligation to make proper provision. Put slightly differently, I do not believe that the testator was acting immorally or wrongly or capriciously in seeking to make provision for J.R.”

Birmingham J. refers to the case of *A.C. (a minor) v. J.F., F.G. & P. McE.* [2007] I.E.H.C. 399 in which Clarke J. stated (at p.10):

“it is clear from a number of the authorities that the persons in respect of whom a deceased may owe a moral duty are not confined to those persons in respect of whom a legal obligation arises.”

This is an important judgment in that it appears to confirm a moral obligation towards cohabitants that a court should be mindful of in such cases.

Birmingham J. also took into account that obviously the deceased’s resources were finite when deciding on any distribution to his children. However, he concluded that the deceased erred in failing to have regard to the fact that in providing that J.R. would acquire the bungalow by right of survivorship that he was conferring a significant benefit on J.R.

He directed that the net assets (after being converted into cash) be distributed on the basis of:

“50% for P.A. and 16.66% for M.K., P.K. and J.R. ... In particular J.R. is likely to be left with a sense of grievance. She is benefiting to a much lesser extent than the testator would clearly have wished. However, if provision is to be made for P.A. whose needs are very real and if any provision is to be made for M.K. and P.K. as the testator would appear to have wished to have made, that is also unavoidable.”

The judge was influenced in his decision by the fact that the plaintiffs had reached a settlement of estate debts which had conferred a significant benefit on J.R. He noted that were it not for this the plaintiffs would not be benefiting equally to J.R. “as it was clearly their father's intention to make greater provision for her than for them, and I would have wished to respect his decision.”

This judgment is of significance in terms of highlighting the changing judicial attitude to cohabitants and the judge's respect for the notion of freedom of testation. He balanced this with the particular circumstances of the case where there was a child with particular needs and the fact that the devise to the two sons had not come to fruition for various reasons.

Emma Storan¹³⁷, discussing s.117 jurisprudence, is of the view that “far from resulting in a series of arbitrary and capricious decisions, a consistent, just and comprehensive body of case law has developed” and compliments “its accomplished interpretation”. She submits that the section “is another means for the courts to rewrite a will, to argue otherwise would be futile. The judiciary do not however, indiscriminately apply the section to every will that comes before the courts. It is only invoked where absolutely necessary, and as far as is necessary, where to rule otherwise would endorse substantial iniquity.”

Cooney comments on the paucity of references to overseas authorities in s.117 case law and describes it as striking. He highlights the single exception of *Re G.M.*¹³⁸ in which a number of Australian, Canadian, English and New Zealand authorities were cited. Kenny J held, however, that these authorities were of “little assistance” for reasons he set out. Cooney laments that the effects of these remarks was to effectively kill off any interest in overseas authorities. He argues that Kenny J.'s reasoning did not accurately represent the law in these jurisdictions. Cooney is of the view that the Commonwealth courts have considerably more experience in dealing with the issues that arise in these cases, and reference to their decisions cannot fail to be of some assistance. “It would be arrogant

¹³⁷ Storan, “Section 117 of the Succession Act 1965: Another Means for the Courts to Rewrite a Will?” (2006) 11(4) *Conveyancing and Property Law Journal* 82 at 12

¹³⁸ (1970) 106 I.L.T.R. 82

indeed to assume that we have nothing to learn from the deliberations of these courts on this, or many other issues in the whole area of discretionary testamentary provision.”¹³⁹

The body of s.117 case law and the cases referred to above show how the judiciary has used its discretion as regards providing provision for children. Will the judiciary treat civil partners fairly as regards s. 67A(3) or s.117(3A) applications by children or applications for provision by former spouses? Given the fact that a civil partner’s legal right share is not protected in the same way as a spouse’s, is this a green light to eat into their share? As referred to earlier, the threshold to be reached by a claimant is that it would be unjust for a court not to make such an order. This would appear to be a high threshold to meet. Positive injustice must be demonstrated before the court will act to the detriment of the civil partner’s entitlements. The case of *In the Matter of the Estate of M.K.* above would give some hope that the testator’s wishes will take precedence in s.117(3A) applications unless there has been unfairness or inequity that has affected the children. As was seen in the case law above, children with special and/or medical needs have been successful in their s.117 claims for proper provision from an estate. In all likelihood it is this type of injustice which must also be demonstrated by children to succeed in s.117(3A) and s.67(3A) applications.

The new s.67A(3) and s.117(3A) may lead to some future litigation, however, the numbers of civil partners will be small and the numbers of civil partners with children smaller again. However, the first judgments handed down will certainly set important precedents. The judicial discretion exercised so far in the s.117 case law would lead to the conclusion that all persons will be treated as fairly as possible in the circumstances and the as has been seen vulnerable children or children with special needs will take precedence. That said, however, the new provisions appear to accord a privilege to children of civil partners that is not

¹³⁹ Cooney, Vol. XV (n.s.) Pt I (1980) *The Irish Jurist* 86

extended to the children of spouses. Firstly, they have the right to make an added claim on intestacy and secondly, their rights are not subject to the legal right of the spouse.

CHAPTER 7: VARIOUS ESTATE DISTRIBUTION SCENARIOS

As was seen in the recent statistics and from the various reports referred to earlier, family structures are increasingly diverse and potentially complex. The new succession law provisions introduce another layer of complexity to the administration of estates in Ireland in that certain categories of persons now have been given new rights to make claims and applications for a share of an estate.

Below are some examples of the variety of competing interests there may be to a deceased's estate depending on the number of applicable relationships he/she entered into throughout their lifetime. The ramifications of the introduction of the new applications for provision from an estate which are now possible by virtue of the Act of 2010, on top of the already existing succession rights, will be illustrated. The hierarchy of entitlement in such blended families will be shown. How a court will exercise its discretion in deciding on the distribution of an estate in such cases remains to be seen. The s.117 jurisprudence shows the balancing act involved in these decisions. In particularly complex cases with many competing interests this will be an onerous task for the judiciary.

7.1 SCENARIO 1:

Below is a potentially complex family structure scenario which could lead to an unpredictable outcome should all or a few of these persons apply for provision from the estate of a deceased.

- A marries B and they have 2 biological children (W and X)
- A and B divorce
- A enters into a civil partnership with C

- A leaves C and starts a cohabiting relationship with D lasting 5 years
- A and D have 2 biological children (Y and Z)

→On the death of A, potentially B, C and D and all his four children have a claim on A's estate

If A dies testate: -

- C is A's surviving civil partner, therefore entitled to legal right share of 1/3 of estate
- However, B, as divorcee of A, could make an application for provision from the estate of A and affect C's legal right share
- Also D, as A's cohabitant, could make an application for provision from the estate of A, however, any such provision is from the 'net' estate meaning after provision for the satisfaction of any rights of the surviving civil partner
- All four children (W, X, Y and Z) could make an application under s.117(3A) of the Act of 1965 for provision from the estate of A and affect C's legal right share
- C's legal right share will not be decreased by the court under s.117(3A) unless it would be unjust not to make the order.

If A dies intestate: -

- C is A's surviving civil partner, therefore entitled to 2/3 of estate under the rules of intestacy
- B and D could make an application for provision from the estate of A
- The four children (W, X, Y and Z) are entitled to 1/3 of estate divided equally under the rules of intestacy

- All four children (W, X, Y and Z) could make an application under s.67A(3) of the Act of 1965 (as amended) for increased provision from the estate of A
- The court will not make an order under s.67A(3) unless it would be unjust not to make the order.

7.2 SCENARIO 2:

- A enters into cohabiting relationship with B lasting 5 years
- A and B have 2 biological children (W and X)
- A leaves B
- A marries C
- A and C have 2 biological children (Y and Z)

→On the death of A, potentially B and C and all four children have a claim on A's estate

If A dies testate: -

- C is A's surviving spouse, therefore entitled to legal right share of 1/3 of estate
- B as A's former cohabitant, could make an application for provision from the estate of A, however, such an application cannot affect C's legal right share
- W and X could make an application under s.117 of the Act of 1965 for provision from the estate of A. However, such an application cannot affect C's legal right share. As C is their step-parent it can affect any devise or legacy left to C.
- Y and Z can make an application under s.117 as the surviving spouse is their parent. However, such an application cannot affect C's legal right share. As C is

their parent it cannot affect any devise or legacy left to C. If A left his entire estate to C, then Y and Z could not make an application under s.117

If A dies intestate: -

- C is A's surviving civil partner, therefore entitled to 2/3 of estate under the rules of intestacy
- B could make an application for provision from the estate of A
- The four children (W, X, Y and Z) are entitled to 1/3 of estate divided equally under the rules of intestacy
- None of A's four children (W, X, Y and Z) have a right to make an application for increased provision from the estate of A.

7.3 SCENARIO 3:

- A enters into cohabiting relationship with B lasting 5 years
- A and B have 2 biological children (W and X)
- A leaves B
- A enters into civil partnership with C
- A and C have 2 children (Y and Z) who are the biological children of C

→On the death of A, potentially B and C and two of his four children have a claim on A's estate

If A dies testate: -

- C is A's surviving civil partner, therefore entitled to legal right share of 1/3 of estate
- B, as A's former cohabitant, could make an application for provision from the estate of A, however, any such provision is from the 'net' estate meaning after provision for the satisfaction of any rights of the surviving civil partner
- W and X, as A's biological children, could make an application under s.117(3A) of the Act of 1965 for provision from the estate of A and affect C's legal right share
- C's legal right share will not be decreased by the court under s.117(3A) unless it would be unjust not to make the order.
- Y and Z, as A's non-biological children, have no rights in relation to A's estate.

If A dies intestate: -

- C is A's surviving civil partner, therefore entitled to 2/3 of estate under the rules of intestacy
- B could make an application for provision from the estate of A
- W and X, as A's biological children, are entitled to 1/3 of estate divided equally under the rules of intestacy
- W and X could make an application under s.67A(3) of the Act of 1965 (as amended) for increased provision from the estate of A
- The court will not make an order under s.67A(3) unless it would be unjust not to make the order.
- Y and Z, as A's non-biological children, have no rights in relation to A's estate.

Obviously the three scenarios set out above are subject to many variables and potential bars such as the terms of any judicial separation agreement, divorce, blocking orders or renunciation of succession rights. Partners and children would have to prove that provision was not made for them during A's lifetime. Also the amount of any provision made for an applicant during the lifetime of the deceased or made for an applicant on the termination of their relationship with the deceased will be taken into account. If the applicant was a cohabitant of the deceased, they would have to meet the criteria of a 'financially dependent' cohabitant. The various competing interests in an estate and the needs of those competing interests would be balanced with the needs of the applicant by the court. The needs of other dependents such as vulnerable or incapacitated children would take precedence over some applicants' needs. The court also looks at the applicant's own means and situation in life.

In addition, the scenarios above presume that all the applicants may be within the relevant time limits to make such applications for provision from the estate of the deceased.

As stated, how a court would decide on the distribution of a given estate with such competing claims would be dependent on the particular circumstances of the case. However, as illustrated a surviving spouse's legal right share is absolute and judicial discretion will be used in deciding on the distribution amongst other claims for provision and in determining the hierarchy of needs in the rest of an estate depending on the facts.

CHAPTER 8: CONCLUSION

It is laudable and timely that new rights have been introduced for same-sex couples wishing to enter civil partnership and for cohabitants on the termination of their relationships by the Act of 2010. Hardships on the death of a partner will help to be avoided by this new legislation. Nonetheless, the Act has failed to comprehensively address the reality of 21st century Ireland. The absence of provisions in relation to the children of same-sex couples is regrettable. Only the biological children of a civil partner are covered under the Act of 2010. Although there was a promise by the Minister at the time the Bill was being passed for further legislation on children's rights this has not been published yet. In the meantime, these non-biological children are left with no recognition in these family structures.

The new provisions of the Act of 2010 grants a lot of judicial discretion and while this might lead to justice being served it increases litigation. I agree with the contention that where the Act of 1965 sought to avoid litigation and provide certainty, especially in relation to intestacy, the new provisions do the opposite.

It is disappointing that s.117-type applications have not been extended to intestacy situations for all children and not just the children whose parent has entered a civil partnership (as contained in s.67A). Arguably, all children should be afforded equal protection if in a vulnerable situation be they the children of two biological parents, a parent and step-parent, a biological parent and civil partner or cohabiting biological parents. While such an arrangement could give rise to a difficulty in that if a child were to be allowed to make s.117 applications against non-biological parents this would arguably favour a child with step-parents over a child being raised by both his or her biological parents. This would be due to the fact that the child with step-parents could claim from 3

parents as opposed to 2 for those without. However, in the case of a child who has been raised by a biological parent and a non-biological parent, civil partners, there should have been provisions included in the act in relation to succession rights of children to the estate of the deceased non-biological parent. The child may have no relationship with the other biological parent and the non-biological parent may have undertaken all of the obligations and duties of a biological parent. In the alternative, or in the interim until new legislation addresses this issue, non-biological parents in civil partnerships will have to ensure to make adequate arrangements and provision for children in their wills.

In the balancing of the various new rights being afforded by the provisions, the rights of civil partners suffered in that their legal right share and share on intestacy can be challenged. This is in stark contrast to a spouse, including importantly a spouse who is a step-parent of a claimant child. In the new hierarchy of claimants, a spouse's legal right share is absolute whereas a civil partner's legal right share is not. The fact that a civil partner's share can be challenged by children is of some consolation in that vulnerable children do deserve a special degree of protection. However, if their shares are eaten into by former spouses, former cohabitants or former civil partners, this would seem unfair. The rationale behind the differing treatment of civil partners seems to stem from a need by the legislature to ensure that civil partners are not completely equivalent with spouses and so civil partnership is not equivalent to marriage in all but name. As the special constitutional protection of marriage has not been amended, this would appear to be a pre-emptive step by the legislature to ensure no judicial constitutional challenges.

In relation to cohabitants, it remains to be seen how the provisions in relation to application for provision from the estate of a deceased cohabitant will be dealt with. There

may be many competing interests in such dynamics, such as a former spouse, and judicial discretion will be of vital importance in this delicate balancing act.

S.194 applications for provision from the estate of deceased cohabitants may be one of the most important provisions in the new Act as the number of cohabiting couples in Ireland is significant when compared to the number of same-sex couples who may enter civil partnerships. This provision has the potential to have widespread practical effect on a sizable section of society.

As a piece of amending legislation, it may be seen as a wasted opportunity to comprehensively amend the existing statutes in one major codified statute. The further legislation required in order to deal with the issue of children of civil partnerships will add yet more legislation to what is fast becoming a dense body of statutory succession law. There is a lack of a coherent body of legislation. For so long there was one main source of probate law with few amendments, the Succession Act 1965 followed by the amendments contained in the Status of Children Act 1987, the Family Law Act 1995 and the Family Law (Divorce) Act 1996. The number of important provisions in the Act of 2010 now splits succession law entitlements across various Acts.

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