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Spousal Disinheritance Protections under Irish Law: A Proposal for Reform

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Abstract: Ireland is unusual in a succession law context as despite being a common law jurisdiction Irish succession law applies a comprehensive system of forced heirship for spouses under the Succession Act 1965. However, notwithstanding the strengths inherent in such a regime, shortcomings have emerged. This paper considers the position of the surviving spouse who has been disinherited, and the challenges they face in Ireland in the application of the legal right share towards the appropriation of the family home. In light of the difficulties identified, the paper proposes a new and alternative approach based on the provision of a preferential share representing a fixed monetary sum, subject to limitations. The proposal is then tested from both a theoretical and practical perspective. The paper concludes that the implementation of such a proposal, as an alternative to the legal right share, would eradicate one of the most striking weaknesses inherent in the current regime, and should be afforded serious consideration.

Keywords: succession, Irish succession law, forced heirship, protection of surviving spouses

I. Introduction

While almost everyone will, at some point in their lives, come into direct and personal contact with the legal provisions which regulate family property on death, this area of law has generated relatively little attention compared with other matrimonial property issues. Indeed, despite its quantitative importance, the impact of succession law in this area is often overlooked. As Helene S. Shapo noted in 1993:

The intellectual history of family law over the past thirty years features vehement disagreements over the proper roles of support and property

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division at divorce. By contrast, analogous issues in succession law have inspired surprisingly little controversy.¹

In the interim, this trend has continued. However, the need to ensure a cohesive framework of protection for the surviving spouse in Ireland demands that these issues be tackled.

A huge variety of systems are applied across the world to regulate property rights on the death of a spouse, and which endeavour to confer some protection on the surviving spouse, in particular in relation to the family home. Moreover, various common law jurisdictions including British Columbia,² Alberta,³ England and Wales,⁴ Scotland,⁵ and New South Wales⁶ have recently placed their respective laws of succession under the spotlight. The resultant body of discussion papers, consultation papers and reports is a valuable resource for those who wish to identify and analyse the main strengths and weaknesses of the relevant provisions of the succession law regime in Ireland, while seeking viable methods of improving it.

In order to place the Irish law of succession into context, it is useful to briefly compare it with the laws which are applied by our neighbours across the Irish Sea. In England and Wales, a system of family provision operates on testacy and on intestacy under the Inheritance (Provision for Family and Dependants) Act 1975. While surviving spouses therefore do not possess a fixed right to a share of the estate of the deceased spouse, they can apply for further provision from the estate at the discretion of the court. In Scotland, in light of its status as a partly civil law jurisdiction, a limited system of forced heirship applies under the Succession (Scotland) Act 1964, which entitles surviving spouses to a fixed portion of the movable estate on testacy.⁷ What

1 H.S. Shapo, 'A Tale of Two Systems: Anglo-American Problems in the Modernization of Inheritance Legislation' (1992–93) 60 *Tennessee Law Review* 707 at 710.

2 British Columbia Law Institute, *Wills, estates and succession: a modern legal framework*, Report No. 45 (2006). The report subsequently resulted in the Wills, Estates and Succession Act 2009 which, although enacted, has not yet fully commenced.

3 Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report for Discussion No. 16 (1996); Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Report No. 78 (1999).

4 Law Commission for England and Wales, *Intestacy and family provision claims on death*, Report No. 331 (2011); Law Commission for England and Wales, *Intestacy and family provision claims on death: a consultation paper*, Consultation Paper No. 191 (2009).

5 Scottish Law Commission, *Report on succession*, Report No. 215 (2009); Scottish Law Commission, *Discussion paper on succession*, Discussion Paper No. 136 (2007).

6 New South Wales Law Reform Commission, *Uniform succession laws: intestacy*, Report No. 116 (2007); New South Wales Law Reform Commission, *Uniform succession laws: intestacy*, Issues Paper No. 26 (2005); New South Wales Law Reform Commission, *Uniform succession laws: family provision*, Report No. 110 (2005).

7 Recent proposals have, however, recommended considerable change to provision on testacy in Scotland. Central to the proposed changes on testacy is that the surviving spouse would instead be entitled on testacy to one-quarter of what he

makes Ireland unusual in a succession law context is that, despite being a common law jurisdiction, Irish succession law applies a comprehensive system of forced heirship for spouses. Thus, irrespective of whether a will exists, a surviving spouse is entitled to a specified portion of the entire estate of the deceased. On testacy, this is known as the 'legal right share'.⁸ While they are entitled to some fixed provision on intestacy, where a will exists the children of the deceased are limited to applying for discretionary family provision.⁹

This paper considers, in particular, the position of the surviving spouse who has been disinherited¹⁰ and the challenges they face in Ireland in the application of the legal right share towards the appropriation of the family home.¹¹ To this end, the historical development and modern relevance of these protections are first analysed, before the overriding public policy justifications for their implementation are discussed. Through the use of a case study, the paper then considers the strengths and weaknesses inherent in the Irish approach to protecting the surviving spouse against disinheritance. In light of the shortcomings which are revealed in this analysis, a new and alternative approach based on the provision of a preferential share representing a fixed monetary sum, subject to limitations, is presented. The proposal is then tested from both a theoretical and practical perspective. The paper concludes that the implementation of such a proposal, as an alternative to the legal right share, would eradicate one of the most striking weaknesses inherent in the current regime.

or she would have received on intestacy. Therefore, the fixed right would operate over the value of the entire estate and not merely be limited to movables. See Scottish Law Commission Report, above n. 5 at Part 3.

8 S. 111 of the Succession Act 1965 governs the legal right share applicable on testacy. See below.

9 S. 117 of the Succession Act 1965 governs applications for family provision for children. See below. It is also worth noting that England and Wales did consider the possibility of introducing a form of forced heirship in the 1970s; however, it subsequently decided against such a move. For a recent discussion of succession law in England and Wales, see R. Probert, *Family Law and Succession Law in England and Wales*, 2nd edn (Kluwer Law International: Dordrecht, 2012).

10 Technically speaking, however, no one can be 'disinherited' because nobody possesses an indefeasible right to succeed in another's estate under a will. None the less, the term is frequently used to refer to someone who does not receive anything under a will but who would have been catered for under the rules of intestate succession had no will existed, or to refer to the feeling of disinheritance where an individual believes the deceased had a moral duty to make provision for him or her.

11 Although this paper assumes that the family home is owned by one or both spouses, in the current economic climate this may not be the case for many families. As a result, the proposal made below is also of relevance to non-home owners.

II. Historical Development of the Legal Right Share in Ireland

The history of the law of succession in Ireland has, as Professor John Wylie notes, been rather 'chequered'.¹² Although testamentary dispositions originally developed under Roman law, under the feudal system of tenure which was applied in the British Isles, intestate succession prevailed. A devise of land was not possible in Ireland until 1634. Instead, landowners availed themselves of the use in order to make a devise of property. With the introduction of the Statute of Uses (Ireland) 1634, however, it was felt that this function of the use would be adversely affected and thus the Statute of Wills (Ireland) was introduced in the same year to directly facilitate testamentary bequests.¹³

Under the original Roman law of wills, testamentary freedom was subject to the rules of *legitima portio*. This represented a share of the estate which could be claimed by a disinherited spouse or child. Despite this precedent, when wills were introduced into the English system, this legal provision did not form part of the law. Indeed, Minister Brian Lenihan Sr, Minister for Justice, in discussing the Succession Bill in 1965, noted 'Complete freedom of testation is a peculiarly English idea which, apart from England and Wales, is only to be found in countries forcibly brought under British rule.'¹⁴ Thus, succession law in Ireland was effectively integrated with this English approach through the introduction of section 10 of the Irish Statute of Distributions 1695, which Brady notes 'abolished the so-called "Custom of Ireland" by which only one-third of one's property was disposable by will'.¹⁵ Following this, the common law concept of freedom of testation applied in Ireland. Testators thereafter enjoyed unfettered testamentary freedom to dispose of their estate as they wished, and were not bound by any legal or statutory requirements to make provision for any individual, neither spouse nor children; the only claims on their estate were those relating to pre-existing debts, and funeral and testamentary expenses.

12 J.C. Wylie, *Irish Land Law*, 4th edn (Bloomsbury Professional: Dublin, 2010) para. 14.02 at 885. Indeed, Sir Henry Maine noted in E. Rhys (ed.), *Ancient Law* (1917) at 103: 'Few legal agencies are, in fact, the fruit of more complex historical agencies than that by which a man's written intentions control the posthumous disposition of his goods.' For further discussion of inheritance rights in Ireland pre-1965, see Wylie at 919–26. For more on the ancient development of succession law in Ireland, see C. Breathnach, 'An Exploration of Testamentary Behaviour in Twentieth Century Ireland' (2009) 14 *History of the Family* 309 at 310–12.

13 See H. Delany, *Equity and the Law of Trusts in Ireland*, 4th edn (Thomson Roundhall: Dublin, 2007) at 53; Wylie, above n. 12 para. 14.02 at 885.

14 Dáil debates, Second Stage (25 May 1965) Vol. 215 col. 2017.

15 J.C. Brady, *Succession Law in Ireland*, 2nd edn (Butterworths: Dublin, 1995) para. 7.02 at 211.

While the law did develop over the centuries with regard to intestate distribution,¹⁶ rules limiting testamentary freedom were much slower to emerge. However, recognizing the injustice of a strict, separate property regime, in the 1960s the Irish legislature began to consider the incorporation of alternative legislative solutions into the law of succession. Today, thanks chiefly to Part IX of the Succession Act 1965, the law in this area has changed dramatically, particularly through the introduction of the legal right share.¹⁷ In the ancient tradition of the Brehon laws, and in a similar way to the civil law systems of continental Europe, a testator's freedom of disposition is now tempered in Ireland. Under section 111 of the Succession Act 1965, where a testator is survived by a spouse and no children, the surviving spouse has a right to one-half of the entire estate. Alternatively, where the testator is survived by a spouse and children, the spouse is entitled to one-third of the estate.¹⁸ Moreover, while a testator is not obliged to make provision for their children, section 117 of

16 Distribution on intestacy was subject to certain established rules. The descent of realty was governed by the Inheritance Act 1833 (c. 1.06), while the common law scheme of intestate succession provided for surviving spouses through the rights of dower and curtesy. A widow was entitled to the right of dower. This provided her with a life estate in one-third of the fee simple or fee tail estate of the deceased, excluding any part of the estate disposed of *inter vivos* or by will. This protection was given legislative status with the Dower Act 1833 (c. 105). This legislation included a caveat, however, that dower could not be claimed by a widow where it had been barred by the husband so declaring by deed or in his will under the Act. It was also restricted as it only applied where the birth of issue was possible, even if it had not yet occurred. By contrast, the right of curtesy, or, more properly, a tenancy by the curtesy of England, entitled widowers to a life estate in the whole of the real estate of his deceased wife which had not been disposed of *inter vivos* or by will, provided that issue of the marriage capable of inheriting the land had already been born alive. See Wylie, above n. 12 para. 4.162-4 at 292-3. See also Brady, above n. 15 para. 8.08. Dower and curtesy were abolished in Ireland by s. 11(2) of the Succession Act 1965.

While personalty was initially governed by the Statute of Distributions (Ireland) 1695 (c. 6), almost two hundred years later, this protection was supplemented with the Intestate Estates Act 1890. The 1890 Act provided that the real and personal estate of an intestate, leaving a widow and no issue, passed to the widow absolutely if the value did not exceed £500. Where this value was exceeded, the widow was entitled to a first charge for £500, at 4 per cent, coupled with a half-share in the remainder. This value was adjusted upwards over time and the Intestates' Estates Act 1954 increased the widow's rights, entitling her to £4,000, or the whole estate, if it was worth less than £4,000.

17 In the Supreme Court decision of *Re Urquhart Deceased: Revenue Commissioners v Allied Irish Bank Ltd* [1974] IR 197, it was observed by Walsh J at 208 that the Succession Act 1965 'brought a revolutionary change in the law of succession in this State'.

18 See the Succession Act 1965, s. 115 which states that where there is a devise or a bequest under a will, the surviving spouse may elect to take the devise or bequest, or their legal right share. Where no election is made, the surviving spouse will take under the will. A devise or bequest may also be chosen in partial satisfaction of the legal right share. S. 115(4) sets out the duty of the personal representatives to notify the spouse in writing of the right of election. The right is only exercisable within six months from the receipt by the spouse of such notification, or one year from the first taking out of representation of the deceased's estate, whichever is the later. Where the deceased leaves nothing to the surviving spouse in his or her will, or if there is a legacy or devise expressed to be in addition to his or her legal

the Act allows a child to apply to the court for ‘proper provision’ where the court is of the opinion that the testator has failed in their moral duty to make such provision for them. In light of these measures, it has been noted, ‘a considerable restraint on an individual’s testamentary freedom’ now exists.¹⁹

The Succession Act 1965 also introduced a new scheme of distribution on intestacy which dramatically improved the situation of a surviving spouse. Section 67 states that where an intestate dies leaving a spouse and no issue, the spouse is entitled to the whole estate. On the other hand, where an intestate dies leaving a spouse and issue, the spouse takes two-thirds of the estate; the remaining one-third of the estate is distributed among the issue.²⁰

Finally, recognizing the importance of the family home, the legislature enacted measures specifically directed at securing this property for the surviving spouse. Section 56 states that, subject to certain restrictions, where the estate of a deceased person includes a dwelling in which, at the time of the deceased’s death, the surviving spouse was ordinarily resident, the surviving spouse may require appropriation of the home in, or towards, satisfaction of any gift under the will, legal right share, or share on intestacy to which they were entitled.²¹

III. Modern Relevance of the Legal Right Share and the Right to appropriate the Family Home in Ireland

The reliance which a surviving spouse will place on these provisions varies depending on the way in which title to the family home is held.

right share, the legal right share will, in a similar way to a share arising on intestacy or an interest arising under a will, vest automatically (see *O’Dwyer v Keegan* [1997] 2 ILRM 401). Moreover, the protection provided by the legal right share under s. 111 was also extended to civil partners by s. 81 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

- 19 E. 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. In ‘Reforming Inheritance Law—Providing for the Non-Marital Family’ (2002) 7(3) *Conveyancing and Property Law Journal* 58, Siobhan Willis notes that the changes introduced by the Succession Act 1965 were ‘radical and, at the time, highly controversial reforms’.
- 20 This is, however, subject to s. 67(4), which states that where all the issue are in an equal degree of relationship to the deceased, the distribution will be made in equal shares among them; if they are not, it will be made *per stirpes*.
- 21 With regard to the restrictions, ss. 56(5)(b) and 56(6) provide (a) where the dwelling forms part of a building, and an estate or interest in the whole building forms part of the estate; (b) where the dwelling is held with agricultural land an estate or interest in which forms part of the estate; (c) where the whole or a part of the dwelling was, at the time of the death, used as a hotel, guest house or boarding house; (d) where a part of the dwelling was, at the time of the death, used for purposes other than domestic purposes, the right to appropriation shall not be exercisable, unless the court, on application made by the personal representatives or the surviving spouse, is satisfied that the exercise of that right is unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in due course of administration and authorizes its exercise. These restrictions are not the focus of this paper; however.

Assuming the surviving spouse is not the sole owner, the second most secure position for a surviving spouse arises where the family home is held by the spouses as co-owners. In this regard, the highest level of protection arises in the case of a joint tenancy due to the right of survivorship, which ensures that the deceased's interest passes automatically to the surviving, co-owning spouse. While there is a lack of statistical information detailing the way in which title to the family home is held in Ireland, it is presumed that joint tenancies represent the most prevalent form of co-ownership.²² Moreover, the introduction of section 30 of the Land and Conveyancing Law Reform Act 2009 has, with the abolition of unilateral severance, made it more difficult to convert a joint tenancy into a tenancy in common.²³

In all other circumstances, the protections afforded under the Succession Act 1965—by virtue of the legal right share, the share on intestacy and the right to appropriate the family home—are of much greater importance. While it may constitute a less common form of co-ownership, a family home may be held by spouses as tenants in common. Upon the death of a tenant in common, the deceased's interest in the property will fall under the deceased's estate, to be distributed under his or her will, or under the rules of intestacy. Assuming the deceased's interest is not left to the surviving, co-owning spouse, the legal right share, or share on intestacy, may, in such circumstances, secure the family home for the surviving co-owner. Where the share is insufficient, the surviving, co-owning spouse may, none the less, combine his or her newly acquired interest with his or her own share as a tenant in common in order to mount an arguably stronger challenge to any application for the sale of the family home—brought pursuant to section 31 of the Land and Conveyancing Law Reform Act 2009 by a beneficiary who acquired a co-ownership interest under the deceased's will.²⁴

22 Legal co-ownership between spouses by means of a joint tenancy is particularly popular among new homeowners. From a sociological point of view, increased levels of education, growing awareness of legal rights, and the rise of feminism have ensured that many women who in the past would not have been co-owners are now more likely to insist that their name appears on the title. Moreover, purely economic practicalities have also played an important role in this change. Where property is purchased by way of a mortgage loan, it must be purchased in the names of all the borrowers. As a result of the enormous expense involved in purchasing a house, mortgages raised to finance such purchases regularly require both spouses to be borrowers, and hence co-owners, in order to generate a loan sufficient to finance the purchase.

23 Land and Conveyancing Law Reform Act 2009. See U. Woods, 'Unilateral Severance of Joint Tenancies—The Case for Abolition' (2007) 12(2) *Conveyancing and Property Law Journal* 47, who puts forward the case in favour of abolition. For a contrary view, see J. Mee, 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions—Part II' (2006) 11(4) *Conveyancing and Property Law Journal* 91.

24 However, as s. 31 of the Land and Conveyancing Law Reform Act 2009—which now replaces the Partition Act 1868 (c. 40) and the Partition Act 1876 (c. 17)—does not offer the court guidance as to how the jurisdiction to order a sale or partition should be exercised, it is not possible to say, with any degree of certainty, how the

However, while co-ownership may be the most prevalent form of ownership nowadays, sole ownership by the deceased spouse remains a possibility. Indeed, while the prevalence of exclusive ownership of the family home is undoubtedly reduced, there remains an important, vulnerable and often forgotten segment of society for whom legislation conferring protection in relation to the family home remains of fundamental importance.²⁵ While it is admittedly rare nowadays to have newly purchased properties vested in one spouse only, anecdotal evidence suggests such a scenario may arise where, upon inheritance or receipt of a gift of property, a family home is placed in the sole name of the beneficiary.²⁶ Furthermore, a spouse

judiciary would approach such an application, and an order for sale could still be made irrespective of the size of the share held by the surviving spouse. Formerly, under the Partition Acts, where a co-owner entitled to less than a 50 per cent share in the property desired a sale, the court could, at its discretion, make such an order under s. 3 of the Partition Act 1868. Where the co-owner who requested the sale was entitled to a 50 per cent share or more in the ownership of the property, s. 4 of the 1868 Act stated that the court could not, in the absence of 'good reason to the contrary', refuse to award a sale of the property and a division of the proceeds.

- 25 Recently, in the context of England and Wales, Professor Roger Kerridge seemed to prove that the number of spouses who died as beneficial joint tenants was much higher than suggested by the Department of Constitutional Affairs. On the basis of calculations he produced, sole owners dying first constituted a mere 6 per cent as compared with 24 per cent suggested by the 2006 Department of Constitutional Affairs Consultation Paper entitled 'Administration of Estates—Review of the Statutory Legacy'. See R.J. Kerridge, 'Reform of the Law of Succession: The Need for Change, not Piecemeal Tinkering' (2007) 71 *Conveyancer and Property Lawyer* 47.

While similar statistics would certainly be beneficial in Ireland, the absence of such data is not fatal to the proposals made in this paper. Professor Kerridge's proposals for intestacy, discussed below, effectively worked to reduce the statutory legacy by the value of the right of survivorship, where present. To this end, the calculation of such figures was a key to his argument. The proposal made here on the other hand, is merely providing an alternative on testacy to the current application of the legal right share and therefore would have minimal impact in the majority of situations where the family home is held in a joint tenancy. The proposal would generally only be relevant where the family home is in the sole ownership of the deceased, where the family home is worth considerably less than the preferential share, or where the spouses do not own a family home. Moreover, the fact that the application of this proposal would be of benefit to such a small section of society, who may find themselves in such a vulnerable position following the death of their spouse, does not diminish the need to ensure the adequate protection of such spouses in Ireland.

Another important measure in this respect is the Family Home Protection Act 1976. Such legislation is particularly important in the case of spouses whose contributions are not recognized under the doctrine of the purchase money resulting trust, most notably those providing unpaid labour in the home, see *L. v L.* [1992] 2 IR 77. The continued importance of such legislation is also evidenced by the inclusion of s. 28 in the Civil Partnership Act 2010, which prevents the unilateral disposition of the family home, essentially replicating the provisions of the Family Home Protection Act 1976 for civil partners.

- 26 It may arise that, in a joint loan application, one of the proposed joint borrowers may be taking a gift of a site from their parents. While the beneficiary of the gift would not be liable for Capital Acquisitions Tax, any other borrower whose name appeared in the title deeds would be. Thus, in order to avoid such liability for other borrowers, the beneficiary of the gift may seek to have the property vested in their name exclusively. It appears that lending institutions will usually agree to

may have purchased or built the property prior to marriage and subsequently failed to transfer the property into joint names. In any case, the growth in co-ownership of the family home over the past number of decades primarily protects younger generations, while many middle-aged and older individuals, for whom succession law is of more direct relevance, remain in traditional situations whereby the family home is in the sole name of one spouse (usually the husband). In these circumstances, in particular, the Succession Act 1965 remains of paramount importance.

IV. Rationale for the Provision of the Legal Right Share

Before considering the effectiveness of the legal right share, the question must be posed: What is the overriding social goal of section 111? A communitarian agenda was certainly in the mind of the legislature when formulating the legislation. Indeed, the introduction of the Succession Act 1965 was surrounded by a whirl of communitarian rhetoric. Minister Lenihan noted:

I am firmly of the opinion that, in the case of a spouse, the provision of a legal right to a specific share, irrespective of dependency, is the only system compatible with the true nature of the obligations and responsibilities that bind husband and wife. Under this system, the spouse will be entitled to a share which is just and equitable having regard to his or her status as a member of the family.²⁷

On another occasion Minister Lenihan stated: 'I envisage that the position will be somewhat the same as in France where husband and wife, in the absence of a pre-marriage contract, own their own property in common.'²⁸ However, it is submitted that the legal right share was not enacted in furtherance of an overriding policy of communitarianism, nor is it the functional equivalent of a community property regime on death. Instead, the real driving force behind these provisions was a desire to protect surviving spouses against disinheritance or insufficient provision in the will of the testator. The evidence for this conclusion is overwhelming.

First, if the introduction of a partnership theory of marriage or a desire to introduce communitarianism was the driving force behind

this on the basis that the mortgage deed is signed by the exclusive owner, and the non-owning spouse provides their prior written consent as required under s. 3 of the Family Home Protection Act 1976. Furthermore, in such circumstances, it is generally the expressed intention of both parties to subsequently transfer the property into their joint names. With regard to bank policy and the family home, I am sincerely grateful to Michael Kelly, Securities Policy and Training Manager, Allied Irish Bank for his welcome assistance. Any errors are my own.

27 Dáil debates, Second Stage (14 July 1965), Vol. 59 col. 415 per Minister Lenihan. For an overview of Minister Lenihan's justifications for interfering with freedom of testation, see Brady, above n. 15 paras 7.02-7.04 at 211-12.

28 Dáil debates, Second Stage (2 December 1964), Vol. 213 col. 349 per Minister Lenihan. While this may have been Minister Lenihan's vision, it never reached fruition.

these provisions of the Succession Act 1965, surely the legislature would have sought to introduce a community property system which would confer rights on spouses to family property not just on their deaths, but equally during their lifetimes.²⁹ Instead, no further effort to introduce communitarian legislation was forthcoming until the failed Matrimonial Home Bill 1993, some 28 years later.³⁰ Secondly, if these provisions of the Succession Act were principally designed to incorporate communitarian values into Irish matrimonial property law, presumably the share to which the surviving spouse should be entitled would be one-half, regardless of the existence of children, and the property over which it should be exercisable would be limited to family assets. Thirdly, if the goal was the introduction of a communitarian property system under which recognition is given to the equal status of both spouses, should the legal right share not vest automatically instead of being subject to an election in some cases?³¹ Finally, if a policy of communitarianism was the key, should the deceased spouse not also be entitled to a share in the family assets held by the surviving spouse?

Historically, inheritance legislation was introduced as part of a policy to prevent people becoming wards of the state upon the death of the financially stronger spouse.³² It is submitted that the objective of ensuring adequate financial support for the surviving spouse continues to be the primary goal behind such provisions today. Nevertheless, the fact that communitarian principles were implemented to a greater or lesser degree was undoubtedly a conscious decision. Indeed, as Lucy-Ann Buckley states, the legislation 'was clearly based on both communitarian and constitutional principles'.³³ The communitarian rhetoric was also in line with modern views of partnership and evolving social standards. Moreover, in light of the fact that women, on average, live longer than men and generally earn less money, if any, the principal public policy concern was, and presumably continues to be, the financial support of surviving wives.³⁴ Referring to

29 In many community property jurisdictions, a community fund is formed on marriage which operates *inter vivos*. Alternatively, a deferred community-of-property regime ensures that a community of property arises on the termination of marriage, either by death or divorce. Such an approach is adopted in Germany and in many states of the USA.

30 While communitarian rhetoric was again relied upon with the introduction of the Family Home Protection Act 1976, it did not give spouses an *inter vivos* interest in the property, merely a right of veto.

31 See above n. 18.

32 Siobhán Willis notes, 'Inheritance law serves not only to facilitate donative intention but also to minimise society's social welfare burdens and to alleviate hardship.' See Willis, above n. 19 at 58.

33 L.A. Buckley, "Proper Provision" and "Property Division": Partnership in Irish Matrimonial Property Law in the Wake of *T v T* (2004) 3 *Irish Journal of Family Law* 9 at 10.

34 However, the law is placed in gender-neutral language. Moreover, this paper focuses on the protections available to financially weaker surviving spouses, irrespective of gender. To this end, all proposals made are again gender neutral.

the development of intestate protection in England for a surviving spouse, Professor John Fleming explains:

The predominant concern for the surviving spouse has little to do with women's liberation, but much with the importance of an independent home for the widow, amidst housing shortage, the vanishing sense of responsibility by children to support their aged parents and, most important of all perhaps, the substantially increased life expectancy of people over the last one hundred years.³⁵

In a similar vein, albeit in relation to the Uniform Probate Code 1990, Professor Ralph Brashier notes:

Despite the recent tendency of scholars to reclassify the forced share as an acknowledgment of marriage as an economic partnership, case law involving the forced share indicates that most courts still perceive the predominant purpose of the share to be that of protection: the surviving spouse should not be left impecunious if disinherited by the decedent.³⁶

Finally, an associated policy linked to the provision of financial support for the surviving spouse is also evident in the Succession Act 1965. This is the protection of the family home for the surviving spouse as provided for by the inclusion of the right of appropriation under section 56.³⁷ While there are important restrictions on this right of appropriation, which have undoubtedly weakened its effectiveness, it none the less has the potential to be fundamentally important in the protection of the surviving spouse.³⁸ This protection again emphasizes the cultural importance of the family home. The home is, by its very nature, unlike any other asset. It is a source of comfort, security and protection. Indeed, it has been noted: 'Although the form of the family is undergoing change, the idea of family remains fundamental. By its association with family, the home . . . hold[s] cultural centrality.'³⁹ This was emphasized by Lorna Fox, who pointed out that the family home is a 'powerfully emotive idiom, with considerable cultural kudos and, as such, may be regarded as carrying significant weight in policy

35 J.G. Fleming, 'Changing Functions of Succession Laws' (1977-78) 26(2) *American Journal of Comparative Law* 233 at 236.

36 R.C. Brashier, 'Disinheritance and the Modern Family' (1994) 45(1) *Case Western Reserve Law Review* 83 at 152.

37 This policy of protecting the family home is also evident in the Family Home Protection Act 1976 and, more indirectly, in the overriding status attributed to the equitable interest of a person in 'actual occupation' of registered land under s. 72(1)(j) of the Registration of Title Act 1964. Moreover, s. 56(10)(b) of the Succession Act 1965, which provides that if the value of the home exceeds the legal right share or share on intestacy, the court may waive the payment due to the estate in light of the hardship which meeting the shortfall would cause, again points to financial support being the predominant force behind the legislation rather than communitarianism.

38 For restrictions, see ss 56(5) and 56(6) of the Succession Act 1965, as outlined above at n. 21.

39 J. Fitchen, 'When Toxic Chemicals Pollute Residential Environments: The Cultural Meanings of Home and Home Ownership' (1989) 48 *Human Organisation* 313 at 315.

debates'.⁴⁰ Therefore, if the overall aim of the legislation is to secure financial stability for the surviving spouse, with a special focus on the family home, the question arises: How well does the legal right share actually achieve this goal?

V. Effectiveness of the Legal Right Share

On an initial analysis, the legal right share appears to function and achieve its objective quite well. The provision of a fixed legal right is generally accepted as an effective method of providing financial support for a surviving spouse and, it is submitted, is vastly superior to the provision of discretionary protection as applied in many jurisdictions, including England and Wales, to deal with disinheritance.⁴¹ Based on an enforceable right to capital assets from a deceased's estate without the need to make a court application, the scheme adopted under section 111 of the Succession Act 1965 possesses several key strengths. Primary among these attributes is the provision of certainty and predictability to a surviving spouse. In this regard, the importance of predictability should not be underestimated. An enforceable right to a minimum of one-third of the estate ensures at least some provision for a disinherited, surviving spouse who, though in need of financial support, in the absence of such a right may be reluctant to instigate legal proceedings to demand a share, and as a result would receive nothing. In modest estates, which undoubtedly require the most protection, the cost of litigation will further reduce the share which a disinherited, surviving spouse will eventually receive.⁴² Thus, in complete contrast to the discretionary approach, the application of fixed rights minimizes litigation and promotes settlement out of court. This, in turn, preserves the value of the estate, eliminates the need for an emotionally draining and stress-inducing court action, as well as minimizing the likelihood of family conflict. Another central benefit of section 111 is that it has the virtue of

40 L. Fox, 'Creditors and the Concept of "Family Home": A Functional Analysis' (2005) 25(2) *Legal Studies* 201 at 224.

41 A discretionary approach to disinheritance originated in New Zealand and has since spread throughout the common law world. In addition to its adoption in England and Wales, it is also applied in Australia and in many Canadian states, including British Columbia. For an analysis of the shortcomings associated with a system of succession based on discretionary justice, see M.A. Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1986) 60 *Tulane Law Review* 1165; M.C. Meston, 'Succession Rights or Discretion' (1987) *Jurist Review* 1.

42 Professor John Mee recently highlighted the benefit of fixed rights in relation to the Civil Partnership and Certain Rights and Obligations of Cohabitants Bill 2009 (now the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010) thus: 'The essential point of a rule creating a legal right share is to obviate the need for . . . a difficult and value-laden inquiry by determining authoritatively, and for all cases, the minimum extent of the obligation of one civil partner to another upon death.' See J. Mee, 'Succession and the Civil Partnership Bill 2009' (2009) 14(4) *Conveyancing and Property Law Journal* 86 at 87.

simplicity. There is no need for an enquiry into the extent of the obligation owed by one spouse to the other. It is set out clearly and definitively, for all cases, what the minimum extent of the obligation is on death. Nevertheless, despite the obvious strengths inherent in the provision of a fixed legal right, important weaknesses may be observed in the application of the fractional share towards the appropriation of the family home, and it is submitted that here there is a clear need for reform in order to limit the potential for injustice which currently exists.

In order to effectively demonstrate the practical implications of the relevant provisions of the Succession Act 1965 for a surviving spouse vis-à-vis the family home,⁴³ it is useful to employ a case study based on a middle-class couple.⁴⁴ In this way, the strengths and weaknesses of the current regime become apparent and allow for a clearer picture of the real-world application of the law.

Case study: The Kelly family

Mr and Mrs Kelly were married in 1987. They have four children, ranging from 12 years to 20 years of age. Mrs Kelly, once a promising photographer employed full-time with a local newspaper, gave up work after the birth of her first child and has since dedicated herself to a life in the home. Mr Kelly has a successful career as a senior sales assistant for a second-hand car dealership in rural Ireland. He also inherited a small family farm of approximately 20 acres from his father, who passed away in 1985. In 1988, Mr Kelly bought the family home. The home is currently worth approximately €180,000 and title to the property is held exclusively in Mr Kelly's name. Table 1 provides a summary of Mr Kelly's assets.

Were Mr Kelly to die testate, making no provision for his wife, Mrs Kelly has fixed property rights which cannot be defeated by the will.

43 These provisions will apply unless the hypothetical couple had voluntarily renounced the share to which they are entitled as a legal right in an ante-nuptial agreement, or in writing after marriage and during the lifetime of the testator (see s. 113 of the Succession Act 1965). However, if a renunciation was not voluntary but rather obtained by force, fear or fraud—or if the spouse did not have the mental capacity to appreciate the nature of a renunciation—it may be set aside by the courts (see *J.H. v W.J.H.*, Unreported HC 20 December 1979). Likewise, it could be set aside under the rules of contract if the renunciation was obtained under duress, undue influence or fraud, or through lack of capacity or fairness of the transaction.

44 The technique of using a case study has been employed very effectively in various academic studies in the family property field. See, for example, M.A. Glendon, 'Matrimonial Property: A Comparative Study of Law and Social Change' (1974) 49 *Tulane Law Review* 21; A. Newman, 'Incorporating the Partnership Theory of Marriage into Elective Share Law: The Approximation System of the Uniform Probate Code and the Deferred-community-property Alternative' (2000) 49 *Emory Law Journal* 487; E. Cooke, A. Barlow and T. Callus, 'Community of Property: A regime for England and Wales?' (The Nuffield Foundation, 2006), available at: <https://eric.exeter.ac.uk/repository/handle/10036/15458> (accessed 25 February 2010).

Table 1 Summary of Mr Kelly's assets

Asset	Value
20 acres @ €10,064*	€201,280
Farm equipment	€ 50,000
Family home	€180,000
Personal savings	€ 20,000
Total value of estate	€451,280

* According to Knight Frank Ireland, the average price for farmland in 2011 was €10,064 per acre (see Knight Frank Ireland, *Farm Market: January 2012*).

Thus, Mrs Kelly has a right to one-third of the estate, valued at approximately €150,000.⁴⁵ As Mr Kelly has not left anything to Mrs Kelly in his will, the legal right share vests automatically upon Mr Kelly's death.⁴⁶ Moreover, the legal right share is protected because it stands next in priority following the payment of funeral and testamentary expenses, and the discharge of all debts owing and due—and must be discharged before the distribution of the estate among the beneficiaries.⁴⁷

However, a major weakness in the adoption of a fractional share is the fact that the size of the share depends on the size of the deceased's overall estate. This poses a particular problem where the estate is modest; a situation where, arguably, the need for legislative protection is most acute. Simply put: the smaller the estate, the smaller the share. If the case study above is adjusted slightly, this weakness of the legal right share becomes even more apparent. Let us say that the Kellys are a family of more modest means. Mr Kelly did not inherit the farm. Instead, his estate consists of the family home, valued at €180,000, and savings of €20,000. In light of the modest size of the estate and the universal application of a one-third share on testacy, Mrs Kelly is only entitled to approximately €67,000 from Mr Kelly's estate. As the family home was in her husband's name, it is clear that she is in a precarious position. What are her options to secure accommodation for the family? Pursuant to section 56 of the Succession Act 1965, even if the home were in the sole ownership of Mr Kelly and devised to a third party, Mrs Kelly may seek the family home to be appropriated in, or towards, satisfaction of her share of Mr Kelly's estate, even where this would be prejudicial with respect to specific devises or bequests in the will. Despite this, however, based on the current valuations it is clear that there will be a shortfall to contend

45 See the Succession Act 1965, s. 111(2).

46 See comments of Barron J in *O' Dwyer v Keegan*, above n. 18. However, see also *Re Urquhart*, above n. 17.

47 See the Succession Act 1965, s. 112. Moreover, the legal right share cannot be affected, should the children make a successful application under s. 117 for discretionary provision.

with.⁴⁸ As the family home is worth approximately €180,000, in scenario one it will be necessary for Mrs Kelly to account for the balance of around €30,000: the difference between the value of her legal right share and the value of the home. The situation is even graver in scenario two. Here, Mrs Kelly has a shortfall of around €113,000 to contend with. In both scenarios, Mrs Kelly has three options under the Succession Act 1965:

- (i) Mrs Kelly may meet the shortfall by paying the difference of values into the estate.⁴⁹
- (ii) If the children, all of whom are under 21 years of age, are beneficiaries under the will and Mrs Kelly is a trustee for them, their share may be added to her legal right share in order to appropriate the home.⁵⁰ If no provision is made for the children under the will, they may apply for 'proper provision' to be made out of the estate; however, this will remain at the discretion of the court under section 117. If successful, this share could be added to Mrs Kelly's legal right share so as to reach the value required to appropriate the home.⁵¹

48 While neither ss 55 or 56 specify the appropriate valuation date of the assets of an estate subject to an appropriation, the difficulty was recently resolved in the decision of *Strong v Holmes* [2010] IEHC 70, where Justice Murphy held, at para. 5.2: 'The only operative and practical date for valuation is the date of distribution, since it is the only date on which the true nature and extent of half the net estate of the deceased can be determined.' Murphy J also acknowledged, at para. 5.2, the 'fluctuating market and, in particular . . . the steep decline in property values from the date of the death to the date of the proposed appropriation.' He noted that such problems associated with fluctuating markets did not prevail in the 1960s when the legislation was introduced.

49 See the Succession Act 1965, s. 56(9). However, considering the size of the shortfall and Mrs Kelly's position as essentially an unpaid housewife for the past 20 years, this may not be a viable solution.

50 See the Succession Act 1965, s. 56(3), which states that the right to appropriation may be exercised in respect of the share of any child for whom the spouse is a trustee under s. 57.

51 While the Act is silent on the issue, Brian Spierin believes that where s. 56(3) is invoked: 'The spouse will presumably . . . hold upon trust for himself and any infants concerned as tenants in common, in proportion to their respective contributions. The status of the spouse as a trustee for an infant beneficiary, where the interest of the infant has been appropriated under this section, should not be overlooked in practice.' See B.E. Spierin, *The Succession Act 1965 and Related Legislation: A Commentary*, 3rd edn (Bloomsbury Professional: Dublin, 2003) 166.

By contrast, Brady argues that, 'since the main thrust of the section is to secure the place of the surviving spouse in the family home and such infant will invariably have succession rights to the estate of the surviving spouse, it is unnecessary to give such infant a share in the family home at the time of its appropriation under s. 56.' Above n. 15 para. 7.32 at 222. While it is submitted that it is not 'invariable' that such a child will receive the benefit on the death of the surviving spouse—because in the case of testacy a child does not have a right to any provision from a parent's estate but will be compelled to apply under s. 117—it is none the less probable that in *most* cases the child will receive a share from the survivor's estate on the latter's death. However, in the case of stepchildren, the danger of a child being excluded from sharing in the ultimate devolution of the estate is arguably greater.

- (iii) Mrs Kelly may apply to the court to waive the payment on the grounds of the hardship which meeting the shortfall would cause.⁵²

Where Mrs Kelly does not have the financial resources to pay the shortfall into the estate, or cannot add a share to which the children are entitled to her own, she would therefore be forced to instigate litigation in the hope that the court would waive the payment. However, this may not be an attractive prospect. First, in light of the lack of reported judgments arising from such applications, Mrs Kelly would not have any firm basis on which to assess the likelihood as to the potential success of her claim and, in the absence of such foreseeability, she may be reluctant to litigate. Secondly, considering the high costs which would result from the instigation of legal proceedings, such a course of action could be perceived as quite a gamble, having regard to her precarious financial position. While Mrs Kelly does have a right to apply to the court to waive the payment of the shortfall, in seeking what is essentially further provision from the estate, she could seriously deplete what limited financial protection she has, were she unsuccessful.⁵³ As a result, should Mrs Kelly decide not to take such a risk, she would be forced to secure alternative accommodation, based on either the legal right share of around €150,000 in scenario one, or the share of only around €67,000 in scenario two. It is submitted that the provision of such a meagre share of the deceased's estate is unacceptable.

It should also be noted that an informal solution to this problem is sometimes availed of by legal practitioners faced with the difficulties arising where the legal right share is worth considerably less than the value of the family home. In order to avoid the inordinate delays involved in probate litigation, deeds of family arrangement, also known as deeds of variation, may be entered into for up to two years after the deceased's death, and may be employed to rewrite a will.⁵⁴ Where difficulties arise regarding the appropriation of the family home, the deed may often provide a surviving spouse with a life estate in the property. Nevertheless, two principal weaknesses are again inherent in this essentially 'man-made', non-legislative remedy. First, such a deed is only a possibility where the agreement of all the beneficiaries is forthcoming. Where such agreement cannot be attained,

⁵² See the Succession Act 1965, s. 56(10)(b).

⁵³ While *Elliot v Stamp* [2008] IESC 10 is authority for the proposition that the court will usually award costs to an unsuccessful litigant who challenges a will, provided there was a reasonable ground for the litigation and it was conducted bona fide, this is again at the discretion of the court. As a result, Mrs Kelly cannot assume she would be awarded costs as this is speculative. It is submitted, that the less financial provision that is afforded by the legal right share, arguably, the less likely a surviving spouse in her position would be to risk it by instigating legal proceedings, thereby creating a vicious circle of sorts.

⁵⁴ For examples of deeds of family arrangements, see *Irish Conveyancing Precedents* (Bloomsbury Professional) Issue 33, Precedent J.2.4 to J.2.5.

deeds of family arrangement may not be employed to solve the problem. Secondly, under section 18 of the Land and Conveyancing Law Reform Act 2009, a life estate is now converted into an equitable interest. In light of section 21 of the Act, a conveyance of the home to a purchaser by two trustees would overreach the life estate—whether or not the purchaser has notice of the equitable interest—and would instead attach to the proceeds of sale. Thus, it is clear that the protection afforded by the life estate through such deeds is far from comprehensive. What the use of these deeds does prove, however, is that issues associated with appropriation of the family home have the potential to cause serious problems in practice and that viable solutions need to be considered.⁵⁵

The answer to these difficulties, it is proposed, may lie in the implementation of a floor of support for surviving spouses through the provision of an entitlement to a fixed monetary sum from the deceased's estate—known as a preferential share.⁵⁶ Applied on intestacy, in one form or another in many common law jurisdictions,⁵⁷ it is submitted that the application of the preferential share to circumstances where a will does in fact exist could present a suitable and worthwhile alternative to the legal right share.⁵⁸

55 Difficulties arising due to insufficient provision on death were noted in the 2011 report in England and Wales, albeit in relation to intestate succession and provision based on a statutory legacy: 'The Office of the Official Solicitor noted that many problematic cases in the past were related to the low level of statutory legacy but these increases should mean that there are fewer problems in future.' See Law Commission for England and Wales report, above n. 4 para. 2.188 at 51.

56 However, as will be seen below, the full preferential share would not be available in all circumstances. While it is not the focus of this paper, it is submitted that the proposal may also be of relevance in certain intestate situations where both a spouse and issue survive a deceased, or in cases of partial intestacy. Nevertheless, as the current provisions on intestacy offer more protection to a non-owning spouse than the relevant provisions on testacy, it is contended that the need for such proposals where a will does in fact exist is more pressing at present and, as such, is central to this paper.

57 Several jurisdictions—including British Columbia, Scotland, and England and Wales—apply systems based on a preferential share on intestacy. It was also applied in Ireland prior to the introduction of the Succession Act 1965 through the Intestates' Estates Act 1954. In declining to follow such an approach based on a fixed monetary sum plus a share of the remainder of the estate, Minister Lenihan, the Minister for Justice, made the following two arguments: 'In the first place, to give a wife with children a sufficient monetary sum in Irish circumstances would, in fact, mean giving her two-thirds or more of the average estate. Furthermore, monetary sums are not satisfactory, as they need to be revised from time to time to take account of changing money values.' Above n. 28 at col. 332. However, it is clear from the above case study that a fractional share, irrespective of its size, does not always provide a sufficient monetary sum for a surviving spouse, as by its nature it is dependent on the overall value of the estate. Moreover, the apparent inconvenience of updating the monetary sum should not be sufficient reason to reject the importance of such a means of provision. In any event, the difficulties, such as they are, which could arise by such a revision would be minimized through the introduction of a detailed statutory review procedure. See below.

58 In no jurisdiction known to the author is such a regime adopted on testacy to provide financial protection for a surviving spouse, despite its inherent strengths. To this extent, the proposals contained in this paper are novel.

VI. Theoretical Difficulties with the Application of a Preferential Share on Testacy

In assessing the suitability of such reforms which borrows from an approach commonly adopted in the case of intestacies, it is first necessary to note that there is a clear distinction between the basis upon which provisions governing intestacy, described as 'intent-serving', and provisions interfering on testacy, described as 'intent-defeating', are founded. One of the primary purposes of the law of intestacy is to produce, in effect, a default will, or a substitute estate plan, in order to reflect the distributive preferences of the deceased. Presumptions are therefore made about the deceased's intentions, as if the deceased had completed the necessary formalities to make the testamentary dispositions themselves. In order to make these presumptions, the distribution patterns of those who die testate are considered. One of the principal presumptions made is that, in general, the average testator would want to make generous provision for their surviving spouse.⁵⁹ As a result, the legislative provisions across the common law world reflect this belief with the rules of intestacy almost invariably placing the surviving spouse as the primary beneficiary of an intestate estate. However, it is not possible to make the same assumptions in adopting the preferential share to protect the surviving spouse from express disinheritance. Thus, while rules governing intestacy are widely accepted as necessary, interfering with the express wishes of a testator who has taken the positive action of making a will, in order to clearly set out his or her intentions, is a more contentious matter. For instance, what if a deceased spouse had good reason to disinherit a surviving spouse, perhaps having already made substantial alternative provision for him or her *inter vivos*? Although it would be possible to introduce a system which would take such *inter vivos* provision into consideration by reducing the preferential share through an extended version of hotchpot⁶⁰ or offset, this would be inconsistent with the approach under the current legal right share which applies irrespective of any *inter vivos* provision.⁶¹ It would also be unnecessary as such a situation is likely to arise as the exception rather than the norm. At an even more fundamental level, the question arises: Can the provision of a preferential share for a surviving spouse be justified where a will exists? Notwithstanding the vastly different contexts, it is submitted that it can. To explain this conclusion, it is necessary to once

59 For a review of the data gathered in various jurisdictions supporting generous provision for a surviving spouse on intestacy, see the report of the New South Wales Law Reform Commission, above n. 6 paras. 3.27–3.33 at 37–8.

60 As canvassed by Professor Kerridge on intestacy; see above n. 25. However, even Kerridge's proposal did not extend hotchpot to situations where provision was made *inter vivos*. His proposal is discussed below.

61 It should, however, be noted that s. 116 of the Succession Act 1965 does provide that if a testator made permanent provision for a spouse 'prior to the commencement of the Act', this would be taken as being given in, or towards, satisfaction of the legal right share.

again consider the central questions arising when formulating the appropriate legal response to the issue of disinheritance:

Does the law . . . favour unfettered freedom of disposition as a necessary or desirable incident of the economic power inherent in the ownership of property? Or does it attach greater importance to the notion that family property ought to be preserved within the family to serve as an endowment to successive generations? How far is the state prepared to interfere with property rights, whether to promote democratic or egalitarian ideals or simply—perhaps in self-interest—to impose a duty to secure adequate provision for the support of an owner's dependants?⁶²

The Irish response indicates that the legislature ranks the need to make provision for a surviving spouse higher than the predilection for retaining complete testamentary freedom. Interference with testamentary autonomy through the legal right share is justified by the overriding social goal of protecting the financial position of a surviving spouse. It is submitted that the provision of a preferential share designed to protect a surviving spouse *vis-à-vis* the family home where a will exists would be equally justified on this basis. This would be more effective in facilitating the achievement of the underlying public policy goals on which protection of a surviving spouse against disinheritance is based, compared to the flawed fractional-share provision currently afforded by section 111 of the Succession Act 1965.⁶³

However, it appears that while the provision of a preferential share would, on initial analysis, be a theoretically acceptable alternative to protect against disinheritance, additional theoretical difficulties arise in considering the actual implementation of such a provision. A second difficulty associated with the proposed reform from a theoretical perspective is that while freedom of testation is already tempered in Ireland, the introduction of a preferential share would arguably represent a further extension of the current interference in many cases. At its most extreme, reform based on this proposal would mean that where an estate falls below the threshold for the preferential share, the testator would have no power to dispose of his or her estate. This begs the following questions: Would the introduction of a preferential share replacing the legal right share represent too great an infraction on testamentary autonomy? Would such a measure represent an unjustified attack on the rights of testators who, simply by virtue of the

62 S. Cretney, 'Reform of Intestacy' (1995) 111 *Law Quarterly Review* 77 at 77–8.

63 The adoption of a system of thirds for the division of land on death has known a long history; see Brady, above n. 15 para. 7.02 at 211. See also Wylie, above n. 12 para. 15.03 at 919–20. As well as the system of thirds which prevailed in the 'Custom of Ireland', the preference for thirds has also recently been described as a 'hangover' from the right of dower; see J.H. Langbein and L.W. Waggoner, 'Redesigning the Spouse's Forced Share' (1987) 22 *Real Property Probate & Trust Journal* 303 at 316. See also above n. 16. Thus, it is submitted that the current choice of one-third where there are children is simply a vestige from the historical law of succession and is not based on a real measure of what might actually be required as a minimum level of financial protection.

limited size of their estate, are prevented from disposing of their property as they so wish?

Two principal arguments may be posed which can answer these questions in the negative. While the right to freedom of testation has generally gained acceptance over the centuries, as Minister Lenihan noted: '[t]here is no historical or moral basis for the view that freedom of testation is a fundamental right inherent in property.'⁶⁴ As a result, if the primary focus of the legislation is the provision of financial support for a surviving spouse, freedom of testation should not be considered a right, but rather a luxury to be enjoyed once the estate is of sufficient size to meet the obligation to protect a surviving spouse. As will be discussed below, the implementation of a preferential share would have the greatest effect where the estate is modest, and least effect where the estate is larger or the family home has already been secured through the right of survivorship. In fact, in such circumstances, the interference with testamentary autonomy would often be even less than that currently applied under section 111 of the Succession Act 1965, depending on the size of the estate.⁶⁵ In addition, where the share on intestacy, legal right share or gift under a will is insufficient to effect the appropriation of the family home, a surviving spouse can currently apply to the court under section 56(10)(b) of the Succession Act 1965 to waive or reduce the balance between the share or gift and the value of the family home, where the payment of the outstanding money into the estate would result in hardship to the surviving spouse. Albeit indirect, the effect of such an order on testacy is none the less the extension of the legal right share on the basis of need, and as such is contrary to the otherwise fixed rights provided for by the legislation, and represents a further infraction on the testamentary autonomy of the deceased. Thus, section 56(10)(b) is a precedent for the extended interference, on the basis of need, with the testamentary autonomy of the deceased beyond the legal right share.⁶⁶

A final issue which must be considered from a theoretical point of view is the impact on children.⁶⁷ Currently, children can apply for 'proper provision' to be made for them from the two-thirds of the

64 Above n. 27 at col. 410.

65 See below for the comparative application where the family home is in sole ownership, in a joint tenancy or in a tenancy in common.

66 It is arguable that in some circumstances, such as where the family home is of below-average value, the proposals go beyond that of need as afforded by s. 56(10)(b). It is nevertheless contended that such an extension is warranted. See below for further expansion of this point.

67 It is not proposed that a surviving spouse should be entitled to a greater share where there are no children, as the main aim is to make adequate provision.

estate which the deceased parent is free to dispose of.⁶⁸ This right to proper provision would be particularly weakened in small estates as there may be nothing left in excess of the preferential share from which such provision could be made. On the other hand, it is clear that children occupy an inferior position to a surviving spouse in the hierarchy of beneficiaries in both testacy and intestacy, and will therefore always rank behind the surviving spouse. As John Fleming explains:

Each generation must look after itself. Just as children can no longer be relied upon to look after their widowed mother with respect and grace, so their expectation of succession must in general be postponed to what might be left to them after both parents have died. Children do have a limited claim to earlier attention—but only to assure their maintenance and education during infancy and adolescence.⁶⁹

Indeed, rejecting the notion that children should be entitled to a legal share, Minister Lenihan again reiterated the supreme position of the surviving spouse, explaining: 'I accept that a married man should not be compelled to leave anything to his children where, in fact, he wants to leave all his property to his wife'.⁷⁰ Nevertheless, the balance which would be struck where a child applies for provision with respect to the proposed preferential share would be quite different to that in relation to the current legal right share. The proposal must reflect the need to ensure that 'proper provision' can be made for children. To this end, it is submitted that a child should be able to bring an application under section 117 of the Succession Act 1965 against a parent's estate, and the court should be empowered to reduce the preferential share of a surviving parent in such circumstances. However, the court should not have the power to make an order which would reduce the preferential share below the level of the legal right share to which the surviving spouse would, as an alternative, be entitled.

An associated, though distinct, issue is the impact of the proposal on stepchildren. It is clear that the Oireachtas (the Irish national parliament) is not blind to the increasing importance of protecting stepchildren in this changing society. While the Succession Act 1965 focuses primarily on protecting the surviving spouse from disinheritance, certain changes have been introduced in light of remarriage and the need to cater for mixed families. Thus, although an order under section 117 of the Act in favour of a child may not affect any entitlement of a surviving spouse where that spouse is the parent of the applicant child,⁷¹ in circumstances where the surviving spouse is a

68 See the Succession Act 1965, s. 117. For more on s. 117, see Spierin, above n. 51 at 312–54. Spierin notes at 339: 'The standard of provision, which the court expects the testator to make, clearly depends to a very large degree upon the means of the testator.' See also Storan, above n. 19; M. Cooney, 'Succession and Judicial Discretion in Ireland: The Section 117 Cases' (1980) 15(1) *Irish Jurist* 62.

69 Above n. 35 at 236.

70 Above n. 27 at col. 417.

71 See the Succession Act 1965, s. 117(3).

step-parent of the child, an order in favour of the child may reduce a gift or share on intestacy to which the step-parent is entitled. However, in neither situation may an order under section 117 affect the legal right share to which the surviving spouse is entitled, irrespective of whether he or she is the parent or the step-parent of the applicant child.⁷²

While Professor John Mee argues that a civil partner should be treated the same as a step-parent, as regards the limits on the effect an application under section 117 of the Succession Act 1965 might have on him or her, the legislature goes even further in the protection of stepchildren in these circumstances. To this end, section 86 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 amends section 117(3), providing:

An order under this section shall not affect the legal right of a surviving civil partner unless the court, after consideration of all the circumstances, including the testator's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.⁷³

Considering the limited protection afforded by the legal right share, it is submitted that Professor Mee's apparent distaste for extended interference on the survivor's share is understandable.⁷⁴ However, again, in light of the difference in the mechanics of a preferential share and the current legal right share, this proposal also considers that special provision to ensure the continued protection of stepchildren is also merited.⁷⁵

Therefore, while it is not claimed that a step-parent or civil partner should be made responsible for a stepchild on testacy, it is submitted that, as with other children, a stepchild should be able to bring an application under section 117 of the Succession Act 1965 against a parent's estate, and the court should be empowered to reduce the preferential share of a step-parent or civil partner in such circumstances. Again, however, this reduction should not result in a preferential share which would be worth less than the provision to which

⁷² See Mee, above n. 42.

⁷³ For a critical analysis of this provision, see *ibid*. Arguably, this provision could be viewed as being focused more on protecting the position of the constitutional family than on the fulsome support of the position of the stepchild.

⁷⁴ While Professor Mee's comments were directed at civil partners, it is fair to assume he would be equally reticent with regard to approving such extended interference on other surviving classes of spouses.

⁷⁵ If an estate is worth less than the preferential share, the proposals would, without amendment, ensure that there would be no residue from which provision could be made for a child under s. 117, and the preferential share of the step-parent would be untouchable. Moreover, the stepchild would perhaps be less likely to receive any future inheritance from the step-parent.

the step-parent or civil partner would be entitled under the current regime, based on the legal right share.⁷⁶

VII. Practical Challenges Posed by the Introduction of a Preferential Share

Once the preferential share is accepted as a viable alternative to the current legal right share from a theoretical point of view, the proposal must then be tested from a practical perspective. It is clear that careful calculations would have to be made in order to fix the preferential share at a fair level.⁷⁷ If the aim is to ensure, in so far as possible, that the family home remains with the surviving spouse or, as an alternative, that a family home may be purchased, real-world property valuations across the country must be considered based on a reliable house price index.

In order to ascertain the level at which the preferential share should be established, the national Residential Property Price Index (RPPI), which was recently launched by the Central Statistics Office, must be considered.⁷⁸ In order to obtain an approximation of the average selling prices of houses, the RPPI may be applied to the Permanent TSB/ESRI (Economic and Social Research Institute) House Price Index, which formerly provided figures for average house prices nationally.⁷⁹ From this calculation, an average selling price of €178,830 in November 2011 emerges.⁸⁰ This figure is in line with a recent report published by Daft.ie, which showed the average asking price for residential properties nationwide was just over €175,000 at the end of

76 Thus, the rules outlined above which govern applications under s. 117 in relation to step-parents and civil partners would continue to exist and would represent the minimum provision available under these proposals.

77 For considerations of the factors at play in setting a statutory legacy, see the New South Wales Law Reform Commission report, above n. 6 paras 4.35–4.61 at 63–70.

78 The RPPI series is based on transactions which are financed by residential mortgages, and covers both houses and apartments. It is designed to measure the change in the average level of prices paid for residential properties sold in Ireland since 2005. The index is also mix-adjusted to allow for the fact that different types of property are sold in different periods. See Central Statistics Office, 'Residential Property Price Index', available at: <http://www.cso.ie> (accessed 3 January 2012).

79 This House Price Index was based on the agreed sale price and calculated using data from mortgage drawdowns. Unfortunately, the production of this index ceased in May 2011. The 'Permanent TSB/ESRI House Price Index' is available at: <https://www.permanenttsb.ie/aboutus/housepriceindex/> (accessed 3 January 2012).

80 Taking the Permanent TSB/ESRI House Price Index for January 2005, the average house price was €255,107. See *ibid.* Having adopted this figure, the RPPI for November 2011, which was 70.1, may be applied. See above n. 78. The adjusted selling price which emerges is €178,830. While this figure cannot be considered exact, it none the less provides a reasonably accurate measure of selling prices in Ireland at the time.

2011.⁸¹ In addition to these sources of data, planned future developments in property regulation under the Property Services (Regulation) Act 2011 should contribute to making this task of calculation easier.⁸² Introduced by the Government as a result of a recommendation by the Auctioneering/Estate Agency Review Group, the Act provides for the establishment of the Property Services Regulatory Authority. The Authority will have statutory responsibility for publishing property sales prices, and introducing a new property database reflecting market trends and house prices.⁸³

Nevertheless, despite the availability of house price indices, difficulties remain and the consideration of house prices will invariably give rise to complications. While the divergence in house prices across Ireland has narrowed in recent years, with a more rapid fall in prices in the Dublin region when compared to the rest of Ireland,⁸⁴ house prices in Dublin will still be higher than those in rural areas. However, the preferential share would, if introduced, apply equally across the board.⁸⁵ Despite regional variations, it is submitted that it would still be possible to establish a preferential share that is appropriate in the majority of cases, and which would better protect surviving spouses countrywide than the application of section 111 of the Succession Act 1965 currently does.

As the focus of the protection delivered by this proposal is securing the family home or facilitating the purchase of alternative accommodation for a surviving spouse, on the basis of the foregoing indicators of house prices, a preferential share of €180,000 is

81 Daft.ie, *The Daft.ie House Price Report: 2011 in Review* (January 2012), available at: <http://www.daft.ie/report/Daft-House-Price-Report-Q4-2011.pdf> (accessed 3 January 2012). The data provided by Daft.ie is based on asking prices and rents, and does not include selling prices.

82 Although enacted, a commencement order for the legislation is still awaited.

83 The then Minister for Justice and Law Reform, Minister Aherne, stated on 10 July 2010 that this legislation would give effect to a commitment in the renewed Programme for Government to facilitate publication of property price data in order to improve market transparency and early detection of market trends. See Property Services Regulatory Authority, 'Minister Announces New Property Price Database' (2010), available at: <http://www.npsra.ie/website/npsra/npsraweb.nsf/page/SJRS-887L8V16323110-en> (accessed 15 August 2011).

84 For instance, at the end of 2011, house prices in Dublin city centre had, on average, fallen by 61.2 per cent from their peak, while in Limerick city the fall was 41.3 per cent. See Daft report, above n. 81. It has been noted in England that 'the statutory legacy may provide either more or less than the surviving spouse needs to purchase the deceased's interest in the house, sometimes significantly so'; see Law Commission for England and Wales consultation paper, above n. 4 para. 3.10 at 40.

85 It was suggested that in Australia the statutory legacy would perhaps vary from jurisdiction to jurisdiction, as noted in New South Wales Law Reform Commission report, above n. 6 para. 4.50 at 68. However, it is submitted that on an island the size of Ireland such variations would not be appropriate. Likewise, the Law Commission for England and Wales noted in its 2011 report that there was 'acceptance that the level of the statutory share could not be set on a regional basis'. Above n. 4 para. 2.120 at 51.

proposed.⁸⁶ However, in light of anecdotal evidence which suggests that nowadays most Irish homes are in fact held in a joint tenancy, a limitation to reflect this reality must also be included. As a result, it is submitted that the preferential share should be offset by the value of the share in the home held by the surviving spouse following their spouse's death.⁸⁷ It is contended that this approach would reflect a better balance of the policies at play and would ensure that the proposal achieves the end desired without interfering with the testamentary autonomy of individuals beyond that which is necessary to make adequate provision for a surviving, non-owning spouse.

Similar proposals to those put forward here have recently been made in Scotland, as well as in England and Wales, albeit in relation to the law on intestate provision, and have drawn very differing reactions.⁸⁸ Referring to the recent Scottish Law Reform Commission report in 2009, it has been noted that proposals for the reduction of the share on intestacy by the value of the survivorship destination were 'especially welcome'.⁸⁹ Moreover, south of the border, Professor Roger Kerridge has given his support for such a system in England and Wales.⁹⁰ Essentially, Kerridge proposes that the statutory legacy be reduced by a revised form of hotchpot, which would include the value of property passing to the surviving spouse under the right of survivorship.⁹¹ Despite this positive endorsement, however, the Law Commission for England and Wales was less than enthusiastic about such proposals. In the 2011 report on intestacy and family provision, it noted that proposals included in the 2010 consultation paper for the

86 The surviving spouse would also be entitled to simple interest, which would accrue on the sum during the period between death and the payment of the share. In order to ensure simplicity, the rate at which this interest would be charged could be based, perhaps, on European Central Bank interest rates.

87 This limitation is not merely restricted to an interest acquired by the right of survivorship in a joint tenancy; it also includes an interest held under a tenancy in common.

88 Although the proposals of the Law Commission of England and Wales relate to intestacy, the discussion which surrounds them is equally relevant in this context, relating to testacy.

89 Alan Barr, 'A View from Practice' (2010) 14 *Edinburgh Law Review* 313 at 315. For a discussion of 'survivorship destinations', see Scottish Law Commission report, above n. 5 paras. 2.19–2.24. Nevertheless, the Scottish proposals are not without difficulty. The threshold sum on intestacy is proposed to rest at £300,000 which, in light of the primary policy objective of retaining the family home, appears excessive. Dot Reid points out that the average value of homes in Scotland in December 2008 was £152,256 and notes, perhaps sceptically, that the recommended threshold sum 'therefore provides a very generous margin to ensure acquisition of the family home'; see 'Inheritance Rights of Children' (2010) 14 *Edinburgh Law Review* 318 at 320.

90 Kerridge, above n. 25.

91 *Ibid.* at 61. However, this differs from the proposal made in this paper as it merely reduces the statutory legacy by the value of the right of survivorship, not the entire interest held by the surviving spouse. In addition, Professor Kerridge's proposals do not reduce the statutory legacy by any share held under a tenancy in common. See also R. Kerridge, 'A View from England' (2010) 14 *Edinburgh Law Review* 323 for a comparison between his proposals and those of the Scottish Law Commission.

provision of the family home up to a certain value limit—or requiring the surviving spouse to account for a share of the family home derived by virtue of the right of survivorship, perhaps in the context of a larger statutory share—received ‘little support’.⁹² Nevertheless, while the report cited claims by the Chancery Bar Association that such a system would be ‘unwieldy in its application’, and by the Law Society that it would introduce ‘unwelcome complexity and discrepancies’,⁹³ it is contended that such views are unduly negative and overstate the difficulties inherent in such a regime. While it is easy to over-complicate any legislative proposal, it is submitted that such a system would not be difficult to implement and, as such, should be afforded serious consideration in Ireland.

Finally, owing to the fixed monetary nature of the provision, in addition to the inclusion of offset, both of which could conceivably provide substantially less to a surviving spouse than the current regime under section 111 of the Succession Act 1965, it is submitted that the proposal should act as an alternative to the legal right share, rather than a replacement.⁹⁴ This would preserve section 111 for those who opt for it, while, crucially, the introduction of a preferential share would eliminate the weakness of the fractional-share system through the inclusion of a floor of support for those most in need. The practical effect of this proposal may be summarized as follows:

- (i) Where the home is in the sole name of the deceased, no offset arises and the surviving spouse is entitled to the full preferential share of €180,000.
- (ii) Where the home is held in a joint tenancy, the preferential share is offset by the value of the home. If the value of the home is less than €180,000, the surviving spouse is entitled to the balance.⁹⁵ Where, however, the value of the home exceeds the preferential share, no benefit will accrue from the proposal and the surviving spouse may choose instead to rely on section 111.

92 See Law Commission for England and Wales report, above n. 4 paras. 2.46–2.47. See also Law Commission for England and Wales consultation paper, above n. 4 paras. 3.91–3.94.

93 See Law Commission for England and Wales report, above n. 4 para. 2.47.

94 The provision of different options from which the surviving spouse can choose depending on which provides the better protection is currently applied in Germany. See E.D. Graue, ‘German Law’ in A.K.R. Kiralfry (ed.), *Comparative Law of Matrimonial Property* (A.W. Sijthoff: Leiden, 1972); K.W. Ryan, *An Introduction to Civil Law* (Law Book Co. of Australasia: Sydney, 1962) ch. 6; W. Müller-Freienfels, ‘Family Law and the Law of Succession in Germany’ (1967) 16(2) *International & Comparative Law Quarterly* 409.

95 The decision to extend these proposals to include their application to joint tenancies instead of limiting their application to where the home was in the sole name of the deceased was, despite the theoretical difficulties with such an extension, a pragmatic one. It arose due to the anomaly which could otherwise result where the value of the family home was less than €180,000. See below for more discussion of this point.

- (iii) Where the home is held by the spouses as tenants in common, the preferential share is offset by the value of the share held by the survivor. Where the value of the share held by the survivor is less than the preferential share, the surviving spouse is entitled to the balance.⁹⁶ Where the value of the share held by the surviving spouse exceeds the preferential share, no benefit accrues from the proposal and the surviving spouse may again choose instead to rely on section 111.

In circumstances where the spouses do not own a family home, it is proposed that no deduction would arise and the full preferential share would be available. The dangers of granting property-specific rights are considerable and have been illustrated elsewhere in recent times.⁹⁷ In particular, the 2011 report on succession in England and Wales quoted the Norwich and Norfolk Law Society, which expressed this concern succinctly:

[R]egardless of the sentimental value that a home can have, it was not appropriate to treat assets which were held in bricks and mortar differently to assets held in other forms, such as savings and investments. We felt that this could cause significant unfairness in a number of cases; an

96 It is accepted that, on initial analysis, this may appear to go beyond meeting the primary objective of the proposal, namely the protection of a surviving spouse in relation to the family home. However, it is contended that such provision is warranted in order to protect the surviving spouse in such situations by also attempting to ensure that they would have sufficient funds to live after securing their accommodation. If a surviving spouse acquires a family home of average value, or greater than average value, where the finances of the family demand, it would be possible for the family to sell the home, buy a house of below average value, and thereby release cash which the family could then use to maintain themselves. However, where the family home is of less than average value, the possibility of releasing any liquidity from the property is a much more remote possibility. The ability of the surviving spouse to purchase alternative accommodation of a sufficiently low value which would allow them to retain some cash from the original sale may be severely limited. This, it is contended, could give rise to serious hardship and arguably jeopardize the continued survival of the family unnecessarily, where additional resources exist in addition to the family home, up to the value of the preferential share.

97 The importance of considering the vulnerability of non-owning couples when making provision for the family home was considered recently in Scotland, and in England and Wales, albeit in relation to intestacy. On intestacy, Scottish law currently entitles a surviving spouse to a housing prior right worth up to £300,000, as set in 2005. However, in the recent Scottish Law Commission report, above n. 5, the Commission recommended a move away from granting property-specific rights as, depending on the composition of the estate, the rights could be valueless, and vulnerable members of the community could be left without protection. While such an outcome would not occur in Ireland if the preferential share was not extended to apply where there was no family home, owing to the continued application of s. 111, it is submitted that the provision of one-third of an estate does not afford a surviving spouse adequate protection where a family home is not owned by the couple. A similar point to that made in Scotland was made in the 2011 report on England and Wales in relation to intestacy, which noted: '[A]ny reform which elevated the status of real property over other assets . . . could produce unfortunate results in some cases; for example, where a couple sold their home and invested the proceeds to pay for residential care shortly before one of them died.' Above n. 4 para. 2.48 at 37.

individual beneficiary should not be better off because their spouse kept property as opposed to stocks and shares.⁹⁸

The provision of the preferential share in such circumstances would ensure that surviving spouses would be in a position to secure the family home, should they so desire, and that they would enjoy equal treatment with their home-owning counterparts.⁹⁹

Another practical issue which must be considered is that in order to keep pace with inflation and to retain real value the preferential share must be updated. The fact that the share must be varied to keep in line with changes in currency values or the value of estates means that there is the possibility of constant lobbying for change from some members of the community. Similarly, due to the potential for public comment or backlash following every increase, or otherwise, such a system could be awkward for the government to implement. Indeed, the lack of a statutory review procedure has been a major weakness in other jurisdictions which apply the preferential share on intestacy.¹⁰⁰ Moreover, Stephen Cretney notes:

[I]t is not satisfactory to proceed by using delegated legislation at irregular and unpredictable intervals to vary the amount of a surviving spouse's entitlement without any clear statement of the principle upon which the variation is made.¹⁰¹

98 See Law Commission for England and Wales report, above n. 4, para. 2.48 at 37–8. It is for this reason that Dot Reid's suggestion that on intestacy the family home be allocated to the surviving spouse up to a specified value would not provide sufficient protection; see above n. 89 at 321.

99 While a family's finances may not stretch to purchasing a family home, accommodation needs must then be met in some other manner. Most commonly, in the absence of ownership of a family home, accommodation is rented. However, the need to pay for rent is often also a considerable drain on resources. Thus, it is submitted, the provision of a preferential share would be merited to ensure adequate financial protection for all surviving spouses, irrespective of whether a family home is in fact owned.

100 In British Columbia, the former Law Reform Commission recommended that the preferential share of \$65,000 be increased to \$200,000 in 1983; however, no alteration of the share was forthcoming until 2009, when it was increased to \$300,000. The Law Commission also recommended that it be variable by regulation; however, this was not introduced either; see Law Reform Commission of British Columbia, *Report on statutory succession rights*, Report No. 70 (1983). Under the equivalent legislation in England, the Lord Chancellor was empowered to vary the legacy by statutory instrument in 1966. This power was first applied in 1967 and has been invoked six times since. England and Wales currently have a lower level of £250,000 (where there are surviving children or other descendants) and an upper level of £450,000 (where there are no surviving children or other descendants, but the deceased left a parent or full sibling). The latest increase came under the Family Provision (Intestate Succession) Order 2009, SI 2009/135, for deaths on or after 1 February 2009. However, owing to the lack of an established review procedure to guide the Lord Chancellor in when to exercise his discretion, and to what extent the level should be varied, difficulties have also ensued. As a result, this most recent alteration of the statutory legacy (see above) effectively doubled the previous floor of support. The lower level of £125,000 was doubled and the higher level was more than doubled, rising from £200,000 to £450,000.

101 Above n. 62 at 99.

It is submitted that these difficulties could easily be avoided through the inclusion of a detailed statutory review procedure.¹⁰² Having regard to the procedures, both currently in place and proposed in many jurisdictions,¹⁰³ it would be highly advantageous to state at the outset the frequency with which such reviews would take place. It is therefore recommended that the preferential share should be reviewed biennially.¹⁰⁴ A statement of principle as to the basis on which a variation would be made should also be provided, namely a consideration of a reliable house price index.¹⁰⁵ Finally, an explanation for each change in the figure, or otherwise, should be made available to the

- 102 The Law Commission for England and Wales report 2011 quotes Christopher Jarman, who observed: '[T]he legislation should aim for a process which is as nearly automatic as can be achieved, so as to avoid the potential for either a waste of time and resources on frequent consultation or criticism for failure to consult'. See above n. 4 para. 2.121 at 52. While it may be said that the track-record for statutory reviews is poor in Ireland, our past failure in this regard should not be used as a stick with which to knock the merits of such a proposal. Indeed, it is submitted, the inclusion of such provisions for statutory review would be a positive addition to the Irish legislative regime.
- 103 The report of the Law Commission for England and Wales recommended a review at least every five years; *ibid.* para. 2.128 at 53. By contrast, the Scottish Law Commission report proposed reviewing the threshold sum of £300,000 on an annual basis; see above n. 5 para. 2.16 at 16. For a summary of the report, see D. Nichols, 'Reform of the Law of Succession: The Report in Outline' (2010) 14(2) *Edinburgh Law Review* 306.
- 104 Akin to proposals on intestacy in England and Wales, it is possible that a review of the preferential share could be prescribed to take place 'no less than once every two years' to allow the flexibility to respond to changes in property values, if required. However, it is submitted that it is unlikely that such a shorter time frame would, in practice, be required.
- 105 In the consultation paper for England and Wales, it was suggested that the statutory legacy might be raised in line with the average rate of increase, if any, of house prices across England and Wales. However, in the 2011 report, above n. 4 para. 2.123 at 52, the Law Commission for England and Wales explains that it had been convinced that the statutory legacy should not be linked exclusively to house price inflation. Instead, it proposed a 'statutory indexation mechanism'. The level of statutory legacy would be updated periodically by reference to the retail prices index (RPI). The RPI is published on a monthly basis by the Office for National Statistics and includes certain housing costs (council tax, mortgage interest repayments, house depreciation, buildings insurance, ground rent, and estate agents' and conveyancing fees) not included in the consumer prices index (CPI). As a result, the Commission explained, in para. 2.124 at 52–3: 'Using RPI means that future increases in the statutory legacy will reflect house price inflation to some extent but also reflect inflation in the rest of the economy and across the country as a whole.' The report continues, in para. 2.127 at 53, by stating that the Lord Chancellor would, however, be given discretion to substitute a different measure of inflation in place of the RPI, if required, in order to 'give sufficient flexibility to choose a measure of inflation that is considered to be most appropriate or to cater for the possibility that the RPI is no longer published'. This approach certainly appears to be more attractive than a mere consideration of changes in house prices and, it is submitted, would be an appropriate basis on which to make a variation of the preferential share. Unfortunately, however, while in Ireland the Central Statistics Office does publish a CPI—which covers a range of housing costs including mortgage interest repayments, private and public rental costs, home insurance and local authority service charges—it does not include home depreciation values. It is submitted that this is a serious weakness in the index as it currently exists, and should be eliminated before being invoked for the purpose of reviewing the preferential share.

public upon the completion of each review.¹⁰⁶ Moreover, any amendment to the preferential share should be rounded to the nearest €1,000.

It would be remiss not to comment on two further issues which must be considered in implementing any such proposal: first, the constitutional implications, if any, which could arise with the introduction of a preferential share; secondly, the appropriateness, or otherwise, of adopting a preferential share in the midst of a property crisis. In response to the former issue, it is submitted that despite the comprehensive nature of the measure and the considerable impact it would have where the family home is in the sole name of the deceased spouse, the implementation of a preferential share would not be repugnant to *Bunreacht na hÉireann* (the Irish constitution). Unlike the Matrimonial Home Bill 1993, which sought to introduce an automatic beneficial joint tenancy of the family home *inter vivos* and was subsequently found to be unconstitutional,¹⁰⁷ the preferential share would have no effect *inter vivos* and would fundamentally be based on the existing interference in the property matters of spouses on death, as currently applied under sections 111 and 56(10) of the Succession Act 1965. As the current interference is constitutionally acceptable, this proposal would also be acceptable. With regard to the latter issue, concerning the introduction of a preferential share during a period of crisis in the property market, it is submitted that rather than being the worst possible time for such reform, the correction of the market which is currently taking place actually presents the perfect opportunity for such reform to flourish. In light of the dramatic falls in house prices since 2007, prices now, arguably, reflect more accurately the true value of property in Ireland. Moreover, having learned from the mistakes of the past, it is widely considered that the government will focus on ensuring stability in the property market in the coming years.¹⁰⁸ In such an environment, it is submitted that the conditions are ripe for the implementation of a preferential share in order to cure

106 Law Commission for England and Wales report, *ibid.* para. 2.126 at 53, proposes that index-linked updates of the statutory share on intestacy are intended to be 'upwards-only'. No such recommendation is made in these proposals.

107 *In the matter of Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993* [1994] 1 ILRM 241. The retrospective effect of the provision and its infringement on the constitutionally protected authority of the family were the principal factors in the finding of unconstitutionality.

108 As Ronan Lyons points out: 'It is somewhat ingrained in Irish commentary to see larger falls as a bad thing . . . However, if you think of the fall in house prices as a necessary correction, whose size is determined by fundamental factors, then it is better for the prices to race to the finishing line than to crawl there.' See Daft Report, above n. 81 at 2. Lyons also explains that attaining stability in the market, instead of rising prices, is the key to success: 'The golden rule of house prices is that over the long run, they don't increase any faster than inflation. We can see this everywhere: in Ireland up to 1995, in the US over the last fifty years or in the Netherlands over the last four hundred years. So, if we're seeing house prices rising any faster than about 2 per cent a year, as we did during our bubble, something has gone wrong. What the market needs is stable prices, not rising ones.' Above n. 81 at 3.

one of the most serious defects in the Succession Act as it currently stands: specifically, the lack of a floor of support for those most in need.

VIII. Application of the Proposal

Using the hypothetical scenario outlined in the case study above, the implications of the introduction of a preferential share become clearer, and the difference between the proposal made here and the law as currently applied under section 111 of the Succession Act 1965 becomes apparent.

Table 2 shows that the effect of the proposal is considerable when applied to a home in the sole ownership of the deceased spouse. In the larger estate in scenario one, the share which a surviving spouse takes is increased by approximately €30,000 (about 7 per cent of the estate). By contrast, in relation to the smaller estate in scenario two, the share rises by approximately €113,000 (about 57 per cent of the estate). This means that while under the current law, in the absence of an order under section 56(10) of the Succession Act 1965, the legal right share is the equivalent of 33 per cent of the estate, with the introduction of a preferential share, the percentage share of the estate designated for the financial protection of a surviving spouse would vary considerably. In relation to the larger estate in scenario one, the preferential share amounts to approximately 40 per cent of the entire estate. However, with the smaller estate in scenario two, the preferential share amounts to 90 per cent.

Table 2 Comparative application of current law and proposal on testacy: Sole ownership

	Scenario One: Estate valued at €451,280 (inc. home worth €180,000)	Scenario Two: Estate valued at €200,000 (inc. home worth €180,000)
Section 111 (1/3 estate)	€150,426 (83.57% of home)	€66,666 (37.03% of home)
Preferential share (€180,000)	€180,000 (100% of home)	€180,000 (100% of home)

By contrast, Table 3 demonstrates that the effect of the proposal is minimal, where the home is of average value and is held by both spouses as joint tenants.¹⁰⁹ Owing to the lack of provision resulting from the application of the preferential share, in such circumstances,

¹⁰⁹ As the family home passes to the surviving spouse due to the right of survivorship, it does not constitute part of the deceased's estate. Thus, the figures are adjusted to reflect the actual value of the estate without the family home. However, the value of the home is relevant for the purposes of the proposals made based on the preferential share, owing to the inclusion of set-off.

Table 3 Comparative application of current law and proposal: Joint tenancy I

	Scenario One: Estate valued at €271,280 (excl. family home worth €180,000)	Scenario Two: Estate valued at €20,000 (excl. family home worth €180,000)
Section 111 (1/3 estate)	Home + €90,426	Home + €6,666
Preferential share (€180,000)	Home	Home

and where the home is worth more than average, surviving spouses would instead be advised to avail themselves of the legal right share provided by section 111 of the Succession Act 1965, which would ensure much greater provision.

However, the introduction of a preferential share could still be relevant in a joint tenancy where the family home is worth less than €180,000. In such circumstances, this proposal once again gains importance, and may protect a surviving joint tenant better than the current legal right share. By adjusting the case study once more, this effect can be clearly seen in Table 4 (where the family home is held in a joint tenancy and is worth €160,000, and the deceased spouse also possesses savings worth €20,000). While the focus of the protection afforded by the preferential share is undoubtedly directed towards surviving, non-owning spouses, it is submitted that the extension of the proposal to situations where a joint tenancy arises is a pragmatic one, as evidenced in this application. The possible anomaly is avoided where, in such a scenario, a surviving, non-owning spouse would receive both the home and the €20,000 savings, while a surviving joint tenant would be limited to receiving the family home under the right of survivorship and the legal right share of approximately €7,000.

Table 4 Comparative application of current law and proposal: Joint tenancy II

	Estate valued at €20,000 (excl. family home worth €160,000)
Section 111 (1/3 estate)	Home + €6,666
Preferential share (€180,000)	Home + €20,000

Illustrating the comparative effects of the proposal for a surviving tenant in common is more difficult as the share of the home held under a tenancy in common can vary considerably. However, at both ends of the spectrum of a tenancy in common, links can be drawn with the impact of the proposals on non-owning spouses and spouses gaining an interest under a joint tenancy, respectively. To this end, it is

Table 5 Comparative application of current law and proposal: Tenancy in common I

	Scenario One: Estate valued at €361,280 (excl. 50% interest in family home worth €90,000)	Scenario Two: Estate valued at €110,000 (excl. 50% interest in family home worth €90,000)
Section 111 (1/3 estate)	50% of home + €120,426 (100% of home + €30,426)	50% of home + €36,666 (70.37% of home)
Preferential share (€180,000)	50% of home + €90,000 (100% of home)	50% of home + €90,000 (100% of home)

clear that where a small share in the home is held by the surviving tenant in common, the situation arising under these proposals would be akin to that of sole ownership as the preferential share would merely be reduced by the limited interest held in the home. On the other hand, where a large share of the home, perhaps approaching full ownership, is held by the surviving co-owner, the outcome would more closely resemble a joint tenancy and the benefit, if any, presented by the proposal would be limited to situations where the home was worth less than the preferential share. However, in order to understand the impact of the proposal on a tenancy in common where the ownership is equally divided, it is useful to consider Table 5. It is clear that while in the larger estate in scenario one it would be more beneficial to a surviving tenant in common to avail themselves of the one-third share currently afforded by section 111 of the Succession Act 1965, the merits of this proposal, once again, come to the fore in the smaller estate in scenario two, where the preferential share affords vastly more protection to the surviving tenant in common than does the legal right share.

Finally, as in a joint tenancy, the advantages of the current proposal where the home is worth less than average are equally relevant with regard to a tenancy in common. This is demonstrated in Table 6. A similar anomaly whereby a surviving spouse with no interest in the family home would be in a more advantageous situation than a co-owning, surviving spouse who was a tenant in common is avoided by extending the preferential share to situations where the family home is co-owned.

Table 6 Comparative application of current law and proposal: Tenancy in common II

	Estate valued at €100,000 (excl. 50% interest in family home worth €80,000)
Section 111 (1/3 estate)	50% of home + €33,333 (70.83% of home)
Preferential share (€180,000)	50% of home + €100,000 (100% of home + €20,000)

It is submitted that where the means of the testator are limited to less than €180,000 when the family home is included, it is not excessive to ring-fence such a figure for the financial protection of the surviving spouse, whether the home is in the sole ownership of the deceased or is co-owned either through a joint tenancy or a tenancy in common.¹¹⁰

IX. Conclusion

There is a phrase in Irish '*Tús maith, leath na h-oibre*', or 'A good start is half the work'. The provisions of the Succession Act 1965 conferring fixed rights on the surviving spouse certainly represent a 'good start'. The Oireachtas succeeded in providing a solid framework of protection for the surviving spouse and the family home with the legal right share and the right to appropriation. These protections should not be underestimated and the legislature should be lauded for its courage in enacting such a regime in the face of the then widespread application of discretionary provision on testacy. The dual effect of these rights is far superior to the protection provided in many other common law jurisdictions on death, including England and Wales, and represents a key attribute of Irish matrimonial property law.

Nevertheless, despite the clear strengths of the Succession Act 1965, this paper has demonstrated a key weakness in the adoption of a fractional share as a protection against disinheritance under section 111 of the Act. Consequently, while there is a high degree of familiarity with the current legislative provisions which will weigh in favour of retaining the status quo, it is concluded that the implementation of a preferential share to protect surviving spouses from disinheritance, as an alternative to the legal right share, should be seriously considered. While it is accepted that an alteration of the law to provide for a preferential share from a testate estate could be viewed in some quarters as an infraction too far on testamentary freedom, it is none the less argued that this proposal would not present any greater interference in the testamentary autonomy of the testator than does the law as it currently stands in the majority of cases. Neither, it is concluded, would it be repugnant to the core features of the current regime against disinheritance under Irish law or introduce radically different principles. What this novel approach would do, however, is to further develop and restructure the important fixed rights already afforded by the Succession Act 1965. Providing some of the most vulnerable members of society—specifically, surviving, non-owning spouses—with the right to a fixed monetary sum, irrespective of the size of the estate, would radically enhance their protection against disinheritance and place them in a much stronger position vis-à-vis the family home on death.

110 See above n. 96.

While the commitment to testamentary freedom was seriously challenged in 1965 with the introduction of the legal right share, now, nearly 50 years later, very few would argue that the measure should be rowed back on. Instead, it is submitted, improvements could be made. As the need to provide protection for a surviving spouse is the principal driving force behind the provision of the legal right share, where this does not fulfil the objective, namely in modest estates, re-evaluation of the *modus operandi* needs to take place. To this end, reform on the basis of a preferential share must be afforded serious consideration in Ireland.

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