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Ireland lagging behind in the protection of surviving spouses on intestacy

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Title: Ireland lagging behind in the protection of surviving spouses on intestacy

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December 22nd marks the 50th anniversary of the enactment of the Succession Act 1965 – the primary legislation governing inheritance in Ireland. When introduced, the 1965 Act was said to have brought about a ‘revolutionary change’ to Irish succession law. Key provisions of the Act sought to protect surviving spouses against disinheritance and introduced a new scheme for the distribution of an intestate estate. However, although these provisions have received little attention from Irish law reformers to date, it is increasingly clear that Ireland lags well behind other jurisdictions in its protection of surviving spouses, especially in cases of intestacy.

Pursuant to the Succession Act, where an intestate dies leaving a spouse and no descendants such as children or grandchildren, the surviving spouse is entitled to the entire estate. By contrast, where an intestate dies leaving a spouse and descendants, the spouse takes two-thirds of the estate. However, a key difficulty in the adoption of a fractional share approach such as that applied is the fact that the extent of the share to which a surviving spouse is entitled depends on the overall value of the deceased's estate. Where the estate is modest, a situation where the need for protection is most acute, this presents a potentially serious problem for surviving spouses. In short: the smaller the estate, the smaller their share. To exacerbate the problem, research has shown it is precisely in these lower value estates that intestacy is most likely to arise. Admittedly, in limited circumstances, the Succession Act allows surviving spouses to apply for extra provision from an intestate estate at the discretion of the court. However, this provision is only available to secure the ownership of the family home for the surviving spouse where a) the spouse's share on intestacy is worth less than the value of the property and b) it is deemed that requiring them to pay the difference of value into the estate would give rise to hardship. In certain types of co-ownership or where there is no family home, the legislation makes no provision for augmenting a surviving spouse's share on intestacy, irrespective of their level of need.

By contrast, much greater financial protection is afforded to surviving spouses in modest estates across the Irish Sea. In England and Wales, surviving spouses are entitled to the first £250,000 of an intestate estate where the deceased is also survived by descendants. The Law Commission for England and Wales estimate 90% of intestate estates are worth less than this threshold. Consequently, in the vast majority of cases the surviving spouse takes all. Moreover, where the value of the estate exceeds £250,000, the surviving spouse is entitled to one half of the remainder and may even apply to increase their overall entitlement further at the discretion of the court where the distribution on intestacy does not make ‘reasonable financial provision’ for them.

In light of emerging demographic shifts and, in particular, increased life expectancy, the Scottish Law Commission (2009), the New South Wales Law Reform Commission in Australia (2007) and the British Columbia Law Institute in Canada (2006) have also recently placed their intestacy regimes under the microscope. The common denominator which emerged from each of these reviews was the overwhelming desire to ensure as much as possible the financial security of surviving spouses on intestacy, with the legislatures in each jurisdiction undertaking important reforms to achieve this end.

From an Irish perspective, the need to reconsider our own approach to provision on intestacy seems obvious. Despite popular belief, the rate of intestacy in Ireland remains quite high. On the introduction of the Succession Bill in 1964, the then Minister for Justice Brian Lenihan estimated that half of all deaths resulted in intestacies. Although this figure has fallen over the years, almost 3,300 intestate estates were recorded by the Courts Service of Ireland in 2014. These statistics suggest that between 20-25% of all estates on death are intestate. However, the Courts Service figures are based on the grants of representation issued for intestate estates. Such grants may not be required in certain circumstances, for example, where a person dies leaving only a small deposit in a bank or building society. Thus, it is likely that the true rate of intestacy is even higher.

And the trend appears likely to continue. Despite annual campaigns to raise public awareness of the benefits of making a will, many people fail to do so. Last month, to coincide with Best Will Week 2015, MyLegacy.ie reported the findings of research conducted with 1,000 participants. It found that only three in every ten Irish adults have drafted a will. These findings tally with previous research conducted in 2012 where only 51% of those in the 45-64 age group were reported as having drafted a will with almost one in five respondents over the age of 65 not having done so. Indeed, even where a will is made, it may be found invalid for a number of different reasons.

In this context, it appears clear that intestacy will remain an important feature of Irish inheritance law for some time to come. As we mark the 50th anniversary of the enactment of the Succession Act, we need to seriously consider how to reform the law in this area and best support vulnerable surviving spouses in Ireland.