

LAW SOCIETY SUBMISSION



RESPONSE TO THE LAW REFORM COMMISSION ISSUES PAPER ON SECTION 117 APPLICATIONS UNDER THE SUCCESSION ACT 1965

LAW REFORM COMMISSION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

- 1.1 The Law Society of Ireland welcomes the Law Reform Commission's examination of Section 117 applications. The following commentary is based on the experience of Society's Probate, Administration and Trusts Committee members.
- 1.2 By way of summary of Section 117; the provision provides that a child, including an adult child, of a deceased parent who has made a will may apply to Court for a declaration that the parent failed in his or her "moral duty" to make proper provision for the child in accordance with the parent's means during the parent's lifetime whether in the parent's will or otherwise. If the Court agrees that the parent failed to comply with the duty to make proper provision for the child, it may make an Order that such provision as is considered just be made for the child out of the deceased parent's Estate. Section 117 and its application in practice should reflect changed social and legal circumstances and the Society has taken this into consideration in the context of any reform of the Section.
- 1.3 The Issues Paper seeks views on the following proposals :-
 - a) Whether Section 117 of the Succession Act 1965 should be repealed, retained as it is or amended. If it is to be retained but amended whether to prescribe the matters to which the Court should have regard in deciding whether to make an Order under the Section.
 - b) Whether Section 117 should be extended to permit applications by children of parents who have died intestate.
 - c) Whether the six month time limit for applications under Section 117 should be increased and/or whether the Courts should have a discretion to extend it.
 - d) Whether the date from which the time limit in Section 117 begins requires clarification or reform.
 - e) Whether the personal representatives of the deceased parent should be under a duty to inform children of their entitlement to make an application under Section 117.

2. Costs

2.1 While not provided for within the current Law Reform consultation, the Society wishes to take the opportunity to emphasize its concerns about the significant cost issues associated with Section 117 applications.

2.2 Almost invariably, when deciding applications, Courts will opt not to penalise an applicant in terms of costs. This is the case even where the application is found to be without merit - unless it is clear to the Court that the application is frivolous or vexatious. This reflects the Court's views, as expressed by Budd J. in *Vella v Morelli* [1968] I.R. 11, that the fear of the burden of an award for costs should not be a deterrent to an application.

2.3 In general terms there is an expectation that an applicant who makes a Section 117 application has "nothing to lose" as, whatever the outcome, the Court will direct that costs are paid out of the Estate.

2.4 The Society recommends the following to ease the difficulties caused by the obligation on an Estate to pay an applicant's costs:-

- That the decision in *Elliot v Stamp* [2008 IESC 10] is put on a statutory footing in terms of its implications for costs. In that case the Court found that, once an executor fully and fairly sets out the available evidence pertaining to the issues in the case (in that case, testamentary capacity), a plaintiff who elects nonetheless to maintain the claim thereafter but who loses the case may not recover the costs from the Estate unless they were justified in continuing the proceedings after the disclosure has been made.
- That a duty to disclose all facts and documents on the service of the proceedings is imposed on all parties and that the rules of the Superior and Circuit Courts prescribe full disclosure of all matters as between the parties.
- Increased use of case management of Section 117 applications to ensure that costs imposed are minimized with respect to motions and other matters.
- An amendment of the Circuit and Superior Court Rules to facilitate a lodgment of funds into Court by a Personal Representative of an Estate to meet a claim.
- Provision for the Court to direct mediation in prescribed circumstances.

3. Response to the Issues Paper's proposals

3.1 *Whether Section 117 of the Succession Act 1965 should be repealed, retained as it is or amended; and if it is to be retained but amended whether to prescribe the matters to which the Court should have regard in deciding whether to make an Order under the Section.*

3.1.1 Section 117 should be retained but in amended form.

3.1.2 The Society recommends that consideration be given to removing the term "moral duty" and that an onus be placed on any applicant to prove that his/her circumstances give rise to significant need/hardship, and that it is this need/hardship - not the failure of the parent's moral duty - which gives rise to the entitlement to succeed in any application.

3.1.3 Today, unlike in 1965, in general, children in Ireland are educated to secondary level, and the majority to third level; thus providing them with opportunities for employment and to pursue careers either in Ireland or abroad. By comparison to 1965, Ireland has become a more open and international centre; broadening the scope of opportunity. Accordingly, it is not reasonable that a parent would be said to have any further "moral duty" to an adult child.

3.2 *Whether Section 117 should be extended to permit applications by children of parents who have died intestate.*

3.2.1 Section 117 should not be extended as proposed in this manner and the Succession Act 1965 provides a prescribed share for children of parents who have died intestate which is fair and reasonable.

3.2.2 Section 67A(3) provides Section 117-type protection for a finite group of children - those of existing civil partners who die intestate. The Society does not consider it is necessary or practical to amend the Section to provide similar protection beyond that small and dwindling class of persons.

3.2.3 Section 63 provides a statutory footing for the doctrine of advancement. The doctrine applies where children of the deceased share the Estate of the deceased and an advancement, as defined in the section, was made by the deceased person to his/her child during the deceased's lifetime. This advancement shall, subject to a contrary intention expressed or appearing from the circumstances of the case, be taken as being made in or towards the satisfaction of the share of such child in the Estate of the deceased. The effect of this is that the shares are calculated as if the advancement were added back in to the portion of the Estate to be shared between children and then deducted from the share of the child who received the advancement. Section 63 applies to shares on intestacy as well as to shares under a will. The doctrine is designed to achieve fairness between one child and another. It is an existing provision which is available to a child who considers themselves unfairly treated in terms of an intestate distribution.

3.3 *Whether the six month time limit for applications under Section 117 should be increased and/or whether the Courts should have discretion to extend.*

3.3.1 The law in this matter requires certainty. The Society does not consider that an extension is required or advisable.

3.3.2 The six month time limit runs from the date of the issue of the Grant. Additional time is required to prepare the application for probate and there are inbuilt administrative delays in the system. Currently a Grant of Probate will issue 16 – 20 weeks after the lodgment of the application in the Principal Probate Registry. When these additional periods are taken into account, the Society considers that the six months provided allows more than sufficient time to any applicant.

3.3.3 It is the Society's view that Courts should not have any discretion to extend the time. It considers this will give rise to unnecessary uncertainty and delay and will undermine the established principle of the Executor's duty to administer an Estate within one year of death of the deceased.

3.4 *Whether the date from which the time limit in Section 117 begins requires clarification or reform.*

3.4.1 In the light of the *Finn*¹ case, the law should be clarified so that the time limit provided should run from the date of the principal Grant rather than from a limited Grant.

3.4.2 Clarification of the law is also required as to whether the term "principal grant" in this context applies only to Irish grants or is extended or deemed to include a grant extracted outside the jurisdiction. It is noted that foreign grants were not dealt with by Ms. Justice Laffoy in the Finn case.

3.5 *Whether the personal representative of the deceased parent should be under a duty to inform children of their entitlement to make an application under Section 117.*

3.5.1 The Society does not agree with this proposal.

3.5.2 While mindful of the duty of the legal personal representative (LPR) to defend the deceased's will and to protect the Estate, the proposed reform would give rise to the imposition of untenable and undue burdens on the LPR and possibly, an expectation or sense of entitlement on the part of children of a deceased as to any share in a parent's Estate.

3.5.3 When considering the position of minor children or those suffering from a disability it is reasonable to expect that persons in this position can be properly represented by their guardians or trustees or those in *loco parentis* in terms of asserting the entitlements contained in the Act.

¹ In the Matter of the Estate of F. Deceased (High Court) Laffoy J., 23 August 2013)

- 3.5.4 The Society notes with concern the small instance of Section 117 applications taken on the part of children who suffer from disabilities. The policy rationale which gave rise to Section 117 in the 1965 Act included the perceived need to spare the State the “burden” of providing for the deceased’s children. If a child who is suffering from a disability and is afforded State benefits (disability allowances, free travel, medical card etc) were to take a Section 117 application, any benefit accruing from a successful application would likely disqualify that person from ongoing social welfare benefits.
- 3.5.5 Probate practitioners report a trend amongst potential Section 117 applicants, where the comfort and security of ongoing State benefits is considered preferable to looking to the Estate to pay its proper and fair share to children suffering from a disability. The fact that this works for the benefit of remaining siblings will be a factor in any decision made by the trustees/guardians of the child with a disability who may be surviving siblings themselves.
- 3.5.6 Courts should be given powers to make an award out of a deceased’s Estate into a form of Protective Trust for a minor child or an adult child with a disability. The Protective Trust would provide the Court with an alternative vehicle to Wardship, and without the associated administrative overheads and requirements which can prove onerous and costly for those concerned.

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