

QUESTION 1

- **1(a) Do you think that section 117(1) of the Succession Act 1965, which provides that the testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means, should be repealed, retained as it is or amended?**

Retained and amended. The Social Context of the Succession Act, 1965 (“1965 Act”) was that of the traditional family based on marriage. For a range of social reasons (including but not limited to the increase in marital breakdowns, cohabitation, multiple relationships) there is now more than ever a greater probability that a child will not be reared by his or her parent which may lessen a parents’ role and involvement in that child’s life. As a result, a parent may have limited knowledge/ awareness of their child’s circumstances or indeed not be mindful of their child’s circumstances at their date of death increasing the odds that a parent will have failed to discharge their moral obligation to that child.

- **1(b) If the answer to 1(a) is that section 117(1) should be retained but amended, do you think that section 117(1) should include the matters to which the court should have regard in deciding whether to grant an order under it? If so, please indicate what factors should be set out.**

The criteria are well established by the Courts and should not be included in Section 117. There should be flexibility to provide for the Court’s discretion in these cases.

- **1(c) If the answer to 1(a) is that section 117(1) should be retained but amended, do you think that the test that the testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means should be applied as of the date of the making of the will, the date of death or the date of the court hearing?**

The date of death should be the relevant date to apply the test that the testator has failed in his or her moral duty to make proper provision for the child. The Court should be given discretion to look at the administration costs. The financial test for the Plaintiff should be the date of hearing.

- **1(d) Do you think that the matters to be considered in the making of orders under section 117 of the Succession Act 1965 should be different from, or similar to, those set out in section 16 of the Family Law Act 1995 and section 20 of the Family Law (Divorce) Act 1996?**

The administration of estates in practice and the jurisdiction arising under the Succession Act 1965 in general and Section 117 thereof in particular, are discrete and, to an extent, *sui generis*. While there is overlap with the considerations that apply in family law proceedings, they are not identical and the Court should be empowered to consider Section 117 applications not only inasmuch as they touch upon family relations but also as they affect the wider considerations that apply in the administration of estates.

- **1(e) Do you think that section 117 of the 1965 Act should be consolidated with the family provision sections in the 1995 and 1996 Acts into a single set of statutory rules on family provision?**

No. Please see reply to question 1(d) above.

- **1(f) Do you have any other general comments on section 117 of the 1965 Act, including whether account should be taken of the effect of current or future demographic changes?**

The Court's discretion should continue to be used in these matters as they are better placed to decide on a case by case basis. Without a definition of what current or future demographic changes are contemplated in the question, it is not possible to frame a response.

QUESTION 2

- **2(a) Do you think that it would be appropriate to extend section 117 of the Succession Act 1965 to claims by children of parents who die intestate?**
- **2(b) If the answer to 2(a) is “No”, do you think that an alternative procedure is required to deal with claims by children in the case of intestacy?**

QUESTION 3

- **3(a) Do you think that the 6-month limitation period for applications under section 117 of the Succession Act 1965 should be amended?**

The limitation period should be amended to allow for an extension of time in exceptional circumstances in the case of minors and persons under a disability only. However, absent some misconduct on the part of the executor and/or a solicitor assisting in the administration of an estate, provision should be made to indemnify or otherwise protect from personal liability any legal personal representative and/or solicitor who distributes an estate without regard to a potential Section 117 claim.

- **3(b) If so, what do you think is an appropriate limitation period, having regard to whether the period commences on the date of death or the date of grant of representation?**

Please see reply to 3(a) above.

- **3(c) Do you think that the time limit should be different in cases where the applicant is a child; or a person whose decision-making capacity is in question, within the meaning of the Assisted Decision-Making (Capacity) Act 2015?**

Please see reply to 3(a) above.

- **3(d) Do you think that the courts should be given a discretion to extend the time limit?**

Please see reply to 3(a) above.

- **3(e) If the answer to 3(d) is “yes”: (i) do you think that the discretion should be exercised on identified grounds and, if so, (ii) what factors should be taken into account in exercising the discretion?**

The Court should be given full jurisdiction here to decide matters on a case by case basis and the identified grounds should not be specified.

- **3(f) If the answer to 3(d) is “yes”: (i) where the court orders an extension, do you think that it should have power, where appropriate, to disturb distributions already made? (ii) in exercising this power, do you think that the court should take into account whether the person receiving a benefit, or the personal representatives, had knowledge constructive or actual of a possible claim?**

Please see reply to 3(a) above.

QUESTION 4

- **4(a) Do you think that section 117 of the Succession Act 1965 should be amended to clarify the date on which the limitation period for applications under it commences?**

Yes, inasmuch as there is ambiguity as to whether time may run from the date of a limited grant. Time should be understood to run only from the date of a full grant of representation or a limited grant which issues for the purpose of initiating the section 117 proceedings.

- **4(b) If so, when do you think the limitation period should begin: (i) on the date of death or (ii) on the date of first taking out of representation of the deceased’s estate?**

Please see reply 4(a) above.

- **4(c) If the limitation period begins to run on the date of first taking out of representation of the deceased’s estate, what grants, if any, do you think should be disregarded?**

Please see reply 4(a) above.

QUESTION 5

- **5(a) Do you think that a duty should be imposed on personal representatives in the estate of a deceased person to notify potential claimants of their right to make an application under section 117 of the Succession Act 1965?**

No. It would place a very high onus on personal representatives to establish and identify all potential claimants, which isn’t always that easy and the Law Reform Commission refers to the case of *Rojack v Taylor* in which they cited with approval the comments of Spierin who noted that it would be imprudent for the personal representative to encourage or instigate proceedings under Section 117.

However, should a notice be received by a personal representative that a child is potentially going to make a claim under Section 117, we suggest that receipt of such a notice should oblige the personal representative to give notice back as to the date of issuance of the grant within a reasonable period of the grant being received by the personal representative or the filing solicitor. This would prevent the unnecessary use of caveats by a potential claimant in seeking to ascertain whether papers have been lodged and ensure the potential claimant is aware of the date the time limit starts in connection with the making of the claim.

- **5(b) If the answer to 5(a) is “Yes”, who do you think should be notified where potential claimants are under the age of 18, or potential claimants whose capacity may be in question (within the meaning of the Assisted Decision-Making (Capacity) Act 2015)?**

Not applicable.

- **5(c) If the answer to 5(a) is “No”, do you think that an obligation should be imposed on personal representatives to make a reasonable attempt to ensure that notice of the death is brought to the attention of potential applicants?**

No. Please see comments in reply to 5(a) above.

**John Gill
Chairman
STEP Ireland
29th June 2016**