



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

PREVENTION OF BENEFIT FROM HOMICIDE

[LRC 114 - 2015]



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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 190 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Fourth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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Rasmanis v Jurewitsch	(1979) 70 SR (NSW) 407	Aus
In re S (decd)	[1996] 1 WLR 235	Eng
Re DWS (decd)	[2001] Ch 568	Eng
Schobelt v Barber	(1966) 60 DLR (2d) 519	Can
Straede v Eastwood	[2003] NSWSC 280	Aus
Re Thorp & the Real Property Act 1900	[1962] NSWLR 889	Aus
Troja v Troja	(1994) 33 NSWLR 269	Aus

SUMMARY

A Introduction to project

1. This Report forms part of the Commission's *Fourth Programme of Law Reform*, which contains a project to examine a number of discrete areas of succession law.¹ This includes² a review of section 120 of the *Succession Act 1965*, which provides that a person who is guilty of the murder, attempted murder or manslaughter of another person, such as his or her spouse, is prohibited from taking any share in the estate of that other person.³
2. The scope and application of the rule in section 120 has given rise to difficulties in practice, including in the decision of the High Court (Laffoy J) in *Cawley v Lillis*,⁴ which concerned property held in a joint tenancy. Because property held in a joint tenancy does not form part of the estate of a deceased person, including a homicide victim, the rule in section 120 does not apply in such a case. In *Cawley*, Laffoy J therefore applied general principles in determining the outcome of the case, and added that this area of the law should be reviewed.

B General principles that person should not benefit from wrongdoing and that no cause of action should arise from own wrongdoing, in particular homicide

3. The rule in section 120 of the 1965 Act derives from two public policy principles, that a person should not benefit from his or her wrongdoing, especially an act of homicide, and that no cause of action should arise from one's own wrongful act.
4. In this Report the Commission addresses the application to joint tenancies of the general public policy principles, but also recommends that wider legislative reform is required. This is to ensure that the principles are applied not only in the context of succession and inheritance but also to prevent an offender benefitting in any other context, whether under a joint tenancy or, for example, a life insurance policy or a pension. The Report also discusses related procedural matters including the costs associated with such cases. The draft Bill appended to the Report is intended to implement the Commission's recommendations.

¹ *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 7.

² Another area coming within the scope of Project 7 is the operation of section 117 of the *Succession Act 1965*. Section 117 of the 1965 Act allows a child to seek a share of his or her deceased parent's estate if it can be established that the parent did not make "proper provision" for the child in accordance with his or her means, whether by will or otherwise. The Commission intends to complete that aspect of Project 7 separately.

³ See generally Brady *Succession Law in Ireland* 2nd ed (Butterworths 1995), paragraph 6.36ff and 7.80ff; Spierin *The Succession Act 1965 and Related Legislation: A Commentary* 4th ed (Bloomsbury 2011), and Wylie *Irish Land Law* 5th ed (Bloomsbury 2013), paragraph 16.34.

⁴ [2011] IEHC 515, [2012] 1 IR 281, discussed in detail in Chapter 2, below.

5. The rule found in section 120 of the 1965 Act is variously described as a “forfeiture rule” (in the United Kingdom and many other common law jurisdictions), or a “slayer rule” (in the United States) or as a rule on “unworthiness to succeed” (in section 120 of the 1965 Act, and the civil law jurisdictions from which section 120 was derived).
6. The term “forfeiture rule” is likely to be confused with the feudal doctrines of forfeiture under which the land and other property of a person convicted of a felony was forfeited to the State (the Crown). These feudal doctrines were abolished in the 19th century, and the rule discussed in this Report was developed to fill the gap that emerged as a result, which explains why it is often referred to as a “forfeiture rule.” In this Report the Commission has avoided as far as possible the term “forfeiture rule” in order to prevent any confusion with the feudal doctrines.
7. As to the term “unworthiness to succeed” this is clearly appropriate in the inheritance-related context of the *Succession Act 1965*. In preparing this Report, however, the Commission concluded that it was necessary to consider the application of the public policy principles outside the specific context of the law of succession to which section 120 of the 1965 Act is necessarily confined.
8. This wider setting is important in the first place because in *Cawley v Lillis*,⁵ section 120 did not apply since no issue of succession or inheritance arose because the case concerned a joint tenancy. In addition, in other cases that have arisen in this area, section 120 similarly does not apply because they have concerned property that did not form part of the estate of the deceased, including property interests that have arisen from life insurance policies or pensions.
9. For these reasons, this Report makes recommendations for reform that apply to the succession and inheritance setting currently dealt with in section 120 of the 1965 Act, but which also extend the public policy principles to all property interests of victims of murder, attempted murder or manslaughter. For that reason, the title of this Report refers to the principle that a person should not benefit from committing homicide. Similarly, while the application of the two principles often arises after a person has been convicted, this is not always the position, as the cases discussed in Chapter 4 illustrate. As a result, the Commission has concluded that its recommendations, which concern civil liability rather than criminal liability, would most suitably be located in the *Civil Liability Act 1961*, and this is provided for in the draft *Civil Liability (Amendment) (Prevention of Benefit from Homicide) Bill* appended to the Report.
10. In November 2014, the Commission published an Issues Paper on this project and received a significant number of submissions from interested parties. The Commission engaged in further consultation with a range of parties, and also took account of the reform proposals concerning joint tenancies contained in the *Succession (Amendment) Bill 2015*, which was debated in Seanad Éireann in March 2015.
11. The general purposes of the public policy principles are clear: a person who commits murder or manslaughter should not benefit or profit from that, or be

⁵ [2011] IEHC 515, [2012] 1 IR 281.

allowed to bring civil proceedings arising from his or her wrongful act. But the decision in *Cawley v Lillis* illustrates that the application of the principles in specific contexts, in that case a joint tenancy, has proved problematic. The Commission's review of the principles, as they operate in this jurisdiction and in others, has confirmed that the difficulties are not limited to the case of joint tenancies.

12. The Report has therefore considered the following:
- the development of the public policy principles that a person should not benefit from his or her wrongdoing, in particular where this involves committing homicide, and should not be allowed to bring civil proceedings arising from such wrongdoing;
 - the application of the principles to joint tenancies, the specific issue that arose in *Cawley v Lillis*;
 - the application of the principles to all types of property, including life insurance and pensions;
 - whether the application of the principles should be limited to murder, attempted murder and manslaughter;
 - whether the application of the principles should be mandatory, as is the case under section 120 of the 1965 Act, or subject to a discretion to modify or disapply them in some manslaughter cases;
 - the civil nature of proceedings involving the principles, including the fact that neither a prosecution nor conviction is required for them to apply; and
 - procedural matters, including the awarding of costs, and related issues in probate proceedings.

C Development of the public policy principles and the rule in section 120 of the *Succession Act 1965*

13. In **Chapter 1**, the Commission considers the application of the public policy principles that underlie this area, namely that a person should not benefit from his or her wrongdoing, in particular where this involves committing homicide, and should not be allowed to bring civil proceedings arising from such wrongdoing. These principles have led to specific legal rules, including that a contract involving illegality is not, in general, enforceable. They have also led to the enactment of legislation providing for the confiscation of proceeds of crime, whether following conviction under the *Criminal Justice Act 1994* or without the need for a conviction under the *Proceeds of Crime Act 1996*.
14. In the context of this Report, those principles were also applied in case law from the late 19th century onwards to prevent a person who has committed murder or manslaughter from claiming any benefit under, for example, a life insurance policy or in jointly held property, or from inheriting from the victim. While this rule, derived from the public policy principles, emerged initially in case law, since then a number of jurisdictions have placed it, in whole or in part, on a statutory basis.
15. The Commission also outlines the content of section 120 of the *Succession Act 1965*, noting that while it codified some elements of the public policy principles from which it derived it is also limited in scope, as the decision in *Cawley v Lillis*

illustrated. These limitations indicate the need to consider the application of the public policy principles outside the succession and inheritance setting, and the Commission proceeded on that basis in this Report.

D The public policy principles and property held in joint tenancy

16. In **Chapter 2**, the Commission considers the application of the public policy principles to property held in joint tenancy, which arose in *Cawley v Lillis*. Where there are two joint tenants only and one of them dies, under the current law the entire interest in the property automatically passes to the surviving joint owner who becomes full owner. The legal interest held in a joint tenancy does not become part of the deceased joint owner's estate because full ownership automatically vests in the other co-owner. This legal consequence is called the right of survivorship.
17. The Report recommends that legislation should be enacted to provide that an offender who commits murder, attempted murder or manslaughter should be precluded from obtaining the benefit of the right of survivorship; that the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender should be deemed severed from the date when such an offence was committed; that pending any court case, the legal title in the property is to be held in trust and subject to the respective beneficial interests of the victim and the offender; and that it is to be presumed (subject to the recommendations set out below) that the victim holds at least half of the interest in the property.
18. The Commission also recommends that the presumption that, after severance, the victim holds at least half of the property should be subject to rebuttal so that the amount and value held by the offender is to be determined to be at such level as the court considers just and equitable, having regard to the fact that the right of survivorship was accelerated by the homicide and to all other relevant circumstances.
19. Among the relevant circumstances to which the court is to have regard are: (a) the contributions, direct or indirect, made by the offender and the victim to the jointly held property, including whether their respective contributions were equal or not; (b) the contributions, direct or indirect, made by either of them to the welfare of their family; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; and (d) the age and financial needs, obligations and responsibilities of the offender.
20. Other relevant circumstances which the Report recommends that the court should consider are: (e) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (f) that the homicide resulted in a payment under a life insurance policy, whether this involves the discharge of an outstanding mortgage debt or the payment of any other sum under the policy; (g) any civil liability on the part of the offender arising from the homicide, including but not limited to liability under sections 48 and 49 of the *Civil Liability Act 1961* (which concern civil fatal accident claims); (h) the nature of the offender's conduct related to the offence, including whether the offender's act constituted murder or attempted murder (which would be intentional or reckless) or whether it constituted manslaughter (which could arise from excessive use of force in self-defence or from the defence of provocation); (i) where relevant, the presence of diminished responsibility,

which is a defence under the *Criminal Law (Insanity) Act 2006*; (j) whether there was a motive or intention to cause death; and (k) any other matters which may appear to the court to be relevant.

21. Where there are more than two joint tenants, the Commission recommends that the joint tenancy should continue between any remaining innocent joint tenants who would take the deceased person's interest under the survivorship rule, but that the offender's interest would be severed. The offender's remaining interest would also be subject to the judicial discretion to determine the value or amount of that interest in accordance with the circumstances set out above.

E Scope of public policy principles and their modification or disapplication

22. In **Chapter 3**, the Commission considers the general scope of the public policy principles and the extent to which they may be modified or disappplied.
23. The Report recommends that the application of the principles should be confirmed in legislation to extend to all forms of property interest, so that an offender should not be entitled to any interest in any property or interest of the deceased victim. This includes any interest of the deceased under a trust, an insurance policy or a pension.
24. The principles should continue to apply to murder, attempted murder and manslaughter, but should not apply to any person who aids, abets, counsels or procures the commission of the offences.
25. The Commission also recommends that the current scope of the law is appropriate and should not be extended to other offences that lead to death, such as dangerous driving causing death.
26. The Report also recommends that the current law, which contains a "forgiveness clause" under which the victim of any of the three offences (this will usually involve cases of attempted murder) may make whatever provision he or she wishes in a later will should be retained subject to the general law concerning wills, including testamentary capacity.
27. The Commission also recommends that where the offender has committed manslaughter a court should be empowered to modify or disapply completely the rule that prevents the person from benefitting if the court is satisfied that this is required in the interests of justice.
28. In exercising this discretion to modify or disapply the rule, the court must have regard to all of the circumstances of the case, including: (a) where the offender and the victim were spouses of each other, or cohabitants, or had children or were *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (b) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; (d) the age and financial needs, obligations and responsibilities of the offender; (e) the nature of the offender's conduct related to the offence, that is, whether the offence was voluntary or involuntary

manslaughter; (f) the presence of diminished responsibility, where relevant; and (g) any other matters which may appear to the court to be relevant.

29. The Commission also recommends that section 120(4) of the 1965 Act, which contains a limited disinheritance rule where a person is convicted of any offence carrying a maximum penalty of at least two years imprisonment, should be repealed without replacement.

F Civil nature of the public policy principles and procedural issues, including costs

30. In **Chapter 4**, the Commission considers the civil nature of proceedings that involve the application of the public policy principles and some related procedural issues, including costs.
31. The Commission recommends that it should continue to be the case that the rule that prevents a person from benefitting from committing murder or manslaughter does not apply where a person has been found not guilty by reason of insanity in accordance with the *Criminal Law (Insanity) Act 2006*; and that it should also be expressly provided that the rule does not apply where a person has been found unfit to be tried under the 2006 Act.
32. Emphasising that any proceedings concerning the rule are civil in nature, the Commission recommends that such proceedings may be brought where: (a) there has been no criminal prosecution of the offender in the State in connection with any act constituting murder, attempted murder or manslaughter, including where this is because the act constituting the offence occurred outside the State, or (b) even where there has been such a prosecution, whether in the State or outside the State, the offender has been found not guilty (including after an appeal).
33. In addition, an interested person (such as next-of-kin of the victim or the executor of the victim's estate) may apply to have the offender precluded from taking any share in the property of the victim where the applicant establishes to the satisfaction of the court, on the balance of probabilities, that the offender's wrongful act caused (or, as the case may be, attempted to cause) the death of the victim; and that either the offender has been convicted of murder, attempted murder or manslaughter or, on the balance of probabilities, has unlawfully killed the victim (and any such order shall be expressed to be made solely to have effects as a matter of civil law only). A conviction of a person for the murder, attempted murder or manslaughter of another person is to be conclusive evidence that the person has committed the offence for the purposes of such civil proceedings.
34. The Commission also recommends that, in such proceedings, the court will, other than in exceptional circumstances, order that the costs of the proceedings are to be borne by the offender. This is because such proceedings only arise because of the wrongful act of the offender.
35. In connection with related probate proceedings, the Commission recommends that where a person has died in circumstances that give rise to a criminal investigation in respect of which a prosecution for murder or manslaughter is pending, an interested person may enter a caveat in the probate office concerning the estate of the deceased; and that, while that caveat is in force, there must be no transfer of any estate or interest affected by the caveat.

36. The Commission also recommends that a person who is convicted of murder or manslaughter should be presumed to be not entitled to extract a grant of probate or letters of administration intestate in the estate of the victim. This presumption should be rebuttable, in order to provide for those circumstances in which the court in its discretion orders that the rule should not be applied, as recommended above, in cases of manslaughter.
37. The **Appendix** contains a draft *Civil Liability (Amendment) (Prevention of Benefit from Homicide) Bill* to give effect to the recommendations made in the Report.

CHAPTER 1 THE PUBLIC POLICY PRINCIPLES: PERSON SHOULD NOT BENEFIT FROM OR BRING CIVIL PROCEEDINGS ARISING FROM ONE'S OWN WRONGDOING, ESPECIALLY HOMICIDE

A Development of public policy principles from late 19th Century

(1) General principles that person should not benefit from wrongful or unlawful conduct

1.01 Two well established and related legal principles, based on public policy, are relevant to this Report. These are that no person should be able to benefit from his or her wrongful conduct (*nullus commodum capere potest de injuria sua propria*) and that no cause of action should arise from one's own unlawful or dishonourable act (*ex turpi causa non oritur actio*).¹

1.02 These principles have led, for example, to the rule that a contract involving illegality is in general not legally enforceable.² They have also led to the enactment of legislation providing for the confiscation of proceeds of crime, whether following conviction, under the *Criminal Justice Act 1994*, or without the need for a conviction, under the *Proceeds of Crime Act 1996*.³ In *Murphy v GM*,⁴ the Supreme Court upheld the constitutionality of the 1996 Act on the basis that the confiscation provisions were supported by "considerations of public policy or the common good."⁵

(2) Specific rules derived from the principles arose after abolition of common law forfeiture doctrines

1.03 These public policy principles led to the emergence in the late 19th century of the rule that prevents a person who commits murder or manslaughter from claiming any benefit under a life insurance policy, and the related rule that

¹ In English law, *Coke on Littleton* (first published in 1628), §148b stated: "it is a maxim of the law that no man shall take advantage of his own wrong, *nullus commodum capere potest de injuria sua propria*." In *Riggs v Palmer* 115 NY 506 (1889), discussed below, the New York Court of Appeals noted that the related principle *ex turpi causa non oritur actio* ("from a dishonourable cause an action does not arise") could be traced to Roman law, citing the 17th century French jurist Domat's *Les Lois Civiles Dans Leur Ordre Naturel*, Part 2, Book 1, Title 1, §3. Domat's work influenced the content of the Napoleonic *Code Civile de Français* (1804), Article 727 of which sets out the rule prohibiting a person convicted of homicide from inheriting. As discussed in footnote 23 below, section 120 of the *Succession Act 1965* was derived from comparable provisions in the French, German and Swiss Civil Codes.

² See Clark *Contract Law in Ireland* 7th ed (Thomson Round Hall 2013), Chapter 14.

³ The 1994 and 1996 Acts are discussed in Chapter 2, below.

⁴ [2001] 4 IR 113.

⁵ [2001] 4 IR 113, at 153: see the discussion at paragraphs 2.39ff, below.

prevents such a person from inheriting anything from the person he or she killed.

- 1.04 Thus, in 1886, in *New York Mutual Life Insurance Co v Armstrong*,⁶ the US Supreme Court held that where a person took out a life insurance policy on another person's life, "he forfeited all rights under it when, to secure its immediate payment, he murdered the assured." Delivering the Court's decision Field J stated that "[i]t would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken."⁷
- 1.05 In 1889, in *Riggs v Palmer*,⁸ the New York Court of Appeals held that the defendant, who murdered his grandfather so that he could not cut the defendant from his will, was prevented from inheriting the legacy in his grandfather's will; and the Court expressly relied on the principle *ex turpi causa non oritur actio* in so deciding. The Court held that, while on a literal interpretation of the legislation on wills and inheritance in New York at that time a person convicted of homicide was not prohibited from inheriting, it would be contrary to general principles of law and public policy to allow a person to inherit in such a case and that the legislation should therefore be interpreted to give effect to the *ex turpi causa* principle.
- 1.06 In 1891, in *Cleaver v Mutual Reserve Fund Life Association*⁹ the English Court of Appeal took the same approach, holding that a woman who had been convicted of murdering her husband could not claim the proceeds of her husband's insurance policy. Echoing the words of Field J in the *New York Mutual Life Insurance Co* case, above, Fry LJ stated that: "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person."¹⁰ In *In re Glynn decd*¹¹ the Supreme Court noted that the rule in *Cleaver* case was based "on grounds of public policy."
- 1.07 The specific rules developed in the *New York Mutual Life*, *Riggs* and *Cleaver* cases, and the statutory provisions in section 120 of the 1965 Act and in the *Proceeds of Crime Act 1996*, would not have been necessary in the period before the second half of the 19th century. This is because until then there were general common law doctrines of forfeiture, in particular the doctrines of attainder and escheat,¹² which provided that the property of a convicted

⁶ 117 US 591 (1886).

⁷ *Ibid* at 600.

⁸ 115 NY 506 (1889).

⁹ [1892] 1 QB 147.

¹⁰ [1892] 1 QB 147, at 156.

¹¹ [1992] 1 IR 361. In this case, the Supreme Court held that it would be "utterly wrong" to allow a person who had murdered a co-beneficiary under a will (the victim was the testator's sister) to act as the administrator of the estate: see the discussion of the case at paragraph 4.71, below.

¹² Attainder derives from the Latin "*attincta*" meaning "stained" or "blackened," and involved the extinction of a person's civil rights (hence the description of "civil death") such as the right to own property after a conviction for treason or felony. Escheat derives from the Latin "*ex-cadere*"

murderer or any other felon was to be forfeited to the State (the Crown). During the 19th century these all-encompassing forfeiture doctrines, also commonly known as “civil death,” were abolished. Section 2 of the *Forfeiture Act 1870* abolished the doctrines in this jurisdiction.¹³

1.08 The specific rules that emerged in cases such as *Riggs v Palmer* and *Cleaver v Mutual Reserve Fund Life Association* were, therefore, a judicial response to fill the gap left by the abolition of the common law forfeiture doctrines and to use the public policy principles mentioned to replace them.

(3) Principles put on statutory footing, in whole or in part, in many jurisdictions

1.09 In common law jurisdictions, the application of the public policy principles initially occurred in case law which, by its nature, involved specific matters such as the dispute over life insurance in *New York Mutual Life Insurance Co v Armstrong*¹⁴ or the dispute over a legacy in a will in *Riggs v Palmer*.¹⁵ Because case law did not deal with the general application of the principles, and because some judges and courts had stated that this was a matter that required legislative intervention,¹⁶ a number of jurisdictions have placed the principles, in whole or in part, on a statutory basis.

meaning to “fall out,” in this case that the property fell out of the ownership of the next-of-kin where the person was convicted of a felony.

¹³ Although section 2 of the 1870 Act abolished escheat, sections 11(3) and 73 of the *Succession Act 1965* provide for the State taking the estate of a deceased person as “ultimate intestate successor” but only in default of any person taking the estate of a person who has died intestate. This complements the similar approach in the *State Property Act 1954* which applies to personal property, that is, property other than land.

¹⁴ 117 US 591 (1886).

¹⁵ In *Cawley v Lillis* [2011] IEHC 515, [2012] 1 IR 281, Laffoy J cited case law and texts from a number of common law jurisdictions on the application of the public policy principles. From England: *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 and *In re Estate of Crippen* [1911] P 108. From Australia: *Re Thorp & the Real Property Act 1900* [1962] NSW 889 and *Rasmanis v Jurewitsch* (1979) 70 SR (NSW) 407. From Canada, *Schobelt v Barber* (1966) 60 DLR (2d) 519. From New Zealand, *Re Pechar, decd* [1969] NZLR 574. From the United States, *Scott on Trusts* (Laffoy J citing the 1st ed, vol. 3, p.2383 and 2nd ed, para. 493.2; now published in 8 volumes as *Scott and Asher on Trusts* (Aspen Publishers)). In connection with the application of the principles in the United States, see also *New York Mutual Life Insurance Co v Armstrong* 117 US 591 (1886) and *Riggs v Palmer* 115 NY 506 (1889), above.

¹⁶ For example, the decision in *Riggs v Palmer* 115 NY 506 (1889), discussed above, was a 2:1 majority decision. The dissenting judge, Gray J, considered that the majority had overstepped the judicial function by allowing the public policy principles to override the relevant New York legislation on wills as it stood at that time, which did not include any specific rule; and by imposing what he considered was a criminal sanction. A minority of other US state courts took a similar view, but most of them developed a rule similar to the majority in *Riggs v Palmer*, and in most US states this case law has been replaced by statutory regimes. Professor Ronald Dworkin, in *Taking Rights Seriously* (Duckworth 1977), p.82, cited *Riggs v Palmer* as an example of the courts correctly using a legal principle to override the mechanistic application of a specific legal rule (in this case a statutory rule).

In many American states, the relevant legislation involves a full codification of the principles, derived from the model laws prepared by the American Law Institute and the Uniform Law Commission.¹⁷ Similarly, in New Zealand full statutory codification was enacted in 2007 on foot of recommendations by its Law Commission.¹⁸

- 1.10 In the United Kingdom, in response to case law to the effect that the common law did not allow any discretion to modify the application of the principles, the *Forfeiture Act 1982* and the *Forfeiture (Northern Ireland) Order 1982* enacted a judicial discretion to modify the rule in manslaughter cases.¹⁹ In response to later English case law, a “pre-decease rule” to prevent innocent heirs from being disinherited was enacted in the United Kingdom in 2011.²⁰
- 1.11 The limited statutory intervention favoured in the United Kingdom has been followed in some Australian territories and states;²¹ and in 2014 the Victorian Law Reform Commission recommended more complete codification for Victoria, along the lines already enacted in New Zealand.²²

¹⁷ In the United States, the majority of states have enacted codifying legislation derived either from the American Law Institute’s *Restatement (Third) of Restitution and Unjust Enrichment* (section 45.2) and *Restatement (Third) of Property: Wills and Other Donative Transfers* (section 8.4) or from the Uniform Law Commission’s *Uniform Probate Code* (section 2-803): see Cohen “The Slayer Rule” (2012) 93 Boston Univ L Rev 793 and Spivack “Killers Shouldn’t Inherit From Their Victims – Or Should They?” (2013) 48 Georgia L Rev 145.

¹⁸ In New Zealand, the *Succession (Homicide) Act 2007*, which implemented the main recommendations in the New Zealand Law Commission’s Report *Succession Law: Homicidal Heirs* (Report 38, 1997), involves a full codification (expressly replacing the common law).

¹⁹ The *Forfeiture Act 1982* and the *Forfeiture (Northern Ireland) Order 1982*, which provide that the rule may be modified in cases of manslaughter, were enacted in response to cases such as *Re Giles, Giles v Giles* [1972] Ch 544 and *R v National Insurance Commissioner, ex p Connor* [1981] 1 All ER 769 in which the rule had been applied to women convicted of the manslaughter of their husbands. The strict mandatory rule set out in the *Giles* and *Connor* cases, which is also the position under section 120(1) of the 1965 Act, does not reflect the approach in other common law jurisdictions: see Chapter 3, below.

²⁰ The *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* implemented the recommendation to introduce a “pre-decease” rule in the 2005 Report of the Law Commission of England and Wales *The Forfeiture Rule and the Law of Succession* (Law Com No. 295, 2005). That Report followed the English Court of Appeal decision in *Re DWS (decd)* [2001] Ch 568, in which a son had murdered both of his parents, neither of whom had made a will. The killer’s son, the victims’ grandchild, claimed the inheritance that had been forfeited by his father as a result of his crime. As there was no “pre-decease rule” in English law at that time, the English Court of Appeal held that not only the killer but also his son was excluded from inheriting. The property therefore passed to the next persons entitled to succeed, the deceased couple’s other relatives. As noted below, section 120(5) of the 1965 Act already includes a “pre-decease” rule.

²¹ The 1982 Act was the model for the Australian Capital Territory *Forfeiture Act 1991* and the New South Wales *Forfeiture Act 1995* (which had also been influenced by the decision in *Troja v Troja* (1994) 33 NSWLR 269).

²² The Victorian Law Reform Commission’s Report *The Forfeiture Rule* (September 2014) is the most recent review of the rule in a common law jurisdiction.

1.12 In civil law jurisdictions, including France, Germany and Switzerland, the principles have been fully codified, usually under the general heading of “unworthiness to succeed.”²³

B Section 120 of Succession Act 1965: partial codification of the public policy principles

1.13 Section 120 of the *Succession Act 1965* involves partial codification of the public policy principles, in that it deals with inheritance-related matters only, drawing on fully codified provisions on unworthiness to succeed in the French, German and Swiss Civil Codes.²⁴

(1) General disinheritance rule: murder, attempted murder and manslaughter

1.14 Section 120(1) of the 1965 Act provides:

“A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under section 117.”

1.15 This precludes a person guilty of murder, attempted murder or manslaughter (but not a person found to be insane²⁵) from inheriting a share in the estate of his or her victim under a will and on intestacy. It also bars a claim by such a person to the “legal right share” that would otherwise be due to a spouse under the 1965 Act²⁶ and bars a claim for “proper provision” under section 117 of the 1965 Act²⁷ by a child who unlawfully kills, or attempts to murder, his or her parent.

(2) Effect of the pre-decease rule: offender’s children are not disinherited

1.16 Section 120(5) of the 1965 Act provides:

²³ In France, the French Civil Code, *Code Civile de Française*, Article 727. In Germany, the German Civil Code, *Bürgerliches Gesetzbuch* (BGB), Articles 2339-2345. In Switzerland, the Swiss Civil Code, *Zivilgesetzbuch*, Article 540.

²⁴ The *Explanatory Memorandum to the Succession Bill 1965* as passed by both Houses of the Oireachtas (Department of Justice 1965) noted, at para 76, that section 120(1) of the 1965 Act “restates the existing rule of public policy law which precludes a felon from taking advantage of his crime. The other provisions [in section 120] are new to the law and may be compared with the rules as to unworthiness to succeed and disinheritance in the French, German and Swiss Civil Codes.” Section 120 of the 1965 Act is contained in Part 10 of the 1965 Act (comprising sections 120 to 122) under the heading “Unworthiness to Succeed and Disinheritance.”

²⁵ Prior to 2006, the formal verdict where insanity was successfully pleaded was “guilty but insane,” and even though the verdict was treated as an acquittal the use of the word “guilty” in section 120(1) of the 1965 may be explained on this basis. Since the enactment of the *Criminal Law (Insanity) Act 2006* the verdict is “not guilty by reason of insanity.”

²⁶ Part 9 of the 1965 Act sets out minimum inheritance entitlements for spouses where the deceased’s will provides for less.

²⁷ Section 117 of the 1965 Act allows a child to seek a share of his or her deceased parent’s estate if it can be established that the parent did not make “proper provision” for the child in accordance with his or her means, whether by will or otherwise.

“Any share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased.”

1.17 The effect of this “pre-decease rule” is that the inheritance lost by the offender will go to other beneficiaries, if any, named in the deceased’s will or to the next person listed to inherit under Part 6 of the *Succession Act 1965* if the deceased died intestate. This ensures that the offender’s descendants, such as his or her children and grandchildren, are not disinherited by the criminal acts of the offender and are entitled to inherit from the deceased’s estate. As already noted, a similar pre-decease rule was only introduced in English law in 2011.²⁸

(3) Limited disinheritance rule after desertion of two years before death of deceased

1.18 Section 120(2) of the *Succession Act 1965* provides that a spouse who has deserted his or her deceased spouse for a continuous period of two years or more up to the date of death is precluded from taking a share in the deceased person’s estate as a legal right²⁹ or on intestacy. Similarly, section 120(2A) of the *Succession Act 1965* prevents a civil partner from claiming a legal right share in the estate of his or her deceased civil partner if the surviving civil partner has deserted the deceased civil partner for two or more years immediately prior to the date of death.

1.19 For the purposes of section 120, desertion is deemed to include constructive desertion. Thus, a spouse or civil partner who was guilty of conduct which justified the deceased in separating and living apart from him or her is deemed to have deserted the deceased.³⁰

1.20 Because these provisions in section 120 do not involve homicide or any criminal offence, and properly form part of family law, the Commission makes no recommendations concerning them in this Report. They will therefore remain part of section 120 of the 1965 Act, and are unaffected by the recommendations made later in this Report.

(4) Limited disinheritance rule where offence carrying two years imprisonment or more committed against deceased

1.21 Section 120(4) of the *Succession Act 1965* provides that any person “found guilty”³¹ of an offence, punishable by imprisonment for a maximum period of at least two years, against the deceased or the spouse, civil partner or child of the deceased, is precluded from claiming a legal right share in the deceased person’s estate or from making an application under section 117 of the 1965 Act.³²

²⁸ See footnote 19, above.

²⁹ Part 9 of the *Succession Act 1965* sets out minimum inheritance entitlements for spouses where the deceased’s will provides for less than these.

³⁰ See section 120(3) and 120(3A) of the *Succession Act 1965*.

³¹ The use of the term “guilty” in section 120(1) and “found guilty” in section 120(4) is discussed in Chapter 3, below.

³² Section 117 of the *Succession Act 1965* allows a child to seek a share of his or her deceased parent’s estate if it can be established that the parent did not make “proper provision” for the child in accordance with his or her means, whether by will or otherwise.

1.22 Thus, unlike the more general scope of section 120(1), section 120(4) is limited to precluding a person to whom it applies from: (a) making a claim for a legal right share in the deceased person's estate and (b) making an application under section 117. It does not affect any bequest made by the deceased person in his or her will, or any entitlement to a share in the deceased person's estate on intestacy. Section 120(4) applies where the offence is punishable by imprisonment for a maximum period of at least two years, and does not require that a term of imprisonment have actually been imposed. It also applies regardless of when the relevant offence was committed.

C Section 120 of 1965 Act leaves some issues unaddressed or in need of review

1.23 Section 120 of the 1965 Act thus involves partial codification of the public policy principles from which it is derived. Reflecting the influence of a codified approach, by contrast with for example the very limited statutory approach in the United Kingdom, section 120 includes the following elements:

- it sets out a general disinheritance rule in the case of murder, attempted murder and manslaughter;
- it includes a limited disinheritance rule in the case of other offences;
- it also provides, reflecting the position in civil law codes and established case law in common law jurisdictions, that it only applies to a "sane person" thus excluding persons found guilty but insane; and
- it contains a "pre-decease" rule, which protects innocent heirs from being disinherited, a matter typically included in codified regimes but which was not, for example, enacted in the law of the United Kingdom until 2011.

1.24 On the other hand, reflecting the fact that it does not involve full codification of the public policy principles, section 120 is limited in the following ways:

- it does not address the issue that arose in *Cawley v Lillis*, property held in a joint tenancy, because this does not form part of the deceased person's estate, and this has been addressed both in case law and statutory provisions in other jurisdictions;³³
- it does not address the effect of the public policy principles on other property interests of the deceased, such as benefits under a life insurance policy or a pension;
- it does not include a discretion to modify or disapply the rule, which other jurisdictions deal with, including the limited statutory regime in the United Kingdom;³⁴
- it is not clear whether it applies only after a person is convicted, whereas case law and legislation in other jurisdictions provide that the public policy principles are not dependent on a conviction;³⁵

³³ See Chapter 2, below.

³⁴ See Chapter 3, below.

³⁵ See also Chapter 3, below.

- it does not deal with a number of procedural matters, including the awarding of costs or what interim and interlocutory steps can be taken in probate proceedings prior to any criminal trial.³⁶

These limitations indicate the need for a full review of section 120, and the need to consider the application of the public policy principles outside the succession and inheritance setting, and the Commission has proceeded on that basis in this Report.

D Issues Paper on Section 120 of the 1965 Act

1.25 In November 2014, the Commission published an *Issues Paper on Section 120 of the Succession Act 1965*.³⁷ The Issues Paper, as well as addressing the specific issue that arose in *Cawley v Lillis*, noted that the law in this area had been reviewed and reformed in significant respects in other common law jurisdictions. The Commission therefore sought views in relation to the following:

- whether the application of the public policy principles as they apply to property held in a joint tenancy, the specific issue that arose in *Cawley*, should be reformed;
- whether the application of the public policy principles should be extended beyond murder, attempted murder and manslaughter;
- whether courts should be given a discretion in certain circumstances to modify or disapply the public policy principles;
- whether section 120(4) of the 1965 Act, which provides for a limited form of disinheritance for offences that can lead to a sentence on conviction of two years or more, should be amended or repealed;
- whether section 120 should be extended to bar applications under section 67A(3) of the 1965 Act;
- whether a criminal conviction is required for the public policy principles to apply;
- whether the rules on costs of proceedings under section 120 should be reformed.

1.26 The Commission received helpful responses to the questions raised in the Issues Paper. These have informed and been taken into account in this Report,

³⁶ See Chapter 4, below.

³⁷ *Issues Paper on Section 120 of the Succession Act 1965 and Admissibility of Criminal Convictions in Civil Proceedings* (LRC IP 7-2014). As its title indicates the Issues Paper also addressed the admissibility, in general, of a criminal conviction in a related civil case. This had been discussed in another application under section 120 of the 1965 Act, *Nevin v Nevin* [2013] IEHC 80, [2013] 2 ILRM 427. As this general question arises not only in cases under section 120 but is essentially an aspect of the general law of evidence, the Commission considers that it is more appropriate to deal with that general matter in its forthcoming *Report on Evidence*, which it intends to publish in 2015. The narrower issue of the admissibility of convictions in subsequent civil proceedings involving the application of the public policy principles is discussed in paragraph 4.61ff, below.

which sets out the Commission's conclusions and recommendations on the application of the public policy principles.

E Proposals in Succession (Amendment) Bill 2015 on Joint Tenancies

- 1.27 Since the Issues Paper was published, Senator Feargal Quinn published a Private Member's Bill, the *Succession (Amendment) Bill 2015*, which proposes the insertion into the *Succession Act 1965* of a new section 120A to address the application of section 120 of the 1965 Act to a joint tenancy where there is one surviving co-owner, and a new section 120B to deal with a joint tenancy where there is more than one surviving co-owner.³⁸
- 1.28 The Bill underwent Second Stage debate in Seanad Éireann in March 2015,³⁹ during which reference was made to the project with which this Report is concerned; and it was agreed that further debate on the Bill would be adjourned pending the completion of the Commission's review of section 120. In preparing this Report the Commission has had full regard to the proposals in the 2015 Bill and to the Seanad debate on it.⁴⁰

³⁸ The full text of the proposed sections 120A and 120B are set out in paragraph 2.28, below.

³⁹ Vol.238 *Seanad Éireann Debates* pp.679-692 (11 March 2015), available at oireachtas.ie.

⁴⁰ See in particular Chapter 2, below.

CHAPTER 2 THE PUBLIC POLICY PRINCIPLES AND JOINT TENANCIES

A Effect of joint tenancy: legal and equitable principles

2.01 A joint tenancy is a specific type of co-ownership, often arranged between spouses, and is a formal or informal agreement to share ownership of property, including land holdings such as a family home and personal property such as company shares or life insurance.¹ Where there are two joint tenants only and one of them dies, the entire interest in the property automatically passes to the surviving joint owner who becomes full owner. If there are more than two joint tenants, when one of them dies the surviving joint tenants become full legal owners.

(1) *Joint tenancy and right of survivorship*

2.02 The legal interest held in a joint tenancy does not become part of the deceased joint owner's estate because full ownership automatically vests in the other co-owner. This legal consequence is called the right of survivorship.²

2.03 Section 4(c) of the *Succession Act 1965* provides that when a joint tenant dies, his or her legal estate in the assets held in the joint tenancy ceases if there is another surviving joint tenant. As a result of section 4(c), section 120 of the 1965 Act does not apply to the legal right held in a joint tenancy because the deceased's legal interest in the property ceases on his or her death. If there are two joint owners, the person guilty of murder, attempted murder or manslaughter becomes the full legal owner of that property under the right of survivorship. If there are more than two joint owners, the surviving owners (including a person guilty of murder, attempted murder or manslaughter) become full legal owners of the property.

(2) *Effect of equitable principles on joint tenancy*

2.04 It is important to note that land law and succession law are also subject to the law of equity, which comprises a set of principles and rules that can affect legal rights such as the right of survivorship or the ownership or title to an estate,³ so

¹ "Land" includes the land itself and anything built on, attached to or growing on land such as buildings or crops. "Personal property" is anything other than land and includes movable property such as goods, bank accounts, company shares and insurance policies.

² The law of survivorship, also referred to as the *jus accrescendi*, can be traced to *Coke on Littleton*, §181b (see Chapter 1, footnote 4, above).

³ "Title" is the ownership rights which a person has in property. "Legal title" is the actual ownership of the property whereas "equitable title" is the right to obtain ownership, also referred to as "beneficial ownership," where another person holds the legal title. Even where a person holds the legal title to a property such as a house by legitimate means, such as paying for it in part and taking out a mortgage on it, a court may impose a trust, known as a constructive trust, to recognise, for example, another person's indirect contributions to the mortgage repayments such as contributions to household expenses. A constructive trust may also be imposed, as in *Cawley*

that they may be held subject to relevant equitable principles and rules.⁴ The most significant equitable concept of relevance to this Report is the trust, which includes the constructive trust, under which a legal right or estate may be held subject to such a trust in order to protect the equitable or beneficial interests of another person and to prevent unjust enrichment.

- 2.05 The application of section 120 of the 1965 Act, and the interaction between the legal right of survivorship in a joint tenancy and relevant principles of equity, was considered by the High Court (Laffoy J) in *Cawley v Lillis*.⁵

B Three options considered in *Cawley v Lillis* for dealing with property held in joint tenancy

- 2.06 In *Cawley v Lillis* the defendant had been convicted of the manslaughter of his wife, and they were joint tenants of their family home and of other assets. The defendant was therefore precluded under section 120 of the *Succession Act 1965* from taking any share in his wife's estate and, in accordance with section 120(5), that share was to be distributed as if he had pre-deceased her. However, because of the effect of the right of survivorship under a joint tenancy, as recognised in section 4(c) of the 1965 Act, the property held in a joint tenancy did not form part of the estate, and the plaintiffs (the deceased's personal representatives and daughter) applied to the High Court to determine how the jointly held assets were to be treated.

- 2.07 The defendant conceded during the hearing that, although he held the legal estate in the joint tenancy of the family home, he was not solely entitled to the equitable, that is, the beneficial, interest in it. He acknowledged that the joint assets were, in equity, beneficially owned in equal shares by him and the estate of the deceased. This was a concession that, in equity, the right of survivorship did not apply to the assets held under a joint tenancy. In the High Court, Laffoy J noted that:

“in making that concession, the defendant... properly, if belatedly, acknowledged that the law, as a matter of public policy, will not permit him to obtain a benefit or enforce a right resulting from the crime he committed against the deceased.”

- 2.08 Having acknowledged the public policy principles applicable to the case, Laffoy J then proceeded to examine three possible options for dealing with the jointly held family home.

v Lillis, where the legal title has been acquired through wrongful or criminal conduct. The purpose of a constructive trust is to prevent unjust enrichment and to recognise the equitable or beneficial entitlements of the person who was wrongly deprived of legal title. In *Cawley v Lillis*, the legal title to the assets held by the defendant and the deceased under a joint tenancy passed by survivorship to the defendant on the death of the deceased. However, in order to prevent the defendant from benefitting from his unlawful conduct, the Court imposed a constructive trust so that he held the deceased's share on behalf of the victim's estate.

⁴ See generally Delany *Equity and the Law of Trusts in Ireland* 5th ed (Thomson Round Hall 2011). See also Law Reform Commission *Report on Trust Law: General Proposals* (LRC 92-2008).

⁵ [2011] IEHC 515, [2012] 1 IR 281.

(1) Option 1: new “pre-decease rule” to override right of survivorship under joint tenancy

- 2.09 The plaintiffs argued that, having regard to the public policy principle that no person should be able to benefit from his or her wrongful conduct, and by analogy with the “pre-decease” rule in section 120(5) of the *Succession Act 1965*, the defendant should be deemed to have predeceased his wife for the purposes of the joint tenancy. This would mean that the assets that had been held in the joint tenancy by the deceased and the defendant would pass entirely to the estate of the deceased, depriving the defendant of the rights he held in those assets prior to the deceased’s death.
- 2.10 The defendant objected to this, submitting that, prior to the deceased’s death, he had vested rights in the joint assets subject to the law of survivorship which depended on which of the joint tenants died first. He argued that those rights were property rights which enjoyed the protection of Articles 40 and 43 of the Constitution.⁶ He also argued that he should not be further penalised through what he argued would be the forfeiture of his property rights which he had enjoyed for eight to nine years prior to his wife’s death. He argued that this penalisation would be in addition to his sentence on conviction for manslaughter.
- 2.11 Laffoy J concluded that she could not create a new rule by analogy with section 120(5) of the *Succession Act 1965* to hold that the defendant would be deemed to have pre-deceased the deceased. She noted that section 120 of the *Succession Act 1965* “deals with the distribution of property owned by the deceased person, not with the distribution of property in which an unworthy potential successor has rights.” She stated that “in the absence of legislation empowering the court to so interfere with the defendant’s existing rights at the date of the deceased’s death... the court has no power or jurisdiction to do so.”
- 2.12 Laffoy J added that it would not be appropriate for the Court to express a view on whether legislation which would have the effect of depriving the defendant of his pre-existing property rights would be justified having regard to principles of social justice and the exigencies of the common good. Since she also considered that this question required review, and since this approach has also been proposed in the *Succession (Amendment) Bill 2015*,⁷ this is a matter which the Commission must consider in this Report, and which is discussed below.

(2) Option 2: joint tenancy is severed and overrides right of survivorship

- 2.13 The second option put forward by the plaintiffs, and also contested by the defendant, was that when the death of one joint tenant is caused by the other joint tenant the joint tenancy is severed. The effect of this would be to override the general right of survivorship, with the deceased’s estate and the defendant becoming equally entitled to the joint assets as tenants in common. As a result, both would be entitled to sell the family home and to share out the other assets.
- 2.14 Laffoy J concluded that, having regard to the existing law that applied on the date of the deceased’s death, it was not possible to conclude that the legal

⁶ Articles 40.3 and 43 and related case law are considered in detail at paragraphs 2.32ff, below.

⁷ See paragraphs 1.27 and 1.28, above, and paragraph 2.28ff, below.

estate in the joint tenancy was automatically severed on the death of the deceased. While Laffoy J rejected this option, the Commission returns below to consider whether it is a suitable basis for reform.

(3) Option 3: joint tenancy is subject to equity and constructive trust: the option applied in *Cawley v Lillis*

2.15 Laffoy J held, therefore, that the right of survivorship meant that the legal title to the property was held solely by the defendant. As already noted, however, at a late stage in the case the defendant had conceded that, as the person who caused his wife's death, he should be treated as holding the joint assets subject, in equity, to a constructive trust in equal shares for himself and the estate of the deceased.

2.16 Laffoy J concluded that this option provided the most appropriate solution under the current law, and she applied this in *Cawley v Lillis*. Thus, while the legal title in the family home and other assets that had been held in a joint tenancy accrued to the defendant alone on the date of the deceased's death, in equity the defendant held the deceased's share, which in effect was measured as being equal to the defendant's share, on a constructive trust for the benefit of the deceased's estate. Laffoy J considered that this outcome "could not be regarded as conferring a benefit on the defendant as a result of the crime he committed" and was consistent with the public policy principle that a person may not benefit from their wrongdoing.

2.17 As applied in *Cawley v Lillis*, therefore, the constructive trust:

- is imposed on one person, in this case the person guilty of manslaughter, to prevent him from gaining any benefit from his crime and thereby preventing any unjust enrichment; and
- is for the benefit of another person, in this case the deceased's daughter, who would otherwise be deprived of her inheritance entitlements due to the wrongful conduct of the defendant.

2.18 As noted by Jacobs J in the New South Wales decision *Re Thorp & the Real Property Act 1900*,⁸ and cited with approval by Laffoy J in *Cawley v Lillis*, this leaves the legal title untouched but at the same time applies the public policy principles by means of the equitable constructive trust. While Jacobs J expressed some misgivings that this is not an entirely satisfactory or logical conclusion, because it leaves enforcement of the public policy principles to equity, Laffoy J noted that the constructive trust had also been used in such cases in Canada.⁹ Indeed, the constructive trust has been used in virtually all common law jurisdictions to deal with joint tenancies.¹⁰

2.19 Laffoy J commented that the beneficiary of the constructive trust (the daughter of the defendant and the deceased) wanted to bring finality to the issues which had arisen in the case. She noted that if agreement could not be reached

⁸ [1962] NSW 889, cited in *Cawley v Lillis* [2011] IEHC 515, [2012] 1 IR 281, at 298. Laffoy J also cited with approval another New South Wales decision, *Rasmanis v Jurewitsch* (1979) 70 SR (NSW) 407, which had applied the same approach.

⁹ Laffoy J cited with approval the Canadian decision *Schobelt v Barber* (1966) 60 DLR (2d) 519.

¹⁰ See paragraph 2.51ff below.

between the parties, it was open to the courts on the application of the personal representatives to make orders granting various reliefs under section 31 of the *Land and Conveyancing Law Reform Act 2009*. These include an order for sale of the land and distribution of the proceeds of sale as the court directs, or such other order as appears to the court to be just and equitable in the circumstances of the case.

(4) Need identified for legislation to deal with joint tenancies

- 2.20 At the end of her judgment in the *Cawley* case, Laffoy J commented that “ideally, there should be legislation in place which prescribes the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner.”¹¹
- 2.21 She noted that any solution would have to be compatible with the property rights in Articles 40.3 and 43.2 of the Constitution under which the exercise of the rights to private property, including the general right to inherit property, may be “regulated by the principles of social justice” and delimited with a view to reconciling their exercise with “the exigencies of the common good.” These constitutional provisions are considered below.
- 2.22 Laffoy J added that such legislation should have regard to two other matters: the changes to co-ownership of land made by sections 30 and 31 of the *Land and Conveyancing Law Reform Act 2009* (which came into force after the events in the case¹²); and the complications that may arise where there are three or more joint tenants.¹³

C Reform Options in Joint Tenancy Cases

(1) Suggested reform options: offender loses all property rights in joint tenancy or receives share

- 2.23 In the Issues Paper, the Commission asked consultees to consider the three reform options canvassed in *Cawley v Lillis*, namely that where a joint tenant had committed murder, attempted murder or manslaughter:
- (a) he or she should be precluded from succeeding to any interest in the property held under a joint tenancy, in other words, overriding the right of survivorship; or
 - (b) the joint tenancy should be severed so that the property is held by the offender and the victim’s estate as tenants in common; or
 - (c) as decided in *Cawley v Lillis*, the legal right of survivorship should pass to the offender but that, in equity, he or she should hold one half of the deceased person’s beneficial interest on a constructive trust for the estate of the deceased.

¹¹ [2011] IEHC 515, [2012] 1 IR 281 at 303.

¹² Section 30 of the 2009 Act prohibits the unilateral severance of a joint tenancy by one or more joint tenants without the consent of the other joint tenants unless a court order has been obtained dispensing with consent. Section 31 empowers the courts to make a wide range of orders in relation to co-owned property: see above

¹³ [2011] IEHC 515, [2012] 1 IR 281 at 303.

- 2.24 As between these three options, the first would deprive the offender fully of any property rights, whereas the second and third are quite similar to each other in that the offender receives a share; the only distinction being that in option (b) this would apply to the legal title whereas option (c) applies in equity only.
- 2.25 The Commission received varying views on these options in the submissions received since the publication of the Issues Paper.
- 2.26 Some submissions agreed that the first option was consistent with the public policy principles that a person should not benefit from a criminal offence that involved loss of life, and that the law should therefore provide that a person who commits any such offence should be precluded from obtaining any interest in jointly held assets, including land as well as life insurance proceeds and pensions. However, the majority of submissions did not support this option, on the ground that it would deprive the offender of pre-existing property rights and would not therefore withstand a constitutional challenge. They suggested that it could be seen as being contrary to the principle that a person is to be penalised through the sentence imposed by the criminal law only, and they also noted that the common law doctrines of attainder and escheat which had provided for general forfeiture on conviction for felony had been abolished by the *Forfeiture Act 1870*.¹⁴
- 2.27 The majority of submissions received supported the thrust of the outcome in *Cawley v Lillis*, namely that the deceased person's estate should be entitled to a half share of the property. A minority of consultees considered that in light of the decision in the *Cawley* case further legislative change was not necessary, but the majority considered that the position should be clarified. Some consultees favoured the second option, that is, to sever the joint tenancy and provide that the property is instead held by way of tenancy in common, while others favoured the constructive trust option actually applied in the *Cawley* case.

(2) Proposals in Succession (Amendment) Bill 2015

- 2.28 The varying views in the submissions received were also reflected in the contributions made during the Second Stage debate in Seanad Éireann on the *Succession (Amendment) Bill 2015*,¹⁵ which proposes to insert sections 120A and 120B into the *Succession Act 1965* to address the application of section 120 of the 1965 Act to a joint tenancy. The proposed new section 120A deals with a joint tenancy where there is one surviving co-owner; and the proposed new section 120B deals with a joint tenancy where there is more than one surviving co-owner. The proposed new sections in the 2015 Bill are:

“Joint tenancies – one surviving co-owner

120A. (1) This section applies in respect of a joint tenancy where there is only one surviving co-owner and that surviving co-owner has been found guilty of the murder, attempted murder, or manslaughter of the other co-owner.

(2) Where subsection (1) applies—

¹⁴ On the background to the 1870 Act see paragraph 1.07, above.

¹⁵ Vol.238 *Seanad Éireann Debates* pp.679-692 (11 March 2015), available at oireachtas.ie.

- (a) the joint tenancy, and
 - (b) any rights in favour of the offender accruing therefrom,
- shall be deemed to have been terminated with effect from the date of the offence mentioned in subsection (1).
- (3) Where a joint tenancy has been terminated pursuant to subsection (2), the entire interest in the property shall be deemed to have been vested in the estate of the deceased co-owner with effect from the date of the offence mentioned in subsection (1).
- (4) Where subsection (1) applies, the offender shall not be entitled to make an application under—
- (a) section 117 [of the 1965 Act], or
 - (b) section 67A(3) [of the 1965 Act].
- (5) In this section ‘offender’ means the surviving co-owner who has been found guilty of the murder, attempted murder, or manslaughter of the other co-owner.

Joint tenancies – two or more surviving co-owners

120B. (1) This section applies in respect of a joint tenancy where there are two or more surviving co-owners and one of the surviving co-owners has been found guilty of the murder, attempted murder, or manslaughter of another co-owner.

(2) Where subsection (1) applies the joint tenancy shall be deemed to have been modified with effect from the date of the offence mentioned in subsection (1) so that—

- (a) the deceased co-owner’s interest in the property, and
- (b) the offender’s interest in the property,

shall be deemed to have been vested in the estate of the deceased co-owner with effect from the date of the offence mentioned in subsection (1).

(3) Where subsection (1) applies, the offender shall not be entitled to make an application under—

- (a) section 117, or
- (b) section 67A(3).

(4) For the avoidance of doubt, notwithstanding the provisions of subsection (2), a joint tenancy continues to subsist.

(5) In this section—

- (a) ‘offender’ means the surviving co-owner who has been found guilty of the murder, attempted murder, or manslaughter of another co-owner;
- (b) a reference to the co-owner’s interest shall be read as being a reference to the interest in the property to which the co-owner was entitled immediately prior to the date of the offence mentioned in subsection (1).”

2.29 Put briefly, the proposals in the 2015 Bill favour the first option discussed in the Issues Paper. Thus, in the case of a joint tenancy where there is only one

surviving co-owner and that surviving co-owner is guilty of the murder, attempted murder, or manslaughter of the other co-owner, the 2015 Bill proposes that both the joint tenancy and any rights in favour of the convicted offender accruing from the joint tenancy “shall be deemed to have been terminated with effect from the date of the offence.”¹⁶ The 2015 Bill also proposes that where a joint tenancy has been terminated in this manner “the entire interest in the property shall be deemed to have been vested in the estate of the deceased co-owner with effect from the date of the offence.”¹⁷ It also proposes that the offender would be prohibited from making an application under section 67A(3) of the 1965 Act or section 117 of the 1965 Act.¹⁸

- 2.30 The 2015 Bill proposes a similar approach where there are two or more surviving co-owners and one of the surviving co-owners is guilty of the murder, attempted murder, or manslaughter of another co-owner. In that situation, the 2015 Bill proposes that the joint tenancy would be “deemed to have been modified” from the date of the offence so that both the deceased co-owner’s interest in the property and the offender’s interest in the property “shall be deemed to have been vested in the estate of the deceased co-owner with effect from the date of the offence.”¹⁹ Reflecting this modification of the joint tenancy, rather than its termination in the case where the offender is the only surviving joint tenant, the 2015 Bill proposes that the joint tenancy “continues to subsist,” that is, it continues for the purposes of the legal rights, including the right of survivorship, of the remaining joint tenants who are not offenders.²⁰ The 2015 Bill also proposes, as with the case above where there are only two joint tenants, that the offender would be prohibited from making an application under section 67A(3) of the 1965 Act or section 117 of the 1965 Act.²¹
- 2.31 In both instances, the 2015 Bill proposes to vest the entirety of the offender’s interest in the joint tenancy in the deceased co-owner’s estate with effect from the date of the offence. In effect, the 2015 Bill proposes that the right of survivorship would not apply and that the offender would be precluded under section 120 of the 1965 Act from inheriting any share in property held in a joint tenancy on the date of the offence. This constitutes a proposal to deprive the offender of property rights and to limit his or her inheritance rights. The key

¹⁶ Proposed section 120A(2) of the *Succession Act 1965* in section 2 of the *Succession (Amendment) Bill 2015*.

¹⁷ Proposed section 120A(3) of the *Succession Act 1965* in section 2 of the *Succession (Amendment) Bill 2015*.

¹⁸ Section 67A(3) of the 1965 Act allows the child of a person in a civil partnership who dies intestate to apply, based on a needs test, for a share in the estate of his or her parent. Section 117 of the 1965 Act provides for an application for “just provision” out of the estate of a parent. This is discussed further in Chapter 3 of the Report, below.

¹⁹ Proposed section 120B(2) of the *Succession Act 1965* in section 2 of the *Succession (Amendment) Bill 2015*.

²⁰ Proposed section 120B(4) of the *Succession Act 1965* in section 2 of the *Succession (Amendment) Bill 2015*.

²¹ Proposed section 120B(3) of the *Succession Act 1965* in section 2 of the *Succession (Amendment) Bill 2015*.

question that therefore arises is whether this is permissible in terms of the constitutional provisions on property rights.

(3) Constitutional provisions on property rights and their delimitation by legislation

- 2.32 The 2015 Bill expressly recognises the constitutional dimension to its proposals because its Long Title contains a number of recitals, which place the proposed sections 120A and 120B of the 1965 Act against the constitutional background concerning property rights, as referred to by Laffoy J in *Cawley v Lillis*, above. The recitals state: that the Constitution “adopts a balanced approach to the protection of property rights” and that they are “not absolute;” that Article 43.2.2° provides that the State may as occasion requires delimit by law the exercise of property rights with a view to reconciling their exercise with the exigencies of the common good; that “it would be contrary to the principles of social justice and the principles of public policy if a person were permitted to benefit directly from his or her own wrongful act;” and that “the interference with property rights for the purpose of ensuring that a person is not unjustly enriched through unlawful killing is a legitimate and proportionate measure.”
- 2.33 Article 40.3.2° of the Constitution provides that “the State shall... by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the... property rights of every citizen.” Article 43.1.2° provides that the State “guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.” However, Article 43.2.1° acknowledges that these property rights may be “regulated by the principles of social justice,” and Article 43.2.2° provides that the State may “delimit” them “with a view to reconciling their exercise with the exigencies of the common good.”
- 2.34 Thus, the State may enact laws limiting property rights, including “the general right to transfer, bequeath, and inherit property,” in order to reconcile those rights with the common good. In this respect, many provisions of the *Succession Act 1965*, such as those conferring minimum legal right shares for the widow or widower and the children of a deceased person, involve significant limits on the pre-1965 general right to transfer and bequeath property. Similarly, the provisions of the *Taxes Consolidation Act 1997* concerning capital acquisitions tax impose limits on inheritance by reducing the amount actually inherited where it is above the untaxed threshold set (and these limits have been amended on many occasions).

(4) Legislation on confiscation of proceeds of crime

- 2.35 Section 120 of the 1965 Act also involves a significant limitation on the general right to inherit but it differs from the other provisions of the 1965 Act mentioned above, and from the provisions on inheritance tax in the *Taxes Consolidation Act 1997*, because it is based on the public policy principle discussed above that a person should not benefit from his or her wrongdoing, in this instance the commission of murder, attempted murder or manslaughter. The public policy principles have also found expression in comparable statutory provisions concerning the confiscation of property that is established to be the direct proceeds of crime.
- 2.36 For example, section 9 of the *Criminal Justice Act 1994* provides that where a person has been convicted on indictment of any criminal offence, the Director of Public Prosecutions may apply to the trial court to make a property

confiscation order. If the court is satisfied, on the balance of probabilities, that the convicted offender obtained property as a result of or in connection with the commission of the offence, the court may make a confiscation order in a sum equal to the value of the pecuniary advantage obtained by the offender. A confiscation order under the 1994 Act can only be made after a conviction on indictment.

2.37 By contrast, the *Proceeds of Crime Act 1996*²² provides that the High Court may, without the need for a criminal conviction, make a forfeiture order in respect of property (of at least €13,000 in value) that is asserted to be the proceeds of crime. Applications under the 1996 Act may be made by an authorised officer of the Revenue Commissioners or by a member of An Garda Síochána not below the rank of chief superintendent; in practice they are made by the Chief Bureau Officer of the Criminal Assets Bureau.²³

2.38 If on the evidence presented the High Court is satisfied, on the balance of probabilities, that a person is in possession or control of property which is or represents the proceeds of crime, it may make a forfeiture order under the 1996 Act, in effect a “freezing” order that prohibits the person from disposing of the property. The initial order may be made after an *ex parte* hearing, but the 1996 Act provides for an *inter partes* interlocutory hearing before the High Court after 21 days where the respondent has an opportunity to establish, also on the balance of probabilities, that the property is not the proceeds of crime. Section 4 of the 1996 Act provides that where an interlocutory order has been in force for not less than 7 years, the High Court, on application to it, may make a disposal order directing that the property be transferred to the State or such other person as the Court may determine. A disposal order is in effect a forfeiture order.

(5) Confiscation of property rights is supported by public policy principles and common good

2.39 In *Murphy v GM*,²⁴ the Supreme Court upheld the constitutionality of the confiscation provisions in the 1996 Act. The Court pointed out that a number of previous decisions had concluded that similar provisions in customs and taxation legislation were consistent with the Constitution, in particular because they did not involve the imposition of a criminal sanction.²⁵ It also noted that in *Clancy v Ireland*²⁶ it had upheld the constitutionality of the *Offences Against the State (Amendment) Act 1985* which provides for the forfeiture by court order of moneys held in bank accounts which, in the opinion of the Minister for Justice, are the property of an unlawful organisation. In *Clancy* the Court held that the

²² The *Criminal Justice Act 1994* and the *Proceeds of Crime Act 1996* implemented key recommendations in the Commission’s *Report on Confiscation of the Proceeds of Crime* (LRC 35-1991).

²³ The Criminal Assets Bureau was established under the *Criminal Assets Bureau Act 1996*.

²⁴ [2001] 4 IR 113.

²⁵ The Court cited *Attorney General v Southern Industrial Trust Ltd* (1957) 94 ILTR 161 and *McLoughlin v Tuite* [1989] IR 82 in support: [2001] 4 IR 113, at 153.

²⁶ [1988] IR 326, at 336.

1985 Act was a permissible delimitation of property rights in the interests of the common good.

2.40 In the *Murphy* case the Supreme Court acknowledged that, historically, the law had distinguished between forfeiture as a civil matter and sanctions imposed after a criminal conviction on the somewhat artificial basis (often described as a “legal fiction”) that whereas forfeiture was directed at the property involved (proceedings *in rem*) a criminal prosecution was quite separate because it was directed at the individual (proceedings *in personam*). The Court, citing the American jurist and judge Oliver Wendell Holmes,²⁷ stated that it would be better to replace this historical rationale with a view that forfeiture provisions are supported by “considerations of public policy or the common good.”²⁸ The reference to public policy echoes the legal principles already discussed that no person should be able to benefit from his or her wrongful conduct and that no cause of action should arise from one’s own unlawful or dishonourable act. The invocation of the common good reflects the use of that term in Article 43 of the Constitution.

2.41 In general terms, therefore, it is constitutionally permissible to provide for confiscation or forfeiture of property connected to criminal activity because public policy principles support such a delimitation of property rights. Nonetheless, while the Supreme Court noted that “a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use” it also stated that such forfeiture legislation “must be sensitive to the actual property and other rights of citizens.”²⁹

(6) Delimitation of property rights must comply with proportionality test

2.42 The Supreme Court has also held, in a series of decisions, that any delimitation of property rights must meet a test of proportionality. For example, in *Cox v Ireland*,³⁰ the plaintiff successfully challenged section 34 of the *Offences Against the State Act 1939* which provided that any public servant convicted of a scheduled offence by the Special Criminal Court automatically forfeited any public service pension entitlement and was also disqualified from any public sector employment. The plaintiff, a teacher, had been convicted of firearms offences and after he had served a sentence of imprisonment he was informed that his teaching post had been terminated under section 34 of the 1939 Act.

2.43 The Supreme Court accepted that the State was entitled to enact far-reaching legislation, including provisions on forfeiture of pensions, where persons were convicted of offences that threatened the authority of the State. The Court concluded, however, that section 34 of the 1939 Act was too broad in scope and therefore constituted an unjust attack on the plaintiff’s constitutional property rights because it applied to persons whose motive and intentions bore no relation to the authority of the State.

2.44 While the Court, in declaring section 34 of the 1939 Act unconstitutional, did not expressly refer to a test of proportionality, this was how it was subsequently

²⁷ [2001] 4 IR 113, at 153, citing Holmes *The Common Law* (Little, Brown & Co 1881).

²⁸ [2001] 4 IR 113, at 153.

²⁹ [2001] 4 IR 113, at 153.

³⁰ [1992] 2 IR 503.

described by the High Court (Costello J) in *Heaney v Ireland*.³¹ In *Heaney* Costello J, and on appeal the Supreme Court, upheld the constitutionality of section 52 of the *Offences Against the State Act 1939* which required persons arrested under the 1939 Act to account for their movements.

2.45 Costello J applied the following proportionality test developed by the Supreme Court of Canada in deciding whether legislation that interferes with a constitutional right is permissible:³²

“1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be ‘rationally connected’ to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right or freedom in question as ‘little as possible;’ and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.”³³

2.46 The Supreme Court has subsequently approved this proportionality test in a number of decisions.³⁴

(7) Discussion and conclusions on reform options for joint tenancies

(a) Constitutional provisions

2.47 In the context of any reform options concerning the application of the public policy principles as they apply to joint tenancies, including the proposals in the *Succession (Amendment) Bill 2015*, any provision must:

- under Article 40.3, protect as far as practicable property rights and prevent an unjust attack on those property rights, and
- under Article 43, regulate those rights by reference to principles of social justice and delimit the general right to transfer, bequeath and inherit property with a view to reconciling those rights with the exigencies of the common good.

³¹ [1994] 3 IR 593, at 607. See also Hogan and Whyte (eds) *Kelly: The Irish Constitution* 4th ed (Bloomsbury Professional 2003), paragraph 7.1.58.

³² This is the proportionality test laid down by the Supreme Court of Canada in *R v Chaulk* [1990] 3 SCR 1303, at pp.1335-1336, cited in *Heaney v Ireland* [1994] 3 IR 593, at 607.

³³ The internal quotes (‘rationally connected’ and ‘little as possible’) are quotes in *R v Chaulk* [1990] 3 SCR 1303, at pp.1335-1336, from the decision of the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

³⁴ See Hogan and Whyte (eds) *Kelly: The Irish Constitution* 4th ed (Bloomsbury Professional 2003), paragraphs 7.1.63-7.1.64.

2.48 In addition, any proposal must meet the test of proportionality approved by the Supreme Court, namely:

1. The delimitation involved must be of sufficient importance to warrant overriding the constitutionally protected right to property; “importance” being related to concerns which are pressing and substantial in a free and democratic society; and

2. The means of delimitation chosen must:

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) delimit or impair the right to property as little as possible; and

(c) be such that the delimiting effects on the right to property are proportional to the objective.

2.49 These factors apply generally to any reform of the public policy principles as they apply to joint tenancies, as well as the matters discussed in Chapter 3 below, such as the extent to which the principles should apply to pensions and life insurance and whether they should apply to other offences that result in death, for example, dangerous driving causing death.

2.50 For the purposes of this Chapter, these factors are considered in connection with what is to be regarded as a proportionate degree of disinheritance when applied to a joint tenancy. In this respect, the options considered in effect amount to a choice between:

- overriding the survivorship rule so that the offender loses all property rights, or
- converting the joint tenancy into a tenancy in common or else imposing a constructive trust so that the offender loses some property rights.

(b) Constructive trust and “half-share” rule or “full deprivation” rule

2.51 A “half share” rule, the approach taken in *Cawley v Lillis*, has been adopted, whether in case law or in legislation, in virtually every common law jurisdiction in which this issue has been considered. In the *Cawley* case Laffoy J noted that, whether arrived at by way of a tenancy in common or by means of a constructive trust, the “half share” rule had been applied in case law in the United Kingdom, Australia and New Zealand; and this remains the approach in those jurisdictions, including where the public policy principles have been placed on a statutory footing.³⁵

2.52 Similarly, in the United States of America, the majority of states have also enacted a “half share” rule for joint tenancies, derived from section 45.2 of the American Law Institute’s *Restatement (Third) of Restitution and Unjust Enrichment* and section 8.4 of the *Restatement (Third) of Property: Wills and Other Donative Transfers*, which provide that a joint tenancy is to devolve on

³⁵ See the extensive comparative review of the approach to joint tenancies in the Victorian Law Reform Commission’s Report *The Forfeiture Rule* (September 2014), at paragraphs 5.84-5.102.

the death of the victim as if the property were owned by the victim and the killer as tenants in common in equal shares.³⁶

- 2.53 A small minority of states such as Massachusetts and North Dakota have departed from this aspect of the *ALI Restatement* by enacting legislation that provides that a joint tenant who kills another joint tenant is treated as though the killer predeceased the victim, so that the entire interest in the property goes to the victim's estate and the killer retains nothing; and that where there are multiple joint tenants, both the victim's and the killer's interests vest in the surviving joint tenants through the right of survivorship.³⁷ The proposals in the *Succession (Amendment) Bill 2015* are very similar to the statutory provisions in Massachusetts and North Dakota.
- 2.54 While the majority of common law jurisdictions have enacted a "half share" rule for joint tenancies, it does not follow that the "total deprivation" rule in Massachusetts and North Dakota, and proposed in the *Succession (Amendment) Bill 2015*, should necessarily be regarded as being unsuitable merely because it represents a minority approach. Nonetheless, as noted in some submissions received by the Commission, such an approach appears to revert to the position under the common law doctrines of forfeiture; and it has been argued that, for this reason, the Massachusetts and North Dakota legislation may breach the US federal Constitution's express prohibition on attainder and escheat.³⁸
- 2.55 In this respect, it is important to distinguish between two different courses:
- preventing the offender from increasing or enlarging his or her property interests as a result of the offence, that is, preventing him or her from making a profit from the offence; and
 - depriving the offender of his or her pre-existing property interests.
- 2.56 The Commission considers that a statutory provision that automatically deprives a person who has committed murder, attempted murder or manslaughter of any portion of property held in a joint tenancy with the victim might well be unconstitutional because:
- it would involve an impermissible deprivation of existing property rights and a reintroduction of the feudal forfeiture doctrines of attainder and escheat which were abolished by the *Forfeiture Act 1870*;
 - it would not be consistent with the requirement that deprivation of property in civil proceedings must meet a test of proportionality.

³⁶ See American Law Institute *Restatement (Third) of Restitution and Unjust Enrichment* (2011 edition), section 45, reporter's note (h), citing the legislation in, for example, Alabama (Alabama Code § 43-8-253(b)); California (California Probate Code § 251); Connecticut (Connecticut General Statutes § 45a-447(a)(3)); Iowa (Iowa Code §633.535(2)); and Florida (Florida Statutes § 732.802(2)).

³⁷ See Massachusetts General Laws ch 265 § 46; and North Dakota Century Code § 30.1-10-03.

³⁸ See Myers "The New North Dakota Slayer Statute: Does It Cause A Criminal Forfeiture?" (2007) 83 North Dakota Law Review 997; and Hennessy "Property Note: The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts 'Slayer Statute'" (2009) 31 Western New England Law Review 159.

2.57 In particular, like the across-the-board provision held to be unconstitutional in *Cox v Ireland*,³⁹ a mandatory “total deprivation” rule in the case of joint tenancies would fail to meet the proportionality test because it goes beyond the legitimate public policy principle of preventing an offender from profiting from a crime and would involve an offender forfeiting property entitlements that he or she possessed before the offence was committed. In addition, such a mandatory rule does not take account of individual circumstances that may arise in specific cases, such as those which have been the basis for introducing a judicial discretion to modify or disapply the rule, which the Commission discusses in Chapter 3, below.

(c) *The “half share” may be altered because survivorship is accelerated by homicide and taking account of all relevant circumstances*

2.58 It does not follow from this conclusion, however, that the only alternative to total deprivation, as proposed in the *Succession (Amendment) Bill 2015*, is the “half share” rule adopted in many jurisdictions, and applied in *Cawley v Lillis*. Bearing in mind that the general purpose in equity of imposing a constructive trust is to prevent the trustee from acting unconscionably or from gaining an unjust enrichment, it would be appropriate to provide that the constructive trust may be held by reference to the specific circumstances of the parties in their lifetime and also to the precise circumstances that surrounded the homicide itself.

2.59 The decision of the Circuit Court (Judge Dunne) in *O’Brien v McCann*,⁴⁰ which was briefly referred to by Laffoy J in *Cawley v Lillis*,⁴¹ indicates that it is already possible under the current law to reduce the share left to an offender well below 50%. In this case, the defendant had been convicted of the murder of his wife. The plaintiff was the murder victim’s mother.

2.60 The defendant and his wife were joint tenants of their family home, which was valued at £180,000; and the outstanding mortgage debt on the home of £50,000 had been paid under the couple’s mortgage protection life insurance policy.

2.61 The plaintiff brought two related sets of Circuit Court proceedings against the defendant, one to apply the public policy principles to the joint tenancy and the other for damages for mental stress and funeral expenses under sections 48 and 49 of the *Civil Liability Act 1961*.

2.62 In the first set of proceedings, Judge Dunne noted that counsel for the defendant had accepted that, arising from the principle that a person may not benefit from a crime, the ordinary rule of survivorship under a joint tenancy could not apply. She held that the effect of the murder was to sever the joint tenancy and as a result the defendant could not inherit or succeed to the half interest his wife held in the property, and that this half devolved to the benefit of her mother, the plaintiff.

³⁹ [1992] 2 IR 503, discussed above.

⁴⁰ Circuit Court, 8 October 1998. The summary of this case is based on the newspaper reports in *The Irish Times* 9 October 1998 and *Cork Examiner* 9 October 1998.

⁴¹ Cited in *Cawley v Lillis* [2011] IEHC 515, [2012] 1 IR 281, at 291.

- 2.63 Judge Dunne made an order for the sale of the family home, and directed that the net proceeds be divided 52.5% to the plaintiff and 47.5% to the defendant. She stated that the 5% difference between the parties was to ensure that any increase in value which had arisen from the early discharge of the mortgage on the family home would not benefit the defendant.
- 2.64 As to the mortgage discharge itself, Judge Dunne also held that the defendant was not entitled to benefit from this, because it had occurred by reason of his wrongful act. Judge Dunne therefore ordered that he pay the plaintiff a further £27,900 which had accrued from his share of the life insurance policy on the mortgage, and that this should be deducted from his 47.5% share of the value of the family home.
- 2.65 She also directed that the defendant pay the estimated £20,000 legal costs of the application under section 120.
- 2.66 In the proceedings under sections 48 and 49 of the *Civil Liability Act 1961*, Judge Dunne ordered the defendant to pay the plaintiff £9,300 for mental stress and funeral expenses.
- 2.67 Thus, in *O'Brien v McCann*, out of the estimated £180,000 home value, the plaintiff received £131,000. This comprised: (a) £94,000, representing 52.5% of the family home valuation; (b) £27,900 related to the early mortgage discharge; and (c) £9,300 under section 49 of the 1961 Act.
- 2.68 The Court therefore deducted from the defendant's 47.5% share in the home of £85,500 the following: (a) £27,900 for the early mortgage discharge; (b) £9,300 awarded under section 49 of the 1961 Act; and (c) costs estimated at £20,000. The cumulative effect of this was that the defendant was left with an estimated £28,300, which represented 33.2% of his 47.5% share in the family home, or 15.7% of the total value of the family home.

(d) General conclusions and recommendations on joint tenancies

- 2.69 The decision in *O'Brien v McCann* is consistent with the general approach to this issue found in most common law jurisdictions, and applied in *Cawley v Lillis*, that is, a starting point of severance of the joint tenancy into equal halves.
- 2.70 It also demonstrates that, consistent with the approach that the severance is subject to equity, including the imposition of a constructive trust, the offender's half share may be further reduced by reference to the underlying basis of a constructive trust, namely to prevent an unconscionable result or to prevent unjust enrichment. It also reflects the fact that tenants in common own undivided shares in property, the exact beneficial ownership of which may not be equal.
- 2.71 The Commission has concluded that, in applying the public policy principles – that a person is prohibited from benefitting from his or her wrongdoing, in particular a homicide, and that no cause of action should arise from one's own wrongdoing – in a case where the offender and the victim held property under a joint tenancy, the court should order: (a) that the offender is not entitled to the benefit of the right of survivorship but that, instead, the legal and beneficial interests ("beneficial interest" referring to the equitable interest) in the joint tenancy are severed; and (b) that, unless otherwise provided (whether in a deed creating the joint tenancy or otherwise by operation of law), and subject to the further recommendations made below, it should be presumed (the burden being on the offender to establish otherwise in any proceedings) that, after

severance, the victim (including where relevant the estate of the victim) holds at least half of the interest in the property. It is important to include “where relevant the estate of the victim” as this applies where succession is involved, whereas the expanded scope of the rule proposed in the Report includes circumstances where succession is not involved, as in the case of a joint tenancy and also where the proceeds of a life insurance policy or pension may be involved (which is discussed in Chapter 3, below).

2.72 The Commission considers that a court should begin with the presumption that the victim held at least half the joint tenancy property, and that the offender’s portion may be further adjusted having regard to the fact that the right of survivorship was accelerated by the homicide and taking account of all other relevant circumstances.

2.73 This would allow a court to reduce the “starting point” for the offender by such amount as the court considers just and equitable. This may occur, as in the *O’Brien* case, where the homicide results in a payment under a life insurance policy, whether this involves the discharge of an outstanding mortgage debt or the payment of any other sum under the policy.

2.74 The court should have regard to all the circumstances that arise, and this should include the circumstances that are considered when property adjustment orders or pension adjustment orders are made under section 16 of the *Family Law Act 1995*. Suitably adapted to the current context, these factors would include:

(a) the contributions, direct or indirect, made by the offender and the victim to the jointly held property, including whether their respective contributions were equal or not;

(b) in a case where the offender and the victim were spouses of each other, or cohabitants, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse or dependent and any contribution made by either of them by looking after the home or caring for the family;

(c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; and

(d) the age and financial needs, obligations and responsibilities of the offender.

2.75 Other factors would include:

(e) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute;

(f) whether the commission by the offender of murder, attempted murder or manslaughter resulted in a payment under a contract of life insurance, including the discharge of an outstanding mortgage debt;

(g) any civil liability on the part of the offender arising from the homicide, including liability under sections 48 and 49 of the *Civil Liability Act 1961*;⁴²

⁴² On the general issue of civil liability arising from a wrongful act causing death, see paragraphs 4.19-4.20, below.

(h) the nature of the offender's conduct related to the offence, that is, (i) whether the offender's act constituted the offence of murder or attempted murder (which would be intentional or reckless) or (ii) if the offender's act constituted the offence of manslaughter, whether it was voluntary manslaughter (which could arise from excessive use of force in self-defence or from the defence of provocation) or involuntary manslaughter (which would have involved gross negligence, rather than any actual intentional conduct by the offender);

(i) where relevant, the presence of diminished responsibility, a defence under the *Criminal Law (Insanity) Act 2006*;

(j) whether there was a motive or intention to cause death; and

(k) any other matters which may appear to the court to be relevant.

2.76 While the result of this approach may, in a specific case, reduce the offender's percentage to much less than half, and may perhaps approach in some instances close to 0%, the Commission considers that this would not, by contrast with the "automatic" rule proposed in the *Succession (Amendment) Bill 2015*, be liable to a successful constitutional challenge.

2.77 This is because, although the result in some instances might be similar, this would arise from a case-by-case approach, as opposed to a blanket approach that was, for example, the constitutional infirmity identified in *Cox v Ireland*, discussed above.

2.78 In that respect, the approach proposed involves a proportionate delimitation of the constitutional property rights of the offender which at the same time reflects the effect of depriving the deceased of his or her right to life.

2.79 The Commission recommends, in applying the public policy principles that a person is not to benefit from his or her wrongdoing and that a cause of action should not arise from one's own wrongdoing to a case where the offender and the victim held property under a joint tenancy: (a) that where the offender and the victim held property under a joint tenancy, the offender shall be precluded from obtaining the benefit of the right of survivorship, and the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender shall stand severed from the date when the offence (murder, attempted murder or manslaughter) was committed, and in any proceedings brought concerning this the court shall make an order to that effect; (b) that pending any determination by the court in any such proceedings brought, the legal title in the property shall be held in trust and subject to the respective beneficial interests of the victim and the offender; and (c) that, unless otherwise provided (whether in a deed creating the joint tenancy or otherwise by operation of law), and subject to the subsequent recommendations below, it shall be presumed (the burden being on the offender to establish otherwise in any proceedings) that, after severance, the victim (including where relevant the estate of the victim) holds at least half of the interest in the property.

2.80 The Commission recommends: (a) that without prejudice to the presumption that, after severance, the victim holds at least half of the interest in the property, the amount and value of the interest to be held by the offender shall be determined by the court; and (b) that the court shall,

in determining the amount and value (which may be above or below half of the interest in the property), make such order as appears to the court to be just and equitable, having regard to: (i) the fact that the right of survivorship was accelerated by the act of the offender and (ii) all the relevant circumstances, including those set out in paragraphs 2.81 and 2.82.

2.81 The Commission recommends that, in determining the amount and value that is just and equitable, the court shall have regard, where relevant, to the following: (a) the contributions, direct or indirect, made by the offender and the victim to the jointly held property, including whether their respective contributions were equal or not; (b) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; and (d) the age and financial needs, obligations and responsibilities of the offender.

2.82 The Commission recommends that, in determining the amount and value that is just and equitable, the court shall also have regard, where relevant, to the following: (e) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (f) that the act constituting the homicide resulted in a payment under a life insurance contract, whether this involves the discharge of an outstanding mortgage debt or the payment of any other sum under the life insurance contract; (g) any civil liability on the part of the offender arising from the act constituting the homicide, including liability under sections 48 and 49 of the *Civil Liability Act 1961*; (h) the nature of the offender's conduct related to the offence, that is, (i) whether the offender's act constituted the offence of murder or attempted murder (which would be intentional or reckless) or (ii) if the offender's act constituted the offence of manslaughter, whether it was voluntary manslaughter (which could arise from excessive use of force in self-defence or from the defence of provocation) or involuntary manslaughter (which would have involved gross negligence, rather than any actual intentional conduct by the offender; (i) where relevant, the presence of diminished responsibility, a defence under the *Criminal Law (Insanity) Act 2006*; (j) whether there was a motive or intention to cause death; and (k) any other matters which may appear to the court to be relevant.

(e) *Conclusions and recommendations in cases of multiple joint tenants*

2.83 In *Cawley v Lillis* Laffoy J drew attention to the issue of what should happen when there are three or more joint tenants. She stated that any legislation enacted to prescribe the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner would "have to

address from a policy perspective the complications which arise in a situation where there are three or more co-owners.⁴³

- 2.84 The concern where there are three or more joint tenants is not only to prevent the offender from acquiring the deceased's share of the property but also to ensure that he or she does not receive part of the deceased's share in the future on the death of any other innocent joint tenants in whom the deceased's share has vested. For example, where there are three joint tenants, if an innocent joint tenant acquires an interest in the share of the victim of an unlawful killing and dies before the offender, the offender could, if the survivorship rule continues to apply to the offender, succeed to that innocent joint tenant's interest which will include that part of the victim's interest which had earlier devolved by survivorship to the innocent joint tenant.
- 2.85 In its Issues Paper, the Commission noted that one way to prevent this would be to treat the joint tenancy as severed on the death of the victim. In the above example the killer, the innocent joint tenant and the victim's estate would each hold a distinct one third share in the property as tenants in common. As the right of survivorship would not apply, the unlawful killer would not succeed to the victim's share either on the death of the victim or at any time in the future through the innocent joint owner. However, the severance of the joint tenancy would also be unfavourable to the innocent joint tenant because he or she would be deprived of the possibility of succeeding to both the victim's and the unlawful killer's share if he or she were still alive when the killer died.
- 2.86 On consultation, opinions were again divided in relation to this issue. One consultee submitted that the offender should be deemed to have pre-deceased his or her victim with the unlawful killer's share and the victim's share being distributed to the remaining joint tenants. Another consultee submitted that the unlawful killer's share in the joint assets should fall into his or her estate to be administered in accordance with his or her will.
- 2.87 Another consultee suggested that where an innocent survivor remains, the innocent survivor should take outright the ownership of the joint property. It was noted that beneficiaries of the deceased's estate would not under normal circumstances have succeeded to the property where a joint tenant survived the death of the deceased and, therefore, any joint tenant should have priority, vindicating their rights both in law and equity. In cases involving three or more joint tenants, this consultee suggested that the law should be amended to limit the wrongdoer's interest to his or her interest at the date of death of the deceased. Thus, the wrongdoer is not penalised disproportionately but is also not in a position to have a further benefit accrue to him or her.
- 2.88 Similarly, another consultee observed that as between the victim and the innocent co-owner the right of survivorship should be allowed to operate. This consultee suggested that the approach adopted should be shaped by two principles. Firstly, whilst the innocent co-owner cannot be prevented from benefitting from the fact that one of the other joint tenants has predeceased him or her, he or she cannot reasonably complain if the law decides that the effect of the unlawful killing is that some form of severance takes place preventing the future operation of the right of survivorship as between the innocent co-owner and the unlawful killer. The second principle relates to the

⁴³ [2011] IEHC 515, [2012] 1 IR 281 at 303.

argument that, but for the unlawful killing, the deceased person could have converted his or her potential one-third share into an actual one-third share by means of severance. Therefore, this consultee proposed that, only as between the unlawful killer and the victim, the victim's share should be treated as having been severed just prior to the unlawful killing. Thus the rights of the innocent co-owner are not affected as he or she is entitled, as one of two surviving joint tenants, to a one-half share if there is a severance.

- 2.89 In the Australian case *Rasmanis v Jurewitsch*,⁴⁴ the Supreme Court of New South Wales used partial severance to deal with the situation where there are more than two joint tenants. The Court held that an equitable interest equivalent to the share of the deceased person vested in the innocent joint tenant so that the offender could never benefit from the deceased person's share of the property if the surviving joint tenant predeceased the offender. The effect of this is that the interest of the deceased person is held on trust for the benefit of the remaining innocent joint tenant. The joint tenancy would remain between the offender and the innocent joint tenants over that percentage of the property that excludes the interest of the victim.
- 2.90 The Commission concurs with this approach so that, where there are more than two joint tenants, the joint tenancy would continue between any innocent joint tenants who would take the deceased person's interest by survivorship, but the offender's interest would be severed. The offender's remaining interest would also be subject to the judicial discretion to reduce that interest in accordance with the criteria already recommended above. The Commission considers that this solution has the advantage that the offender is prevented from making any gain as a result of the death of one of the joint tenants, but that he or she retains a portion of his or her pre-existing property interest, subject to the operation of the judicial discretion to reduce that share.
- 2.91 As noted above by consultees, it is likely that any innocent joint tenant would no longer wish to continue as joint tenant with the offender. In those circumstances, as Laffoy J stated in *Cawley v Lillis*, sections 30 and 31 of the *Land and Conveyancing Law Reform Act 2009* can be used to resolve this, because they empower a court to make an order for sale of the land and for distribution of the proceeds of sale as the court directs, and to make such other order as appears to the court to be just and equitable in the circumstances of the case.
- 2.92 The Commission recommends that where there are more than two joint tenants: (a) the joint tenancy should continue between any remaining innocent joint tenants (that is, joint tenants other than the victim and the offender), who would take the deceased person's interest by survivorship, but that the offender's interest would be severed; (b) the offender's remaining interest would also be subject to the power of the court to determine that interest in accordance with the criteria already recommended in paragraphs 2.80-2.82; and (c) that, where any remaining innocent joint tenant no longer wishes to continue as joint tenant with the offender, an application may be made under sections 30 and 31 of the *Land and Conveyancing Law Reform Act 2009* to resolve this.**

⁴⁴ [1970] 1 NSWLR 650, discussed in the Victorian Law Reform Commission's Report *The Forfeiture Rule* (September 2014), at paragraph 5.88ff.

CHAPTER 3 SCOPE OF PUBLIC POLICY PRINCIPLES AND THEIR MODIFICATION OR DISAPPLICATION

A Application of public policy principles to all property, including life insurance and pensions

- 3.01 It is important to bear in mind that, while some of the case law and legislation on the public policy principles have concerned succession to the estate of a deceased person, in one of the first cases in the common law world concerning them, *New York Mutual Life Insurance Co v Armstrong*,¹ the US Supreme Court applied them to prevent a person from obtaining payment under a life insurance policy he had taken out on another person's life and then murdered him.
- 3.02 Similarly, in the first English decision in this area, *Cleaver v Mutual Reserve Fund Life Association*,² the English Court of Appeal held that a woman who had been convicted of murdering her husband could not claim the proceeds of her husband's life insurance policy.
- 3.03 Similarly, the decision of the High Court (Laffoy J) in *Cawley v Lillis*,³ discussed in Chapter 2, did not involve inheritance or succession because the property at issue was held in a joint tenancy. Equally, in the decision of the Circuit Court (Judge Dunne) in *O'Brien v McCann*,⁴ which also concerned a family home held in a joint tenancy, the Court held that the defendant should not have the benefit of the portion of the payment made under a mortgage-related life insurance policy that that would otherwise have accrued to him.
- 3.04 In these cases concerning insurance policies, the courts applied the public policy principles that a person should not be able to benefit from his or her wrongful conduct and that no cause of action should arise from one's own unlawful or dishonourable act.⁵
- 3.05 It is notable in that respect that neither the decision in *Cawley v Lillis* nor in *O'Brien v McCann* involved the application of section 120 of the *Succession Act 1965*, because the joint tenancies in both, and the mortgage protection life insurance policy in *O'Brien*, did not form part of the deceased person's estate.
- 3.06 Similarly, in the *New York Mutual Life Insurance Co* case and the *Cleaver* case, both leading common law decisions in this area, their outcome did not

¹ 117 US 591 (1886): see paragraph 1.04, above.

² [1892] 1 QB 147: see paragraph 1.06, above.

³ [2011] IEHC 515, [2012] 1 IR 281.

⁴ Circuit Court, 8 October 1998, *The Irish Times*, 9 October 1998; *Cork Examiner*, 9 October 1998: see paragraph 2.56ff, above.

⁵ See paragraph 1.01ff, above.

depend on the application of specific legislative provisions, but rather on the underlying public policy principles.

- 3.07 The Commission considers that a similar approach would, and should, be applied where an offender who committed murder or manslaughter of his or her spouse sought to obtain the benefit of his or her deceased spouse's pension. It is worth noting in this context that a private investment pension bears many of the hallmarks of an insurance policy and is usually underwritten by an insurance undertaking. This is the case even where the pension is arranged through an employer as part of an occupational pension scheme.
- 3.08 Provision to deal with such property assets has also been included in relevant statutory regimes. For example, the New Zealand Law Commission's 1997 Report *Succession Law: Homicidal Heirs* recommended that non-probate property should be included in the comprehensive legislative scheme it recommended.⁶
- 3.09 This was implemented in section 8(1) of New Zealand's *Succession (Homicide) Act 2007*, which provides that an offender is not entitled to any property interest in any non-probate property assets of the victim (whether land, goods or other property) which would otherwise have passed to the offender on the death of the victim. This includes any interest of the deceased under a trust, an insurance policy or a pension.
- 3.10 Section 8(2) of the 2007 Act contains a "pre-decease" rule, and it is worth noting that section 8(3) of the 2007 Act contains a similar pre-decease rule for property held in a joint tenancy. In that respect, section 8 of the 2007 Act is consistent with the "pre-decease" rule already included in section 120(5) of the *Succession Act 1965*.
- 3.11 It is likely that, if a case came before the courts in this jurisdiction that solely concerned a life insurance policy or a pension, the approach in the *New York Mutual Life Insurance Co* and *Cleaver* cases, derived from the public policy principles, would be applied to deprive an offender of any benefit from them. The Commission has concluded, however, that it would be preferable to clarify the current law and that legislation, similar to that enacted in section 8 of New Zealand's *Succession (Homicide) Act 2007*, should expressly provide that the rule applies to the proceeds from all forms of property rights and entitlements of the deceased, such as trusts, life insurance policies and pensions, including occupational pensions or statutory pensions and benefits. This should be subject to the same conditions as those applying to the deceased's estate assets, including the judicial discretion in respect of joint tenancies, discussed in Chapter 2, above, and the more general discretion to modify or disapply the rule, discussed in this Chapter, below.
- 3.12 The Commission recommends that the scope of the public policy principles that a person is not to benefit from his or her wrongdoing and that a cause of action should not arise from one's own wrongdoing should be confirmed in legislation to extend to all forms of all property of whatever kind in which the victim has an interest, whether real or personal property or any part or combination of such property, including land, goods, money, property held under a trust, or the proceeds of an**

⁶ New Zealand Law Commission Report *Succession Law: Homicidal Heirs* (Report 38, 1997).

insurance policy or of a pension (whether such a pension arises from a pension contract or trust or by virtue of statute), and whether or not such property forms part of the estate of the victim; that “interest” includes any legal or beneficial interest, actual or contingent, and whether such interest has vested or is an interest in remainder; and that accordingly, the offender should be precluded from taking any share or interest in any interest of the victim in property which would otherwise have passed to the offender on the death of the victim.

B Scope of offences to which public policy principles apply

3.13 The exclusion from inheritance in section 120(1) of the *Succession Act 1965* applies to a sane person who has been guilty of the murder, attempted murder or manslaughter of his or her victim, except in relation to a share arising under a will made after the act constituting the offence.

3.14 In the Issues Paper, the Commission explored whether section 120 should be extended to other forms of homicide. This was discussed during the Oireachtas debates on the *Succession Bill 1965* when concern was expressed that under the Bill, as originally drafted, dangerous driving causing death could come within the scope of the rule because it was provided that it applied to “felonious killing.” The Minister for Justice noted that the original wording of section 120 had been replaced to remove the reference to felonious killing which he stated was to “make sure that that section debarring people benefitting in that fashion applied only to murder, attempted murder or manslaughter. Dangerous driving causing a fatality is excluded and in that case the person can benefit under the will of the deceased.”⁷

(1) Application to murder and manslaughter

(a) United Kingdom

3.15 In *Cleaver v Mutual Reserve Fund Life Association*,⁸ which involved a murder, the English Court of Appeal held that it could not contemplate enforcing rights where these arose directly from the commission of the murder.⁹ This was applied in *In re Estate of Crippen decd*¹⁰ in which the English High Court held that “it is clear that the law is, that no person can obtain, or enforce, any rights

⁷ See Vol 215 No. 14 Seanad Éireann Debates (25 May 1965), available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1965052500068?opendocument>.

⁸ [1891] 1 QB 147. The case involved an action taken by the executors of the estate of the deceased who had taken out a life insurance policy on his own life for the benefit of his wife. His wife subsequently murdered him. The Court held that, whilst the trust created by the policy in favour of the wife could not be performed because she had murdered her husband, the insurance money nonetheless formed part of the estate of the deceased. See also paragraph 1.03, above.

⁹ [1891] 1 QB 147, at 156.

¹⁰ [1911] P 108.

resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights.”¹¹

- 3.16 The English Court of Appeal confirmed the application of the common law rule to manslaughter in *In re the Estate of Hall*¹² where the sole beneficiary named in the will of the deceased had been convicted of his manslaughter. It was argued that the case should be distinguished from *Cleaver*, which involved murder, but the Court held that no distinction should be drawn “between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter.”¹³
- 3.17 Because the rule remains largely a common law rule in England, the issue as to whether the courts have a discretion to apply the forfeiture rule in cases of manslaughter, being a crime “which varies infinitely in its seriousness”,¹⁴ was discussed in *Gray v Barr*.¹⁵ In the High Court, Geoffrey Lane J concluded that in deciding whether the rule applied the test was whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence. If he or she was, and death resulted, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity.¹⁶ He cited the decision in *In re the Estate of Hall*¹⁷ in support of this view. On appeal to the Court of Appeal this approach was approved by Lord Denning MR. The extent of the common law rule has also been considered in a number of subsequent English cases including cases of diminished responsibility, suicide pacts and gross negligence manslaughter.¹⁸

(b) New Zealand

- 3.18 In New Zealand, section 7 of the *Succession (Homicide) Act 2007* precludes a killer from succeeding to any interest in property arising under the will of his or her victim, or on intestacy. For the purposes of the *Succession (Homicide) Act 2007*, “killer” is defined as “a person who kills a person or a child who has not become a person in any manner and in any circumstances that the person is guilty, either alone or with another person or persons, of the homicide of the person or child who has not become a person or would be so guilty if the killing had been done in New Zealand.”

¹¹ [1911] P 108, at 112.

¹² [1914] P 1.

¹³ [1914] P 1, at 7.

¹⁴ [1970] 2 QB 554, at 581 (Salmon LJ).

¹⁵ [1970] 2 QB 554. See the discussion in paragraph 4.07, below, noting that the defendant had been acquitted of manslaughter in his criminal trial but that this acquittal did not preclude the courts considering whether, in these civil proceedings, his actions were deemed to constitute manslaughter and thus allow the public policy principles to be applied.

¹⁶ [1970] 2 QB 626, at 640.

¹⁷ [1914] P 1.

¹⁸ For example, *In re Giles decd* [1972] Ch 544 (diminished responsibility); *Dunbar v Plant* [1998] Ch 412 (suicide pacts); *In re Land decd* [2007] 1 All ER 324 (manslaughter by gross negligent treatment).

3.19 Section 4 of the *Succession (Homicide) Act 2007* defines “homicide” as “the killing of a person or a child who has not become a person, by another person, intentionally or recklessly by any means that would be an offence under New Zealand law, whether done in New Zealand or elsewhere, but does not include: (a) a killing caused by negligent act or omission; (b) infanticide; (c) a killing of a person by another in pursuance of a suicide pact; or (d) an assisted suicide.

(c) Aiding, abetting, counselling and procuring

3.20 In the Issues Paper, the Commission observed that, arguably a person who aids, abets, counsels or procures the killing of another is morally as culpable as the killer. Thus, section 7(1) of the *Criminal Law Act 1997* provides that “any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.” However the rule does not currently apply to a person convicted under section 7(1) of the 1997 Act. The British *Forfeiture Act 1982*, the *Forfeiture (Northern Ireland) Order 1982*¹⁹ and the New South Wales *Forfeiture Act 1995*²⁰ provide that references to unlawful killing includes aiding, abetting, counselling or procuring such a killing.

(d) Discussion and recommendations

3.21 In the Issues Paper, the Commission asked whether section 120 of the *Succession Act 1965* should be applied to other types of unlawful killing, that is, other than murder, attempted murder and manslaughter. Most consultees suggested that all types of unlawful killing should be included where the perpetrator is sane. Thus, for example, the rule should be applied to cases of assisted suicide, death caused by gross negligence or recklessness and death caused by deliberate and intentional neglect. Most consultees also suggested that the rule should apply to those who aid, abet, counsel or procure such unlawful killing as the perpetrator in these cases is as guilty, either by action or inaction, as the person who actually committed the offence.

3.22 One consultee submitted that, while the application of section 120 should be extended to all forms of unlawful killing, the courts must have the discretion and flexibility to apply or modify the forfeiture rule in order to adequately deal with all of the circumstances of a particular case and for those situations which might not yet have been envisaged. In this regard, legislation should provide extensive guidance as to the principles to be applied.

3.23 One consultee opposed the application of the rule to additional offences, such as causing death by dangerous driving, as these offences do not involve a deliberate taking of life such that the killer could be said to intend to profit from killing his or her victim.

¹⁹ Section 1(2) of the 1982 Act and Article 1 of the 1982 Order both provide that references to a person who has unlawfully killed another “include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other.”

²⁰ Section 3 of the NSW 1995 Act defines “unlawful killing” as “(a) any homicide committed in the State that is an offence, and (b) any homicide that would be an offence if committed within the State, and includes aiding, abetting, counselling or procuring such a homicide and unlawfully aiding, abetting, counselling or procuring a suicide.”

- 3.24 In relation to attempted murder, one consultee identified an anomaly in the wording of section 120 of the *Succession Act 1965* which they proposed should be addressed in the context of any reform. The reference in section 120 to “a share arising under a will made after the act constituting the offence” was intended to relate to cases involving attempted murder. However, this overlooks the scenario in which the victim does not die immediately after the act by the unlawful killer that constitutes the offence and that the victim may not be aware of the identity of the unlawful killer at the time of making the will.
- 3.25 The Commission agrees with the view expressed in these submissions that the current scope of the rule be retained so that it continues to apply to murder, attempted murder and manslaughter. The Commission also concurs with the view that, in accordance with the public policy principles on which the rule is based, the current scope of the rule is appropriate and should not be extended to other forms of offences that lead to death, such as dangerous driving causing death.
- 3.26 The Commission agrees with the comment of a consultee that the reference in section 120 to “a share arising under a will made after the act constituting the offence” should be clarified. It may have been assumed that it is only in the case of attempted murder that a testator will have survived long enough to make a will benefitting the offender, but this is not inevitably the case. A person may be convicted of murder or manslaughter even though a significant period has elapsed between the commission of the causative act and the death of the victim. The common law rule that, in order to sustain a conviction for homicide, the victim had to die within a year and a day was abolished in respect of all homicide offences and suicide by section 38 of the *Criminal Justice Act 1999* (it had been abolished in England and Wales in 1996). Its abolition reflected the reality that, with modern medical interventions, a victim may well survive for quite some time after sustaining a fatal attack. It could also be applicable in poisoning cases, such as arose in the American case *Riggs v Palmer*.²¹
- 3.27 The Commission also considers that this presents a good opportunity to clarify that the rule is subject to the ability of the victim of this crime to be free to make whatever provision he or she wishes in the aftermath of a homicide offence (the so-called “forgiveness rule”). This is, it should be noted, subject to the general law concerning wills, including testamentary capacity (much of the relevant law is set out in Part 7 of the *Succession Act 1965*).
- 3.28 The Commission does not agree with the approach taken in the other jurisdictions discussed above (and reflected in some submissions) that the public policy principles should apply to a person who aids, abets, counsels or procures the commission of the homicide offences. This is because what constitutes such a level of participation can vary enormously and, furthermore, the terms “aid” and “abet” are not subject to clear definitions. While mere presence at the scene of the crime does not, in itself, constitute aiding or abetting, and that more active involvement is required,²² how much more active the participation must be is not always clear. The leading textbooks also reveal

²¹ 115 NY 506 (1889): see paragraph 1.05, above.

²² See *The People (DPP) v Jordan and Deegan* [2006] 3 IR 435 and *The People (DPP) v Boyle* [2010] 1 IR 787.

the indeterminacy of concepts such as aiding and abetting.²³ It is also important to bear in mind that this Report is concerned with civil liability (which is discussed in more detail in Chapter 4), and it should not be presumed that the criminal law liability imposed on those who aid and abet a principal offender should also apply in a civil law setting. Given the range of conduct, with highly variable degrees of subjective culpability, that may come within the meaning of “aiding, abetting, counselling or procuring” the Commission has concluded that in the current context they should not be equated with the act of the person who carries out the offence.

- 3.29 The Commission recommends that the public policy principles preventing a person from benefitting from his or her wrongdoing should continue to apply to the offences of murder, attempted murder and manslaughter; but should not apply to any person who aids, abets, counsels or procures the commission of those offences.**
- 3.30 The Commission recommends that the current scope of application of the public policy principles is appropriate and should not be extended to other forms of offences that lead to death, such as dangerous driving causing death.**
- 3.31 The Commission also recommends that the application of the principles does not apply to a share arising under a will made after the act constituting any of the three homicide offences has occurred; that this is therefore subject to the ability of the victim of murder, attempted murder or manslaughter to make whatever provision he or she wishes in the aftermath of the acts constituting any of those offences, which is in turn subject to the law concerning wills, including testamentary capacity; and that, arising from this recommendation and those already made in the Report, section 120(1) of the *Succession Act 1965* should be repealed.**

C Modification or disapplication of the public policy principles

(1) *Modification or disapplication in cases of manslaughter*

3.32 Homicides have differing degrees of moral culpability. The application of the public policy principles has the potential to operate very harshly against an offender where the offence involved is manslaughter, a crime in relation to which the gravity and moral culpability of the offender vary enormously. In the Issues Paper, the Commission observed that to address this some jurisdictions have enacted legislation to allow the courts a discretion to modify or disapply the principles in cases other than murder.

(a) *United Kingdom*

3.33 The British *Forfeiture Act 1982* and the *Forfeiture (Northern Ireland) Order 1982* both grant the court the power to modify or disapply the rule. Before making such an order, the court must be satisfied that “having regard to the

²³ Ashworth, *Principles of Criminal Law* 6th ed (Oxford University Press, 2009), p.407, for example, writes: “Aid may be given by supplying an instrument to the principal, keeping a look-out, doing preparatory acts, and many other forms of assistance given before or at the time of the offence.” See also Ormerod, *Smith and Hogan’s Criminal Law* 13th ed (Oxford University Press, 2011), p.191 *et seq.*

conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.”²⁴

3.34 The courts have modified the effect of the rule in a number of cases including:

- a case where the killer had suffered violence at the hands of the victim and the death resulted from the accidental discharge of a shotgun in response to that violence.²⁵
- a case where the killer was convicted of the manslaughter of his wife on grounds of diminished responsibility. The plaintiff sought an order for modification to put in trust for his son the proceeds of a joint life insurance endowment policy. It was conceded that such was the deliberate nature of the plaintiff’s violent attack on his wife that the rule applied so as to disentitle him from any benefit under the policy. However, the Court held that it was appropriate to grant his application to modify the rule as his responsibility for the crime was substantially impaired by abnormality of mind and the order sought would benefit his son rather than the killer himself.²⁶
- a case where there was a failed suicide pact. In granting an order modifying the effect of the rule, the Court noted that it was entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the rule.²⁷

3.35 The UK legislation has been criticised, particularly because it does not contain guidance on the principles to be applied in determining when the justice of the case requires the rule to be modified. It has been noted that it is possible to postulate cases in which relevant considerations point in different directions; and that it is difficult to attain precision in formulating principles which would enable confident predictions to be made about the extent to which a degree of moral culpability will be allowed to affect the outcome.²⁸ It was therefore suggested that more extensive guidance, possibly similar to that found in family law legislation such as section 16 of the *Family Law Act 1995* (discussed in Chapter 2, above), would be helpful to the courts and others concerned.

(b) New South Wales

3.36 The New South Wales *Forfeiture Act 1995*, which was modelled on the UK legislation, was enacted to provide relief where appropriate from unduly harsh

²⁴ Section 2(2) of the *Forfeiture Act 1982* and Article 2(2) of the *Forfeiture (Northern Ireland) Order 1982*.

²⁵ *Re K (decd)* [1986] Ch 180.

²⁶ *In re S (decd)* [1996] 1 WLR 235.

²⁷ *Dunbar v Plant* [1998] Ch 412.

²⁸ Cretney, “The Forfeiture Act 1982: the Private Member’s Bill as an Instrument of Law Reform” (1990) 10 OJLS 289, p.303.

application of the rule.²⁹ In introducing the Bill, the NSW Attorney General noted that the operation of the rule may be unduly harsh in some cases of unlawful killing, because the rule may operate regardless of the killer's motive or degree of moral guilt.³⁰ He explained that the proposed legislation recognises that there are varying degrees of moral culpability in unlawful killings, and legislation is necessary to give judges sufficient discretion to make orders in deserving cases in the interests of justice.³¹

3.37 Section 5 of the *Forfeiture Act 1995* provides that if a person has unlawfully killed³² another person and is thereby precluded by the rule from obtaining a benefit, an interested person may make an application to the courts for an order modifying the effect of the rule³³ and that on any such application, the court may make an order modifying the effect of the rule if it is satisfied that justice requires the effect of the rule to be modified.³⁴ In determining whether justice requires the effect of the rule to be modified, the court is to have regard to the conduct of the offender and the deceased person, the effect of the application of the rule on the offender or any other person, and such other matters as appear to the Court to be material.³⁵ The application for an order modifying the effect of the rule can be made not only by the unlawful killer but by any "interested party."³⁶

3.38 The *Forfeiture Act 1995* empowers the court to make a forfeiture modification order in such terms and subject to such conditions as the court thinks fit. By way of example, the *Forfeiture Act 1995* provides that in the case of more than one interest in the same property (for instance, a joint tenancy), the order excludes the operation of the rule in relation to any or all of the interests.³⁷ An example of where the forfeiture rule has been modified under the 1995 Act is a case where the Crown had accepted a plea of guilty by the plaintiff to the

²⁹ The 1995 Act was enacted following the decision in *Troja v Troja* (1994) 33 NSWLR 269 in which the NSW Court of Appeal held, by a majority, that the application of the rule at common law was not discretionary, but was an inflexible rule of law that the courts had to apply regardless of the circumstances of the case.

³⁰ New South Wales, Parliamentary Debates, Legislative Council (25 October 1995).

³¹ *Ibid.*

³² Section 4(2) excludes the application of the Act to unlawful killings that constitute murder.

³³ Section 6(1) of the NSW *Forfeiture Act 1995*.

³⁴ Section 5(2) of the NSW *Forfeiture Act 1995*.

³⁵ Section 5(3) of the NSW *Forfeiture Act 1995*.

³⁶ An "interested person" for the purposes of applications for forfeiture modification orders under the Act includes the unlawful killer; the executor or administrator of the estate of the deceased person; a beneficiary under the will of the deceased person or a person who is entitled to any estate of interest on the intestacy of the deceased person, a person claiming through the unlawful killer; and any other person who has a special interest in the outcome of an application for a modification order.

³⁷ Section 6(2)(a) of the NSW *Forfeiture Act 1995*.

manslaughter of his spouse on the ground that he had available to him a partial defence of diminished responsibility.³⁸

(c) New Zealand

3.39 In New Zealand, the *Succession (Homicide) Act 2007* was enacted following a review of the rule by the New Zealand Law Commission in 1997 in which it recommended its codification.³⁹ Although the 2007 Act does not provide for modification of the effect of the rule, it excludes certain forms of unlawful killing from the definition of homicide for the purposes of the Act, thus excluding the application of the rule to persons guilty of such crimes.⁴⁰ Despite these exclusions, concerns were raised in the parliamentary debates that it did not take sufficient account of the differing degrees of moral culpability.⁴¹

3.40 In response to a proposal that this could be resolved by providing the court with discretion in exceptional circumstances when the interests of justice and fairness so required, it was noted that other jurisdictions had struggled with the concept and that the question of whether a killing was sufficiently abhorrent to trigger the bar of profiting was better decided by Parliament. It was also noted that a key concern of the legislation was to create greater certainty, and that it was arguable that including a discretion would actually reduce certainty and that more cases would end up in courts.⁴²

(d) Discussion and recommendations

3.41 In the Issues Paper, the Commission asked whether the courts should be given a discretion to modify the effect of the public policy principles in cases other than murder. The Commission sought views as to the circumstances in which such a discretion should apply and the factors which should be taken into account in exercising the discretion.

3.42 The majority of submissions received by the Commission favoured empowering the courts to modify the effect of the rule in cases other than murder. A minority of submissions suggested that such a discretion should be avoided as it could lead to an element of uncertainty because individual judges may look at similar cases differently, and that this could lead to increased costs.

3.43 The majority submissions that favoured a discretion to modify the rule suggested that all of the circumstances of each case should be considered including: the conduct of both parties; the circumstances of the offender and his

³⁸ *Jans v Public Trustee* [2002] NSWSC 628. In this case, the beneficiaries under the victim's will (the three children of the killer and his victim) who would succeed to her estate in the event that the application to modify the rule was denied, consented to the order modifying the effect of the rule.

³⁹ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report 38, 1997).

⁴⁰ Section 4(1) of the New Zealand *Succession (Homicide) Act 2007* provides that the forms of unlawful killing excluded are: a killing caused by negligent act or omission; infanticide; a killing of a person by another in pursuance of a suicide pact; and an assisted suicide.

⁴¹ New Zealand, Parliamentary Debates (Hansard), House of Representatives (12 June 2007), Kate Wilkinson.

⁴² New Zealand, Parliamentary Debates (Hansard), House of Representatives (12 June 2007), Clayton Cosgrove (Associate Minister of Justice).

or her dependants; the effect of the rule on all affected persons; the presence of diminished responsibility; whether there was a motive or intention to cause death; and any other matters which may appear relevant.

- 3.44 The Commission concurs with the view expressed in the submissions, which is also the position that has been legislated for in other jurisdictions, that courts should be empowered to modify or disapply completely the disinheritance rule in the context of specific cases of manslaughter. The case studies referred to above indicate the wide variety of circumstances in which manslaughter is committed and the different degrees of moral culpability of offenders that are involved as a result.
- 3.45 An example where the discretion may need to be applied is where the offence is committed in the context of a history of domestic violence. Similarly, an offender may have diminished responsibility as a result of ill-health, a defence now recognised in legislative form in the *Criminal Law (Insanity) Act 2006*.
- 3.46 The Commission also concurs with the views of consultees that, rather than listing specific categories of such instances, it is preferable to include a list of criteria which a court is to consider. This is consistent with the approach taken by the Commission in Chapter 2, above, in the context of joint tenancies.
- 3.47 The Commission recommends that where the offender has committed manslaughter a court may, in its discretion, make an order to modify or disapply completely the public policy principles if the Court is satisfied that justice requires this.**
- 3.48 The Commission also recommends that, in exercising this discretion, the court should have regard to all of the circumstances of the case, including: (a) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (b) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; (d) the age and financial needs, obligations and responsibilities of the offender; (e) the nature of the offender's conduct related to the offence, that is, whether the offence was voluntary or involuntary manslaughter; (f) the presence of diminished responsibility, where relevant; and (g) any other matters which may appear to the court to be relevant.**

(2) Section 117 and section 67A(3) applications

- 3.49 Section 120(1) of the *Succession Act 1965* bars an unlawful killer from making an application for "just provision" pursuant to section 117.⁴³ The question therefore arises whether, in the event that the courts are granted the discretion

⁴³ Section 117 of the 1965 Act allows a child to seek a share of his or her deceased parent's estate if it can be established that the parent did not make "proper provision" for the child in accordance with his or her means, whether by will or otherwise.

to modify the effect of the rule, this discretion should extend to permitting an offender who has killed his or her parent to make an application under section 117 for a share in the estate of that parent.

- 3.50 In the Issues Paper, the Commission sought views on whether any proposed power granted to the courts to modify the effect of the rule should include the power to allow an unlawful killer to make an application under section 117. The majority of consultees concluded that the courts should be empowered to allow an unlawful killer to make such an application. One consultee observed that the courts should only be empowered to do so in highly unusual circumstances where the justice of the case requires it and that guidance on this should be provided. One consultee, however, opposed such a discretion on the basis that section 117 has already given rise to a substantial volume of litigation. The Commission concurs with the views of the majority of consultees on this issue.
- 3.51 Section 67A(3) of the *Succession Act 1965*, as inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, allows the child of a person in a civil partnership who has died intestate leaving a civil partner and one or more children to apply for a greater share in the estate than he or she would otherwise be entitled.
- 3.52 As both section 117 and section 67A(3) provide for an application for a share in the estate of a deceased parent, the absence of a reference in section 120(1) of the *Succession Act 1965* prohibiting an application under section 67A(3) of the *Succession Act 1965* is anomalous.
- 3.53 In the Issues Paper, the Commission asked whether the public policy principles should be extended to prohibit an unlawful killer from applying for provision out of the victim's estate under section 67A(3) of the *Succession Act 1965*. All responses received by the Commission with regard to this issue confirmed that, in the interest of consistency, this should be done. The Commission concurs with this, which would also be subject to the discretion to modify or disapply the rule.
- 3.54 **The Commission recommends that, in exercising the discretion to modify or disapply the public policy principles, the court may, subject to the same criteria as set out in paragraph 3.48, make an order allowing the offender to make an application under section 67A(3) or, as the case may be, under section 117 of the *Succession Act 1965*.**
- (3) *Rule in section 120(4) of 1965 Act for offence committed against deceased carrying 2 years imprisonment***
- 3.55 Section 120(4) of the *Succession Act 1965* provides:
- “A person who has been found guilty of an offence against the deceased, or against the spouse or civil partner or any child of the deceased (including a child adopted under the Adoption Acts, 1952 and 1964, and a person to whom the deceased was *in loco parentis* at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117.”⁴⁴

⁴⁴ Section 120(4) as initially drafted in the *Succession Bill 1965* included a bar on succeeding to a share in the estate on intestacy. During the Oireachtas debates on the 1965 Bill, concerns were

In the Issues Paper, the Commission identified a number of issues in relation to this provision.

(a) Offence punishable by a sentence of two years imprisonment or more

- 3.56 For the provision to apply, it suffices if the offence is punishable by a sentence of two years imprisonment or more; it is not necessary for the offence actually to be punished by two years imprisonment or more. Thus, the application of the provision has the potential to have excessively harsh consequences where a court decides to impose only a lenient sentence. For example, if a person is convicted of assault causing harm of a sibling (punishable by imprisonment for a maximum period of at least two years) but is sentenced to a fine or short term of imprisonment, he or she is barred from making an application pursuant to section 117. Similarly, if a spouse assaults his or her child causing harm but is given a short or suspended sentence or only fined, he or she is forever barred from taking his/her legal right share in the other spouse's estate.
- 3.57 In this respect, it contrasts with section 8 of the *Juries Act 1976*⁴⁵ where disqualification from jury service depends on the punishment actually imposed and not the maximum to which the person might have been liable.
- 3.58 Furthermore, section 120(4) applies where a person has been found guilty of any offence against the deceased (or against the spouse or civil partner or any child of the deceased) and not just a violent offence. This could include, for example, an offence under the *Criminal Justice (Theft and Fraud Offences) Act 2001* because virtually all offences under the 2001 Act carry maximum sentences of two years imprisonment or more on conviction on indictment. It appears that the scope of section 120(4) could include injuries inflicted as a result of driving offences, for example, driving without due care and attention,⁴⁶ which carries a maximum penalty of a Class A fine but if it results in death or serious bodily harm to another it carries a prison sentence of up to two years imprisonment and/or a fine, thus bringing the offence within the scope of section 120(4) of the 1965 Act.

(b) Prosecutorial discretion

- 3.59 Section 120(4) also raises an issue with regard to prosecutorial discretion. Violent conduct towards another person might lead to a prosecution for an offence contrary to section 2 (assault) or section 3 (assault causing harm) of the *Non-Fatal Offences Against the Person Act 1997*. There can often be a fine dividing line between the two. Yet, a conviction for an offence under section 2

expressed on the possible harsh consequences of the provision, particularly on surviving spouses, as a result of which the section as enacted excludes a share in the estate on intestacy.

⁴⁵ Section 8 of the *Juries Act 1976* provides, *inter alia*, that a person is disqualified from jury service if on conviction for an offence he or she: (a) has been sentenced to imprisonment for life or for a term of 5 years or more or (b) at any time in the last ten years served any part of a sentence of imprisonment of at least three months. In Chapter 6 of its *Report on Jury Service* (LRC 107-2013), the Commission recommended that a sentence-related approach to disqualification should be retained, but that this should be complemented by providing that disqualification would also apply to conviction for certain designated offences regardless of the sentence imposed.

⁴⁶ Section 52 of the *Road Traffic Act 1961*, as inserted by the *Road Traffic (No.2) Act 2011*, provides that a person shall not drive a vehicle in a public place without due care and attention.

of the 1997 Act would not engage section 120(4) of the *Succession Act 1965* but a conviction for a section 3 offence would.

(c) Applications under section 117 of the Succession Act 1965

3.60 In so far as section 117 applications are concerned, relief is discretionary⁴⁷ which means that the court can take account of the applicant's past behaviour towards the deceased.⁴⁸

3.61 In deciding whether to grant relief, the courts have generally adopted a two-stage process. Firstly, the court decides whether the testator has failed in his or her moral duty to make proper provision for the applicant. In *XC v RT*⁴⁹ the High Court (Kearns J) confirmed that "there is a high onus of proof placed on an applicant for relief under section 117, which requires the establishment of a positive failure in moral duty."⁵⁰ If the applicant overcomes this "relatively high onus to discharge,"⁵¹ the court proceeds to assess what provision is to be ordered for the applicant child.

3.62 In *McDonald v Norris*,⁵² the Supreme Court confirmed that the extent to which account should be taken of bad feeling between the parent and the child depends upon the particular circumstances of each case. The Court confirmed that the behaviour of the child should be taken into account either to extinguish or to diminish the obligation of the parent. The Court therefore concluded that the applicant's behaviour towards his father diminished the moral obligation of the deceased towards him.

(d) Discussion and recommendation

3.63 In the Issues Paper, the Commission sought views on whether section 120(4) of the *Succession Act 1965* should be repealed. In the alternative, the Commission asked whether it should be amended and, if so, what

⁴⁷ Section 117(1) provides that "where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just." In *Re GM, FM v TAM* (1970) 106 ILTR 82, Kenny J set out a number of criteria to assist in the assessment of what constitutes proper provision and, in *XC v RT* [2003] 2 IR 250, the High Court (Kearns J) provided further assistance setting out eighteen relevant legal principles which, it was agreed by counsel, as a result of the authorities which had been cited can be said to be derived under s. 117.

⁴⁸ Section 117(2) provides that "the court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

⁴⁹ In *XC v RT* [2003] 2 IR 250 Kearns J set out 18 relevant legal principles which it was agreed could be said to be derived from the case law cited on section 117.

⁵⁰ *XC v RT* [2003] 2 IR 250 at 262.

⁵¹ *Re IAC* [1990] 2 IR 143 at 148 (Kearns J).

⁵² [2000] 1 ILRM 382.

amendments should be made to it. The Commission also asked whether the courts should be given a discretion to modify its application.

- 3.64 The Commission received mixed views on this issue. A number of consultees suggested that section 120(4) should be repealed. One consultee observed that the offences envisaged by section 120(4) appear to relate to domestic violence as the offences preclude the taking of a legal right by a spouse or civil partner, or an application under section 117 by a child of the deceased. It was noted that, at the time of the enactment of the *Succession Act 1965*, there was little or no legislation dealing with domestic violence. Similarly, there was no legislation allowing spouses to seek judicial review or divorce and, therefore, no means by which to extinguish the legal rights to a share in the estate of a deceased spouse provided by the 1965 Act.
- 3.65 Another consultee suggested that reference to section 117 could be omitted from section 120(4) given the court's general discretion in dealing with applications under section 117. However, in relation to spouses and civil partners, it was noted that, as a spouse is automatically entitled to the legal right share unless there has been desertion, renunciation of the right under section 113 of the *Succession Act 1965* or extinguishment of the right on judicial separation or divorce, there is a need to address the position of a surviving spouse or civil partner whose serious misconduct towards the deceased should disqualify him or her from the right to the legal right share. It was suggested, however, that section 120(4) could be amended to focus on the actual sentence received for the offence. Such an amendment would reduce the need to have a judicial discretion allowing for a modification of the operation of the rule.
- 3.66 Another consultee proposed that section 120(4) should not be triggered by a conviction which occurred prior to the marriage between the parties and of which the deceased person was aware at the time of the marriage.
- 3.67 The Commission notes the divergent views on this matter in the views of consultees. Bearing in mind the extremely wide nature of the offences to which section 120(4) of the 1965 Act applies, it is difficult to find a clear justification for the exclusion that flows from it. In addition, it appears unlikely that section 120(4) is very well known, or that its provisions could be applied in practice by executors and others who have responsibility for the administration of estates. In addition, the Commission notes the wide discretion already available to courts under section 117 of the 1965 Act, identified in the case law referred to above, under which the behaviour of a person applying under its terms, including behaviour that falls short of a criminal act, can be fully taken into account. For these reasons the Commission has concluded that section 120(4) of the 1965 Act should be repealed without replacement.
- 3.68 **The Commission recommends that section 120(4) of the *Succession Act 1965* should be repealed without replacement.**

CHAPTER 4 CIVIL NATURE OF THE PUBLIC POLICY PRINCIPLES AND PROCEDURAL ISSUES, INCLUDING COSTS

A Civil nature of principles means that conviction not required

- 4.01 Proceedings under the *Succession Act 1965*, including those under section 120, are civil rather than criminal in nature. Nonetheless, it is also clear that the current rule in section 120, derived from the public policy principles that a person should not benefit from his or her crime, is directly linked to the criminal offences of murder and manslaughter. An important question arises as to whether it is necessary for there to be a conviction for those offences before the disinheritance rule can apply. On this matter, the wording of section 120 appears to give contradictory signals.
- 4.02 In *Nevin v Nevin*¹ Kearns P noted that section 120(1) of the 1965 Act refers to a person who is “guilty” of the offences mentioned there (murder, attempted murder and manslaughter), whereas section 120(4) refers to a person being “found guilty” of the other offences mentioned there (carrying at least two years possible imprisonment on conviction). Kearns P commented that “it is an extraordinary omission from s.120(1) for which it is difficult to find any rational explanation, given that a ‘finding of guilt’ is required under s.120(4) for lesser offences and having regard further to the fact that ‘guilt’ is a finding appropriate to the criminal rather than the civil process. One is left not knowing what the section is to mean, unless one supplies the word ‘found’ to subsection (1) where in the text it does not appear.”² He concluded that “in the circumstances of uncertainty, and given that the section is undoubtedly punitive and conclusive in both nature and effect, its terms must clearly be subject to rules of strict construction in favour of the person against whom it is sought to enforce it.”³ Kearns P also commented that a suitable amendment to section 120(1) to address this anomaly would be of considerable assistance.⁴

¹ [2013] IEHC 80; [2013] 2 ILRM 427.

² [2013] IEHC 80; [2013] 2 ILRM 427 at 435.

³ [2013] IEHC 80; [2013] 2 ILRM 427 at 435.

⁴ Spierin *The Succession Act 1965 and Related Legislation: A Commentary* 3rd ed (Butterworths 2003), p.360, commenting on Pearce *The Succession Act 1965: A Commentary* 2nd ed (Law Society of Ireland 1986), p.292, states: “in a previous edition of this book it was suggested that the wording of the section, referring as it does to a person ‘who has been guilty’ rather than to a person ‘who has been found guilty (as in sub-s(4)) does not appear to require a conviction before the disqualification on benefit applies. However the terms ‘murder’, ‘attempted murder’ and ‘manslaughter’ are terms of art in the criminal law and it is perhaps difficult to imagine that a court would apply the disqualification if there is no conviction.” For the reasons discussed below, the view in the 2nd edition of the text that a conviction is not required may be the preferable view and consistent with case law such as *Gray v Barr* [1971] 2 QB 554: see also footnote 12, below.

(1) Section 120 already provides it does not apply where person found insane

- 4.03 The case law in this area has consistently held that the public policy principles do not apply to a person who has been found insane. This is based on the view that only intentional homicide (“felonious” homicide) comes within the public policy principles. This view is reflected in section 120(1) of the 1965 Act which refers to a “sane person” who is guilty of murder or manslaughter. Prior to 2006, the formal verdict where insanity was successfully pleaded was “guilty but insane” and, even though the verdict was treated as an acquittal, the use of the word “guilty” in section 120(1) of the 1965 Act can be explained on this basis. Since the enactment of the *Criminal Law (Insanity) Act 2006* the verdict is “not guilty by reason of insanity.”
- 4.04 Similarly, in its *Report on Succession Law: Homicidal Heirs*,⁵ the New Zealand Law Commission also noted that a person may not be brought to trial, and therefore will not be convicted, where he or she is unfit to plead. The *Criminal Law (Insanity) Act 2006* also sets out a procedure for determining “fitness to be tried” which replaces the pre-2006 “fitness to plead.” Under the 2006 Act, where the person is found to be unfit to be tried, the criminal proceedings are adjourned if it appears that the person may at some time become fit to be tried; or, if it appears that the person would be found not guilty by reason of insanity, he or she may be acquitted. In either case, the person may be detained until such time as it is determined that he or she may be released under the 2006 Act on the same basis as if found not guilty by reason of insanity.
- 4.05 In the Issues Paper, the Commission noted that in 2005 the New South Wales legislature had amended its *Forfeiture Act 1995* to grant further powers to the courts to apply the rule to a killer found not guilty of murder by reason of mental illness where it would not be just for him or her to inherit from the victim’s estate.⁶ In determining whether justice requires the rule to be applied in such circumstances, the court must consider the conduct of the offender and the deceased, the effect of the application of the rule on the offender or any other person and such other matters as appear material.⁷
- 4.06 The courts have made orders under these provisions in a number of cases where a killer has been found not guilty of murder by reason of mental illness:
- in a case where the deceased was killed when she was attacked with a knife by her husband and son. Her daughter took part in the attack but did not inflict any wounds on her mother. The attackers were charged with murder but were found not guilty by reason of mental illness. The court ordered that the rule should apply to preclude all three from succeeding to the estate of the deceased.⁸

⁵ See New Zealand Law Commission *Succession Law: Homicidal Heirs* Report 38 (1997), p.11.

⁶ See Part 3 of the New South Wales *Forfeiture Act 1995* (inserted by section 6 of the *Confiscation of Proceeds of Crime Amendment Act 2005*).

⁷ Section 11(3) of the New South Wales *Forfeiture Act 1995*.

⁸ *Fitter v Public Trustee and Ors* [2007] NSWSC 1487.

- in a case in which the defendant was found not guilty by reason of mental illness where he had killed his partner in an episode of domestic violence.⁹
- 4.07 In the Issues Paper, the Commission asked whether the courts should be empowered to disapply the general principles to those found not guilty by reason of insanity where it would be unjust for them to be disinherited. Some consultees acknowledged that it is difficult to envisage a situation where it would be just to deprive a person of inheritance rights who is found not guilty by reason of insanity. It was suggested that it might depend on whether the wrongdoer remained insane or was found in the future to be sane but it was acknowledged that even in such circumstances disinheritance would be very difficult to justify. It was therefore suggested that this issue should be included in the discretionary powers afforded to the courts to modify the forfeiture rule as discussed in Chapter 3, above.
- 4.08 On the other hand, a number of consultees concluded that the courts should be empowered to apply the rule in such cases and, in exercising the discretion to do so, the court should consider all matters as appear to be material, including the medical history and prognosis of the offender.
- (2) Public policy principles not punitive and apply where person has been acquitted**
- 4.09 The exclusion of cases involving insanity from the scope of application of the public policy principles indicates that, contrary to the view expressed in *Nevin v Nevin*, any deprivation that arises is not “punitive” in its purpose. In 2014 the Victorian Law Reform Commission noted that this law is not concerned with punishing a killer for the crime but with enforcing the public policy principles that a person should not benefit from his or her crime and that no cause of action should arise from one’s own wrongdoing.¹⁰ The Victorian Law Reform Commission cited the decision of the High Court of Australia in *Helton v Allen*¹¹ where the Court held that the rule may be applied to a person who has been acquitted in criminal proceedings or who has not been prosecuted at all. In that case, the defendant had been acquitted of murdering his wife, but civil proceedings were then brought to prevent him being appointed executor and from taking any share of his wife’s estate. The High Court of Australia held that such civil proceedings, based on the public policy principles, did not conflict with the acquittal in the criminal trial and that it would be sufficient in the proceedings for the plaintiff to establish on the balance of probabilities, the civil standard of proof, that the person unlawfully killed the deceased.
- 4.10 This approach was also applied by the English Court of Appeal in *Gray v Barr*,¹² in which the defendant had been charged with the murder of the

⁹ *Hill (Burrowes) v Hill* [2013] NSWSC 524.

¹⁰ See Victorian Law Reform Commission, Consultation Paper, *The Forfeiture Rule* (2014), p.29.

¹¹ (1940) 63 CLR 691.

¹² [1971] 2 QB 554. This is cited in Spierin *The Succession Act 1965 and Related Legislation: A Commentary* 3rd ed (Butterworths 2003) as authority for the proposition that it was doubtful whether the common law public policy principle applies to all cases of manslaughter. The case was not cited for the proposition that the public policy principles apply even where, as in that case, the defendant has been acquitted: see also footnote 4, above.

plaintiff's husband. The defendant, thinking (incorrectly) that his wife had resumed an affair with the deceased, had gone to the deceased's house armed with a loaded shotgun with the safety catch off. During a struggle between the defendant and the deceased, the gun went off and killed the deceased. The defendant was acquitted of both murder and manslaughter, after what Lord Denning MR described as a strong direction to that effect by the trial judge to the jury.

- 4.11 The plaintiff then brought a fatal accidents claim against the defendant, the equivalent of an action under sections 48 and 49 of the *Civil Liability Act 1961*. The defendant admitted liability, but claimed an indemnity under his household insurance policy which covered liability arising from "accidental" claims. The insurance company refused to indemnify the defendant.
- 4.12 The English Court of Appeal held that, although the defendant had been acquitted of murder and manslaughter, the insurance company was entitled to look behind the acquittal to determine whether in fact the killing had been "accidental." The Court held that, as the defendant had knowingly brought a shotgun to the deceased's house, the killing could not be described as "accidental" for the purposes of insurance contract law. In addition, the Court held that in any event it would be contrary to the public policy principles if a person who was armed with a shotgun in the circumstances of the case could avail of insurance cover even where he had been acquitted of all charges relating to the death.
- 4.13 A comparable case, though one involving a quite different factual background, was *Keating v O'Brien*.¹³ In this case the defendant had been charged with his wife's murder but he had been found not guilty after a jury trial. The defendant and his wife had bought their family home as joint tenants for €223,000, subject to a mortgage of €184,000. After his wife's death, the outstanding mortgage debt on the home had been paid under the couple's mortgage protection life insurance policy. The deceased had died intestate.
- 4.14 The plaintiff (the daughter of the deceased) brought Circuit Court proceedings to enforce her one third legal right share under the *Succession Act 1965*.
- 4.15 In these proceedings, she claimed that her mother's estate included full ownership of the family home. A solicitor gave evidence in the case that, a week before her death, the deceased had attended him; told him that she had been assaulted by her husband five days earlier; and instructed him to send a letter to her husband about the assault, which he did.
- 4.16 In the course of a statement made to the Gardaí under caution after his wife had disappeared, the defendant admitted that he had assaulted the deceased yet again, and that she had told him that she had gone to a solicitor, and that if he ever assaulted her again she would make a formal complaint to the Gardaí, and that he would be prosecuted. The defendant stated that he promised his wife that he would never assault her again, that she had said "prove it" and asked him to sign over the family home to her, and that he had agreed to this.
- 4.17 The deceased's solicitor gave evidence that, on her instructions, he prepared an authorisation for the transfer of the title to her sole name and that, four days before her disappearance, he received a letter from the deceased containing

¹³ Circuit Court, 24 and 27 March 2011, *Irish Independent* 25, 28 and 31 March 2011.

the authorisation form signed by her (the deceased) and the defendant. The deceased disappeared before ownership could be formally transferred (her body was later found).

- 4.18 The plaintiff argued that there was clear evidence that the defendant had entered into an agreement with his wife to transfer the property into his wife's sole name prior to her disappearance, thus severing the joint tenancy. The plaintiff therefore sought specific performance to effect transfer of ownership. The defendant argued that the document did not constitute an enforceable contract to transfer ownership.
- 4.19 The proceedings were adjourned at this point, and it was reported that they were later settled on the basis that the plaintiff would receive either a share in the property or a monetary equivalent.¹⁴ This case provides another illustration of circumstances in which, notwithstanding a person's acquittal on a criminal charge, the circumstances surrounding that criminal trial may need to be subsequently litigated in civil proceedings. It is also worthy of note that, for the purposes of the *Civil Liability Act 1961*, which contains many important rules on which civil liability is imposed on a "wrongdoer" who commits a "wrong," the term "wrong" is defined in section 2 of the 1961 Act as "a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, *and whether or not the act is also a crime, and whether or not the wrong is intentional*" (emphasis added). This indicates that, in many instances in which civil liability is imposed, the act involved may also separately constitute a criminal offence.
- 4.20 The courts regularly hear and determine civil claims brought against persons who have been acquitted (or convicted) of criminal offences arising out of the same facts, and these include civil claims related to assaults (including rapes and sexual assaults) and many other offences involving damage to person and property, and such civil claims may be determined by a court comprising a judge only or (in civil assault cases) a judge sitting with a jury. In the specific context of this Report, while a separate tort of wrongful death does not appear at present to form part of Irish law,¹⁵ the tort of trespass to the person has been successfully invoked in civil claims relating to unlawful killings,¹⁶ and the

¹⁴ It is arguable that the circumstances of the case gave rise to a "*Pallant v Morgan* equity," named after the decision in *Pallant v Morgan* [1953] Ch 43. See Delany, *Equity and the Law of Trusts in Ireland* 5th ed (Thomson Round Hall, 2011), pp.210-212.

¹⁵ See McMahon and Binchy *Law of Torts* 4th ed (Bloomsbury Professional 2013), Chapter 19, discussing the tort of wrongful death in other jurisdictions and the question whether such a tort might arise by reference to the deprivation by the offender of the deceased's right to life under Article 40.3 of the Constitution.

¹⁶ For example, in *Breslin and Ors v McKenna and Ors* [2009] NIQB 50, the plaintiffs had all been victims of the 1998 Omagh bombing. The plaintiffs claimed that the four defendants had either assisted in or carried out the bombing and had therefore committed the tort of trespass to the person against them. None of the defendants had been convicted of any criminal offence connected with the bombing, although one of the defendants had been charged in the State in connection with his alleged involvement, had been convicted at trial but his conviction had been overturned on appeal. The plaintiffs obtained a copy of the transcript of his trial as part of the discovery process in their civil claim: *Breslin and Ors v McKenna and Ors* [2008] IESC 43, [2009] 1 ILRM 1. The Northern Ireland High Court (Morgan J) held that the plaintiffs had established on

Commission considers it is important to have regard to the civil liability that arises from wrongful acts causing death.

(3) Dealing with cases where evidence not sufficient to prosecute or where offences committed abroad

4.21 In its *Report on Succession Law: Homicidal Heirs*,¹⁷ the New Zealand Law Commission concluded that it is also necessary to provide for situations where national authorities decide not to prosecute because, for example, there is not sufficient evidence to bring a prosecution which must, after all, be proved beyond reasonable doubt, as opposed to the civil standard of proof on the balance of probabilities. It also concluded that provision should be made for a killing that has occurred abroad, where the decision to prosecute may be outside the control of national authorities.

4.22 The New Zealand Law Commission's analysis on these points was implemented in section 16 of the New Zealand *Succession (Homicide) Act 2007*, which deals specifically with proceedings where there has been either no criminal prosecution or else no conviction after a prosecution. Section 16 of the 2007 Act provides that in such proceedings the court may decide "for the purposes of this Act" (thus indicating that it has no effect on criminal liability) whether the killing has taken place and, if so, whether the alleged killer would be guilty of homicide if prosecuted. Underlining the civil nature of the proceedings, section 16 also provides that the person who alleges that another person is guilty of homicide for the purposes of this Act must satisfy the court of that fact "on the balance of probabilities," that is, the civil standard of proof.

(4) Dealing with time between suspicious death and any trial

4.23 Another reason to have regard to the public policy rationale underlying this area, and to avoid exclusive focus on whether a person has been convicted, is the need to provide for the time after a suspicious death but before any trial. This includes: (a) before any person is charged with an offence, (b) before any person is charged but after a person has been detained in Garda custody as part of an investigation, and (c) where a person has been charged but is awaiting trial. In these circumstances, it has been noted that it would be prudent for any person involved in the administration of an estate to put in place appropriate measures to protect the integrity of the estate's assets.¹⁸

4.24 This issue arose in *In re Estate of Nevin*¹⁹ in which the deceased had been murdered and died intestate. While the deceased's murder was being

the balance of probabilities that the four defendants were liable to the plaintiffs for trespass to the person and he awarded the plaintiffs damages, including damages under the equivalent of sections 48 and 49 of the *Civil Liability Act 1961*. The awards against two of the defendants were upheld and against the other two were reversed by the Northern Ireland Court of Appeal: *Breslin and Ors v McKenna and Ors* [2011] NICA 33. The Court ordered a re-trial in the case of the two defendants whose awards had been overturned. At the re-trial, the Northern Ireland High Court (Gillen J) found those two defendants found liable to the plaintiffs for trespass to the person: *Breslin and Ors v Murphy and Anor* [2013] NIQB 35.

¹⁷ See New Zealand Law Commission; *Succession Law: Homicidal Heirs* (Report 38, 1997), p.11.

¹⁸ See Frost, *A Practitioner's Guide to Joint Property* (Tottel, 2005), p.50.

¹⁹ High Court, 13 March 1997.

investigated but before any charges had been brought, the deceased's widow had initiated an application for the grant of letters of administration to the deceased's estate. The deceased's mother had entered a caveat in the Probate Office, the effect of the caveat being that notice had to be served on her of any further steps in the administration of the estate. The deceased's widow applied to have the caveat set aside.

- 4.25 The deceased's mother resisted this and stated in evidence that she believed that An Garda Síochána regarded her son's widow as a suspect in her son's death, that they had forwarded a file in connection with the investigation to the Director of Public Prosecutions and that, at the time, the Director was considering the matter. She therefore asserted that it was her duty, as the next person entitled after her son's widow, to apply for a grant of administration to instruct her solicitor to enter a caveat "to ensure that the estate would be protected."²⁰ The deceased's widow accepted that she had been detained for questioning by An Garda Síochána in connection with her husband's death, that she had given them a statement, but she also stated in evidence that she was not guilty of any offence in connection with her husband's death or any other offence in relation to him.
- 4.26 Delivering judgment in the High Court, Shanley J pointed out that, while an individual may be identified as a suspect in a death, that person is entitled to the full benefit of the presumption of innocence.²¹ He accepted nonetheless that the deceased's mother had a *bona fide* interest in protecting her deceased son's estate and that she was therefore entitled to register a caveat to the administration. He also noted that the caveat merely had the effect of putting her on notice of any activity in connection with the administration of the estate. On this basis, Shanley J did not set aside the caveat, nor did he make any finding as to whether the deceased's widow was a suitable person to administer the estate.
- 4.27 Nonetheless, he also made an order that the administration of the estate should be limited to the collection and determination of the assets of the estate and that it should not involve the distribution of any assets. This order in effect put a stay on distribution for at least a further nine months, the time limit on the caveat. In making this order, Shanley J gave effect to the deceased's widow's presumption of innocence while at the same time recognising the sensitivities of the deceased's mother and his family. It is irrelevant to this decision that the deceased's widow was later charged with and convicted of his murder, which gave rise to the subsequent proceedings in *Nevin v Nevin*,²² above. The Commission notes that the entry of a caveat is of limited effect and duration and, as in the *Nevin* case, may restrict further activity for that limited time to, for example, collection in of the assets only. Since the estate still needs to be administered, ultimately it will be a matter for an interested party (such as next-of-kin in the *Nevin* case or the Attorney General in the *Glynn* case) to institute proceedings seeking to challenge the administration of the estate. In such proceedings, the interested party may seek more effective remedies, including an injunction to stop a sale or to freeze a bank account.

²⁰ *Ibid*, at p.2 of the judgment.

²¹ *Ibid*, at p.5 of the judgment.

²² [2013] IEHC 80; [2013] 2 ILRM 427.

(5) Conclusions and recommendations

- 4.28 In the Issues Paper, the Commission asked whether the public policy principles should apply where there is no conviction and, if so, the standard of proof that should apply. As already noted, there was no consensus among consultees as to whether the current exclusion in section 120(1) of a person found “not guilty by reason of insanity” under the *Criminal Law (Insanity) Act 2006* should be retained. Opinions were also divided as to whether acquitted persons should be subject to the principles. Some consultees strongly favoured it, noting that the basis for an acquittal in a criminal trial can vary, and that civil proceedings after acquittals in criminal trials are not uncommon. Other consultees suggested that civil proceedings following an acquittal may be perceived as undermining the acquittal, and that such proceedings may be costly.
- 4.29 The public policy principles will, in most instances, apply after a conviction for the offences of murder, attempted murder or manslaughter, but the Commission has concluded that provision should be made for a number of circumstances in which a conviction has not occurred. This conclusion is consistent with the rationale behind the public policy principles as applied in the case law that emerged in the late 19th century, namely, that unlike the feudal forfeiture doctrines of attainder and escheat they are not punitive in nature or dependent on a conviction.
- 4.30 Indeed, the general public policy principles have been applied in a variety of civil law situations, including general contract law and insurance contract law. This conclusion is also consistent with the reality that the statutory regimes related to the confiscation of the proceeds of crime comprise two different processes: one, under the *Criminal Justice Act 1994* that arises in respect of a conviction; and a second under the *Proceeds of Crime Act 1996* that comprises a separate civil process that does not require a criminal conviction. In addition, as already noted section 2 of the *Civil Liability Act 1961* defines the term “wrong” for the general purpose of imposing civil liability under the Act as including an act such as a tort, breach of contract or breach of trust “and whether or not the act is also a crime, and whether or not the wrong is intentional.” This indicates that, in many instances in which civil liability is imposed, the act involved may also separately constitute a criminal offence; and, as noted above the courts regularly hear and determine civil claims brought against persons who have been acquitted (or convicted) of criminal offences arising out of the same facts.
- 4.31 The Commission considers that, in general terms (and subject to one proviso discussed below), the approach taken by the New Zealand Law Commission, and implemented in the *Succession (Homicide) Act 2007*, represents a good basis on which to provide for this issue. While the legislation in New South Wales was amended in 2005 to provide that the principles may be applied to persons found guilty but insane, the Commission has concluded that the arrangements in the *Criminal Law (Insanity) Act 2006* concerning this area of law now clearly provide that a person is either fit to be tried or else is subject to such a severe illness that he or she should not be dealt with in the criminal justice system. In those circumstances, it would not be appropriate to apply the public policy principles to such a person. Thus, as is currently the case under section 120(1) of the 1965 Act, the Commission concludes that the reformed rule should not apply where a person has been found not guilty by reason of insanity; and this should be updated to reflect the changes to the law in the

Criminal Law (Insanity) Act 2006 and should include where a person has been found unfit to be tried under the 2006 Act.

- 4.32 It should also be provided that, where no prosecution has taken place (or where no proceedings or findings have been made under the *Criminal Law (Insanity) Act 2006*) or where a person has been tried but acquitted, those with an interest in the property or estate of the victim may bring proceedings where the civil standard of proof on the balance of probabilities is used to determine whether the public policy principles apply. Although such applications may be rare and although the great majority of cases will arise after a conviction, the circumstances in the English case *Gray v Barr*²³ and the Irish case *Keating v O'Brien*²⁴ (and the other instances referred to by the New Zealand Law Commission, discussed above) illustrate the need for such a procedure. In comparable legislation such as the New South Wales *Forfeiture Act 1995* and the 2007 Act in New Zealand, such interested persons are defined to include: a person who is entitled to any property interest of the victim; the executor or personal representative of the estate of the victim; a beneficiary under the will of the victim or a person who is entitled to any property interest on the intestacy of the deceased person; a person claiming through the offender; or any other person who has an interest in the outcome of such proceedings. As the proceedings in such cases will be civil in nature, any matter must be established in evidence on the balance of probabilities. An interested party will therefore be required to establish on the balance of probabilities that the offender's wrongful act caused (or, as the case may be, attempted to cause) the death of the victim (the use of "wrongful" reflecting the definition of "wrong" in the *Civil Liability Act 1961*, which as noted above is defined to include a crime and an intentional act).
- 4.33 In addition, a court will not make any order in such proceedings unless it is satisfied, on the balance of probabilities, that either the offender has been convicted of murder, attempted murder and manslaughter or, on the balance of probabilities, has unlawfully killed the victim. The term "unlawfully killed" should be defined as meaning that the offender's wrongful act was intentional, or reckless, or grossly negligent or, where intentional, that it resulted from excessive self-defence or provocation. This definition is intended to be consistent with the Commission's recommendations to exclude from the scope of the rule unlawful killings such as dangerous driving causing death and therefore to include murder, attempted murder and manslaughter only. By including terms such as excessive self-defence and provocation, the Commission intends that the courts will be in a position to avail of the case law on excessive use of force and provocation, just as the Supreme Court adapted the case law on insanity in the civil law context of a malicious injuries claim in *Doyle v Wicklow County Council*.²⁵ The civil nature of the proceedings should also be emphasised, as is the case in comparable legislation in other jurisdictions, by providing that any order made by the court shall be expressed

²³ [1971] 2 QB 554: see paragraph 4.10ff, above.

²⁴ Circuit Court, 24 and 27 March 2011, *Irish Independent* 25, 28 and 31 March 2011: see paragraph 4.13ff, above.

²⁵ [1974] IR 55.

to be made solely for the purposes of such proceedings and to have effects as a matter of civil law only.

- 4.34 It is also important to put in place procedures to protect the integrity of the assets in an estate in the aftermath of a suspicious death and pending any criminal trial. The New Zealand legislation provides that a person charged with an offence should be prohibited from being an executor or administrator of the estate of a victim. The Commission agrees with the view of Shanley J in *In re Estate of Nevin*²⁶ that such a rule would not be consistent with the presumption of innocence, and the Commission does not recommend adopting that element of the New Zealand approach. The Commission agrees with the approach of Shanley J in the *Nevin* case that it is sufficient that, where a person has died in suspicious circumstances and a criminal investigation is pending, any interested person may enter a caveat in probate proceedings and that, while that caveat is in force, there must be no transmission of any estate or interest affected by the caveat. The Commission discusses in Part C, below, the recommendations that flow from this.
- 4.35 The recommendations in the Report on the application of the public policy principles that prohibit a person from benefitting from wrongdoing extend beyond succession and inheritance law to encompass a wide range of civil law consequences that arise as between the victim and the offender. For that reason, the Commission has concluded that the recommendations in the Report should be incorporated into the most significant piece of relevant legislation in this area, the *Civil Liability Act 1961*. The 1961 Act comprises a partial codification of key principles and rules concerning civil liability and it is therefore consistent with the Commission's general statutory remit to codify and simplify the law for the recommendations in the Report to be incorporated into the 1961 Act. In addition, it is notable that in at least one case of which the Commission is aware, *O'Brien v McCann*,²⁷ the application of the public policy principles has also involved linked proceedings for pecuniary loss and mental distress under sections 48 and 49 of the 1961 Act, which are contained in Part IV of the 1961 Act (Fatal Accidents). Consequently, the Commission has concluded that the recommendations in the Report should be incorporated into the 1961 Act immediately before Part IV of the 1961 Act and would therefore form a new Part IIIA of the 1961 Act.
- 4.36 The Commission recommends that it should continue to be the case that the public policy principles do not apply where a person has been found not guilty by reason of insanity in accordance with the *Criminal Law (Insanity) Act 2006*; and that it should also be expressly provided that they do not apply where a person has been found unfit to be tried under the 2006 Act.**
- 4.37 The Commission recommends that it should be confirmed in legislation that proceedings involving the application of the public policy principles are civil in nature and accordingly may be brought where: (a) there has been no criminal prosecution of the offender in the State for murder, attempted murder or manslaughter (which should include a case where no proceedings were held or findings made under the *Criminal Law***

²⁶ High Court, 13 March 1997.

²⁷ Circuit Court, 8 October 1998, discussed at paragraph 2.59, above.

(Insanity) Act 2006), including where this is because the act constituting the offence occurred outside the State, or (b) even where there has been such a prosecution, whether in the State or outside the State, the offender has been found not guilty (including after an appeal).

- 4.38 The Commission recommends that such proceedings may be brought by: (a) any interested person, who may apply to have the offender precluded from taking any share in the estate of or property of the victim or for the purposes of having a determination made in relation to a joint tenancy; or (b) any interested person, or the offender, who may apply for the purposes of having a determination made in relation to a joint tenancy or to have the public policy principles disapplied or modified; and that an interested person should be defined to include: a person who is entitled to any property interest of the victim; the executor or personal representative of the estate of the victim; a beneficiary under the will of the victim or a person who is entitled to any property interest on the intestacy of the deceased person; a person claiming through the offender; or any other person who has an interest in the outcome of such proceedings.
- 4.39 The Commission recommends that: (a) in such proceedings, any matter must be established in evidence on the balance of probabilities; and (b) without prejudice to this general requirement: (i) a person bringing such proceedings must establish on the balance of probabilities that the offender's wrongful act caused (or, as the case may be, attempted to cause) the death of the victim; and (ii) that the court shall not accede to the application or make any order unless it is satisfied, on the balance of probabilities, that either the offender has been convicted of murder, attempted murder or manslaughter or, on the balance of probabilities, has unlawfully killed the victim (and any such order shall be expressed to be made solely for the purposes of such proceedings and to have effects as a matter of civil law only); and (iii) that in this context "unlawfully killed" means that the offender has, by his or her wrongful act, caused (or, as the case may be, attempted to cause) the death of the victim, and that the wrongful act was intentional, or reckless, or grossly negligent or that it resulted from excessive self-defence or provocation.
- 4.40 The Commission recommends that: (a) proceedings may be brought by an offender in which he or she may adduce evidence that, although no prosecution was brought or finding made under the *Criminal Law (Insanity) Act 2006* in respect of his or her case, if such a prosecution had been brought a finding would have been made that he or she was either unfit to be tried or was not guilty by reason of insanity in accordance with the 2006 Act; and (b) if the court is satisfied on the balance of probabilities that the offender has made out his or her case, it may make an order that the public policy principles shall not apply to the offender; and any such order shall be expressed to be made solely for the purposes of such proceedings and to have effects as a matter of civil law only.
- 4.41 The Commission recommends that the reforms proposed in this Report should be incorporated into the *Civil Liability Act 1961* immediately before Part IV of the 1961 Act (Fatal Accidents) and would therefore form a new Part IIIA of the 1961 Act.

B Costs in proceedings concerning the public policy principles

(1) Case law on costs

- 4.42 In *Cawley v Lillis (No.2)*,²⁸ the High Court (Laffoy J) dealt with the costs of the proceedings in *Cawley v Lillis*.²⁹ The Court held that the case law to the effect that in probate actions generally costs are ordered out of the estate did not apply to an application under section 120 of the 1965 Act. This was because a section 120 case involved a contest between the estate of the deceased and the defendant as to the beneficial ownership of assets which did not form part of the estate of the deceased, and that this turned on the application of established rules and equity.
- 4.43 At the outset of the judgment, Laffoy J explained that the implementation of the terms of settlement of the section 120 proceedings would create a fund resulting from the realisation of the jointly held assets. The defendant contended that he had made an offer to which there was no response and that, despite making a concession during the hearing that he held one half of the jointly held assets in trust, the plaintiffs had pursued their claim. He argued that he should therefore be awarded his costs against the plaintiffs.³⁰
- 4.44 The plaintiffs argued that their costs should be paid out of the joint fund and that, as the proceedings were necessitated by the criminal act of the defendant and that to award him costs from the joint assets would allow him to benefit from his conduct, there should be no order for costs made in favour of the defendant.
- 4.45 In this regard, Laffoy J considered that, under the current law, it would not be a proper exercise of the court's discretion in determining liability for costs to penalise the defendant merely on the ground that the issue as to the ownership of the joint assets arose out of the tragic death of the deceased at the hands of the defendant.
- 4.46 Nonetheless, because the defendant had persisted in his contention that he was solely beneficially entitled to the joint assets until less than a week before the hearing, Laffoy J held that he was too late to avoid the costs of the hearing being awarded against him.
- 4.47 In granting an order for costs in favour of the plaintiffs, she noted that it was probable that, if the defendant had adopted a different and more reasonable approach from the outset, the proceedings would have been unnecessary or, at any rate, truncated and less expensive. She added that the plaintiffs were obliged to initiate the proceedings because of the defendant's failure to engage at all with the plaintiffs' solicitors before the proceedings were initiated.

²⁸ [2012] IEHC 70.

²⁹ [2011] IEHC 515, [2012] 1 IR 281, discussed in Chapter 2, above.

³⁰ Laffoy J explained that a letter from the defendant's solicitor to the plaintiffs' solicitors was brought to the attention of the Court in the context of the issue of costs. The letter stated that the defendant was willing to agree to an equal division of the joint assets with the plaintiffs taking one half and the defendant taking the remaining half, and that each side would bear its own costs. The offer was not taken up by the plaintiffs and counsel for the plaintiffs explained that, subject to one exception, the proposal related to settling "all matters present or future," not just the proceedings.

4.48 The costs ordered in favour of the plaintiffs were paid out of the joint funds before distribution and not out of the defendant's share.

4.49 It is notable that, by contrast, the costs in the proceedings in the Circuit Court (Judge Dunne) in *O'Brien v McCann*³¹ were paid out of the defendant's share, thus indicating that as costs are at the discretion of the court there is no fixed approach to the matter in current law and practice.

(2) Costs where the public policy principles are modified or disapplied

4.50 The question of who should pay costs where a court has discretion to make an order modifying or disappling the public policy principles, which the Commission has recommended in Chapter 3 above, has arisen in a number of decisions in New South Wales where such orders are possible under the New South Wales *Forfeiture Act 1995*.

4.51 In *Lenaghan-Britton v Taylor*,³² in which the plaintiff had been found not guilty of murdering her husband by reason of diminished responsibility, the New South Wales Supreme Court had made a modification order under the 1995 Act in the plaintiff's favour. The Court ordered the plaintiff to pay the costs on the ground that she had sought, and obtained, the benefit of the application of the Court's discretion; and that it had been reasonable for the defendant, the executor of the estate, to oppose the application, or at the least to require the plaintiff to make out a case for the making of an order. In the Court's view, other beneficiaries should not be disadvantaged by the application; and it also noted that the costs had certainly not been increased by any unreasonable conduct by the defendant.

4.52 In *Straede v Eastwood*,³³ in which the plaintiff had been convicted of dangerous driving causing death (an offence coming within the 1995 Act), the New South Wales Supreme Court also made an order in the plaintiff's favour modifying the application of the rule.

4.53 The Court followed the decision in *Lenaghan-Britton v Taylor* and held that the plaintiff should pay his own costs and that the deceased's estate should not have to bear the costs of such an application.

4.54 In relation to the costs of the co-executor, the Court held that his duties not only included the defence of the will, but also the duty of placing relevant matters before the Court, and in that respect that he had acted properly and responsibly in the conduct of the proceedings. The executor was therefore awarded his costs out of the estate.

4.55 As to the costs of the representative of the deceased's relatives, the Court held that it had not been unreasonable for her to seek to place before the Court the evidence as to marital conduct, even though the Court had come to the firm conclusion that that evidence was irrelevant. The Court therefore concluded that her costs should come out of the estate.

³¹ Circuit Court, 8 October 1998. The summary of this case is based on the newspaper reports in *The Irish Times*, 9 October 1998 and *Cork Examiner* 9 October 1998.

³² [1998] NSWSC 218.

³³ [2003] NSWSC 280.

(3) Discussion and recommendation

- 4.56 In the Issues Paper, the Commission sought views as to whether the law relating to costs in proceedings of this type should be amended, including whether it should be provided that the costs of such applications be discharged by the offender.
- 4.57 Most consultees considered that the costs should be borne by the offender, but there were divergences as to the degree of discretion the court should have in this regard. One consultee proposed that the costs in such actions should always be borne by the offender. Another suggested that the costs should always be borne by a person convicted of murder or manslaughter, but that a person convicted of attempted murder should be liable for the costs of any action taken by him or her in relation to joint assets. All other cases giving rise to proceedings should be dealt with by the court under the general discretion regarding the awarding of costs.
- 4.58 On the other hand, a number of consultees favoured allowing the court to have complete discretion as to costs because this would afford maximum flexibility and allows the court to take account of the conduct of the parties to the litigation. Furthermore, it was indicated that it would not be appropriate to introduce a blanket rule that the costs should be borne by the offender as this would ignore the possibility that the killer might be justified in bringing the particular application, or that the offender might be objecting to an unjustifiably harsh interpretation of the relevant statutory provisions.
- 4.59 The Commission has concluded that the court should, other than in exceptional circumstances, order that the costs of the proceedings are to be borne by the offender. This is because such proceedings arise only because the offender has carried out an act that constitutes homicide. The provision for exceptional circumstances recognises that there may be extremely limited cases, such as in the Australian cases discussed above, in which separate orders may be required.
- 4.60 The Commission recommends that the court shall, other than in exceptional circumstances, order that the costs of the proceedings are to be borne by the offender.**

C Other evidential and procedural matters

- 4.61 In the Issues Paper, the Commission also invited suggestions as to how current procedures could be altered to ease the financial and administrative burden of administering the estate of a victim of an unlawful killing.

(1) Evidential effect of conviction

- 4.62 In its *Report on Succession Law: Homicidal Heirs*, the New Zealand Law Commission observed that an objective of succession legislation was, where possible, to enable administrators and trustees to act without recourse to the courts.³⁴ On foot of this, the *Succession (Homicide) Act 2007* contains specific provisions regarding the evidential effect of convictions of unlawful killing in

³⁴ New Zealand Law Commission *Succession Law: Homicidal Heirs* (Report 38, 1997), at p.11.

subsequent civil proceedings arising out of the killing. This precise issue arose in *Nevin v Nevin*.³⁵

4.63 Section 14 of the 2007 Act therefore provides that the conviction of a person for the homicide of another person is “conclusive evidence” that the person is guilty of that homicide, unless that conviction has been quashed. Section 146A of the New Zealand *Sentencing Act 2002* (inserted by section 17 of the 2007 Act) grants the court power, on or after sentencing a person for an offence of unlawful killing, to certify that for the purposes of the 2007 Act the person convicted is guilty of homicide of that other person.

4.64 The Commission considers that these are important and practical provisions that are likely to reduce costs associated with such proceedings.

4.65 The Commission recommends that, in proceedings involving the public policy principles, a conviction of a person for the murder, attempted murder or manslaughter of another person is conclusive evidence that the person is guilty of that offence for the purposes of such proceedings.

(2) Effect on general civil liability

4.66 The Commission has also concluded that it would be of assistance to clarify, in order to avoid any doubt, that any liability of the offender in proceedings to which this Report applies does not alter or affect any other civil liability of the offender that may arise from the homicide, including but not limited to liability under *sections 48 and 49 of the Civil Liability Act 1961*.³⁶ This general proviso is without prejudice to the limited proviso to similar effect recommended in paragraph 2.81, above (which applies only in cases involving a joint tenancy).

4.67 The Commission recommends that any liability of the offender in such proceedings shall not alter or affect any other civil liability of the offender that may arise from the act constituting the homicide, including but not limited to liability under sections 48 and 49 of the Civil Liability Act 1961 (this proviso being without prejudice to the proviso to similar effect recommended in paragraph 2.81).

(3) Effect in probate proceedings of caveat, and suitability of person to administer an estate

4.68 The Commission has discussed above the decision of the High Court (Shanley J) in *In re Estate of Nevin*³⁷ which concerned a caveat in probate proceedings.

³⁵ [2013] IEHC 80, [2013] 2 ILRM 427. Arising from this decision, the Commission’s *Issues Paper on Section 120 of the Succession Act 1965 and Admissibility of Criminal Convictions in Civil Proceedings* (LRC IP 7-2014) discussed the admissibility, in general, of a criminal conviction in a related civil case. As this general question arises not only in cases under section 120 but is essentially an aspect of the general law of evidence, the Commission considers that it is more appropriate to deal with that general question in its forthcoming *Report on Evidence*, which it intends to publish in 2015. The Commission considers that the narrower issue of the admissibility of convictions in subsequent civil proceedings involving the application of the public policy principles should be dealt with in this Report.

³⁶ On the general issue of civil liability arising from a wrongful act causing death, see paragraphs 4.19-4.20, above.

³⁷ High Court, 13 March 1997: see paragraph 4.24, above.

The New Zealand Law Commission, in its *Report on Succession Law: Homicidal Heirs*,³⁸ recommended that in such situations a caveat should have the precise effect provided for in *In re Estate of Nevin*, namely, that for as long as a caveat remains in force, there must be no transmission of any estate or interest affected by the caveat. This was implemented in section 13 of the New Zealand *Succession (Homicide) Act 2007*.

- 4.69 The entry of a caveat cannot stop the passing of the legal estate under the survivorship rule, and the only means by which this could be done would be to apply for an injunction to prevent this, or to seek an order that the legal estate is held on trust for the victim, that is, to recognise that the severance in equity has occurred by reason of the death and, in the case of registered land, to lodge an inhibition to prevent a sale. In the case of unregistered land the only means by which a sale can be prevented is the entry of a *lis pendens* which can be entered once proceedings have been issued and which would alert any possible purchaser to any pending proceedings concerning the joint tenancy. The Commission considers that, as these remedies are already available to any affected person it is not necessary to provide for them in the legislation proposed in this Report, and the Commission's recommendation on this is therefore confined to the effect of a caveat.
- 4.70 The New Zealand Law Commission also recommended that a person awaiting trial on a charge of homicide should be prohibited from being an executor or administrator of the estate of the victim. This recommendation was also implemented in section 5A of the New Zealand *Administration Act 1969*, inserted into the 1969 Act by the Schedule to the New Zealand *Succession (Homicide) Act 2007*.
- 4.71 A separate but related matter is the suitability of an offender to act as personal representative in a person's estate. In *In re Glynn decd*³⁹ the deceased had bequeathed his farm to his sister as a life tenant, the remainder interest to vest in a man called Kelly, who was also named the executor of the estate. On the same day as the deceased's death his sister was killed, and Kelly was later convicted of her murder. The question then arose as to whether he was a suitable person to take out a grant of probate, and an application was made under section 27(4) of the *Succession Act 1965* which provides that where "by reason of any special circumstances... it appears to be necessary or expedient to do so" a court may order that administration should be granted to such person as it thinks fit. The Supreme Court noted that, "on grounds of public policy" (and citing the decision of the English Court of Appeal in *Cleaver v Mutual Reserve Fund Life Association*),⁴⁰ Kelly could not claim under the deceased's will and that this had been given effect to in section 120 of the 1965 Act. Since Kelly had "accelerated his succession" by murdering the deceased's

³⁸ See New Zealand Law Commission, *Succession Law: Homicidal Heirs*, Report 38 (1997), p.11.

³⁹ [1992] 1 IR 361.

⁴⁰ [1892] 1 QB 147, discussed in paragraph 1.06, above.

sister the Court held that it would be “utterly wrong that he should be permitted, even in the most formal manner, to administer the estate.”⁴¹

- 4.72 The Commission considers that once a person is convicted of the deceased person’s murder or manslaughter, he or she should be presumed to be unsuitable to administer the estate of the deceased. This presumption should be rebuttable, which would provide for those circumstances in which, for example, the court in its discretion ordered that the disinheritance rule should not be applied. The Commission has recommended in Chapter 3, above, that this should only apply in cases of manslaughter.
- 4.73 The Commission recommends that where a person has died in circumstances that give rise to a criminal investigation in respect of which a prosecution for murder or manslaughter is or may be pending, an interested person may enter a caveat in the Probate Office of the High Court concerning the estate of the deceased, and while such a caveat is in force, there shall be no transfer of any estate or interest affected by the caveat.**
- 4.74 The Commission recommends that a person who is convicted of murder or manslaughter should be presumed to be unsuitable to administer the estate of the deceased and that no grant of probate or letters of administration in the estate shall issue to such person notwithstanding that such person is the nominated executor of the deceased or the person who would but for this recommendation be the person entitled as of right to extract letters of administration intestate of the deceased person’s estate. This presumption is rebuttable, in order to provide for those circumstances in which the court in its discretion orders that the public policy principles may be modified or disapplied in cases of manslaughter, as recommended in Chapter 3 of the Report.**

⁴¹ [1992] 1 IR 361, at 364 (McCarthy J, with whom Finlay CJ and Egan J agreed). As there was no next-of-kin available to administer the estate, the Court ordered that the Chief State Solicitor be appointed under section 27(4) of the 1965 Act for this purpose.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

The recommendations made in this Report are as follows.

Chapter 2: The Public Policy Principles and Joint Tenancies

1. The Commission recommends, in applying the public policy principles that a person is not to benefit from his or her wrongdoing and that a cause of action should not arise from one's own wrongdoing to a case where the offender and the victim held property under a joint tenancy: (a) that where the offender and the victim held property under a joint tenancy, the offender shall be precluded from obtaining the benefit of the right of survivorship, and the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender shall stand severed from the date when the offence (murder, attempted murder or manslaughter) was committed, and in any proceedings brought concerning this the court shall make an order to that effect; (b) that pending any determination by the court in any such proceedings brought, the legal title in the property shall be held in trust and subject to the respective beneficial interests of the victim and the offender; and (c) that, unless otherwise provided (whether in a deed creating the joint tenancy or otherwise by operation of law), and subject to the subsequent recommendations below, it shall be presumed (the burden being on the offender to establish otherwise in any proceedings) that, after severance, the victim (including where relevant the estate of the victim) holds at least half of the interest in the property. (paragraph 2.79)
2. The Commission recommends: (a) that without prejudice to the presumption that, after severance, the victim holds at least half of the interest in the property, the amount and value of the interest to be held by the offender shall be determined by the court; and (b) that the court shall, in determining the amount and value (which may be above or below half of the interest in the property), make such order as appears to the court to be just and equitable, having regard to: (i) the fact that the right of survivorship was accelerated by the act of the offender and (ii) all the relevant circumstances, including those set out in paragraphs 2.81 and 2.82. (paragraph 2.80)
3. The Commission recommends that, in determining the amount and value that is just and equitable, the court shall have regard, where relevant, to the following: (a) the contributions, direct or indirect, made by the offender and the victim to the jointly held property, including whether their respective contributions were equal or not; (b) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or in loco parentis to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the

income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; and (d) the age and financial needs, obligations and responsibilities of the offender. (paragraph 2.81)

4. The Commission recommends that, in determining the amount and value that is just and equitable, the court shall also have regard, where relevant, to the following: (e) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (f) that the act constituting the homicide resulted in a payment under a life insurance contract, whether this involves the discharge of an outstanding mortgage debt or the payment of any other sum under the life insurance contract; (g) any civil liability on the part of the offender arising from the act constituting the homicide, including liability under sections 48 and 49 of the *Civil Liability Act 1961*; (h) the nature of the offender's conduct related to the offence, that is, (i) whether the offender's act constituted the offence of murder or attempted murder (which would be intentional or reckless) or (ii) if the offender's act constituted the offence of manslaughter, whether it was voluntary manslaughter (which could arise from excessive use of force in self-defence or from the defence of provocation) or involuntary manslaughter (which would have involved gross negligence, rather than any actual intentional conduct by the offender; (i) where relevant, the presence of diminished responsibility, a defence under the *Criminal Law (Insanity) Act 2006*; (j) whether there was a motive or intention to cause death; and (k) any other matters which may appear to the court to be relevant. (paragraph 2.82)
5. The Commission recommends that where there are more than two joint tenants: (a) the joint tenancy should continue between any remaining innocent joint tenants (that is, joint tenants other than the victim and the offender), who would take the deceased person's interest by survivorship, but that the offender's interest would be severed; (b) the offender's remaining interest would also be subject to the power of the court to determine that interest in accordance with the criteria already recommended in paragraphs 2.80-2.82; and (c) that, where any remaining innocent joint tenant no longer wishes to continue as joint tenant with the offender, an application may be made under sections 30 and 31 of the *Land and Conveyancing Law Reform Act 2009* to resolve this. (paragraph 2.92)

Chapter 3: Scope of Public Policy Principles and their Modification or Disapplication

6. The Commission recommends that the scope of the public policy principles that a person is not to benefit from his or her wrongdoing and that a cause of action should not arise from one's own wrongdoing should be confirmed in legislation to extend to all forms of all property of whatever kind in which the victim has an interest, whether real or personal property or any part or combination of such property, including land, goods, money, property held under a trust, or the proceeds of an insurance policy or of a pension (whether such a pension arises from a pension contract or trust or by virtue of statute), and whether or not such

property forms part of the estate of the victim; that “interest” includes any legal or beneficial interest, actual or contingent, and whether such interest has vested or is an interest in remainder; and that accordingly, the offender should be precluded from taking any share or interest in any interest of the victim in property which would otherwise have passed to the offender on the death of the victim;. (paragraph 3.12)

7. The Commission recommends that the public policy principles preventing a person from benefitting from his or her wrongdoing should continue to apply to the offences of murder, attempted murder and manslaughter; but should not apply to any person who aids, abets, counsels or procures the commission of those offences. (paragraph 3.29)
8. The Commission recommends that the current scope of application of the public policy principles is appropriate and should not be extended to other offences that lead to death, such as dangerous driving causing death. (paragraph 3.30)
9. The Commission also recommends that the application of the principles does not apply to a share arising under a will made after the act constituting any of the three homicide offences has occurred; that this is therefore subject to the ability of the victim of murder, attempted murder or manslaughter to make whatever provision he or she wishes in the aftermath of the acts constituting any of those offences, which is in turn subject to the law concerning wills, including testamentary capacity; and that, arising from this recommendation and those already made in the Report, section 120(1) of the *Succession Act 1965* should be repealed. (paragraph 3.31)
10. The Commission recommends that where the offender has committed manslaughter a court may, in its discretion, make an order to modify or disapply completely the public policy principles if the Court is satisfied that justice requires this. (paragraph 3.47)
11. The Commission also recommends that, in exercising this discretion, the court should have regard to all of the circumstances of the case, including: (a) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (b) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; (d) the age and financial needs, obligations and responsibilities of the offender; (e) the nature of the offender’s conduct related to the offence, that is, whether the offence was voluntary or involuntary manslaughter; (f) the presence of diminished responsibility, where relevant; and (g) any other matters which may appear to the court to be relevant. (paragraph 3.48)

12. The Commission recommends that, in exercising the discretion to modify or disapply the public policy principles, the court may, subject to the same criteria as set out in paragraph 3.48, make an order allowing the offender to make an application under section 67A(3) or, as the case may be, under section 117 of the *Succession Act 1965*. (paragraph 3.54)
13. The Commission recommends that section 120(4) of the *Succession Act 1965* should be repealed without replacement. (paragraph 3.68)

Chapter 4: Civil Nature of the Public Policy Principles and Procedural Issues, Including Costs

14. The Commission recommends that it should continue to be the case that the public policy principles do not apply where a person has been found not guilty by reason of insanity in accordance with the *Criminal Law (Insanity) Act 2006*; and that it should also be expressly provided that they do not apply where a person has been found unfit to be tried under the 2006 Act. (paragraph 4.36)
15. The Commission recommends that it should be confirmed in legislation that proceedings involving the application of the public policy principles are civil in nature and accordingly may be brought where: (a) there has been no criminal prosecution of the offender in the State for murder, attempted murder or manslaughter (which should include a case where no proceedings were held or findings made under the *Criminal Law (Insanity) Act 2006*), including where this is because the act constituting the offence occurred outside the State, or (b) even where there has been such a prosecution, whether in the State or outside the State, the offender has been found not guilty (including after an appeal). (paragraph 4.37)
16. The Commission recommends that such proceedings may be brought by: (a) any interested person, who may apply to have the offender precluded from taking any share in the property or estate of the victim or for the purposes of having a determination made in relation to a joint tenancy; or (b) any interested person, or the offender, who may apply for the purposes of having a determination made in relation to a joint tenancy or to have the public policy principles disapplied or modified; and that an interested person should be defined to include: a person who is entitled to any property interest of the victim; the executor or personal representative of the estate of the victim; a beneficiary under the will of the victim or a person who is entitled to any property interest on the intestacy of the deceased person; a person claiming through the offender; or any other person who has an interest in the outcome of such proceedings. (paragraph 4.38)
17. The Commission recommends that: (a) in such proceedings, any matter must be established in evidence on the balance of probabilities; and (b) without prejudice to this general requirement: (i) a person bringing such proceedings must establish on the balance of probabilities that the offender's wrongful act caused (or, as the case may be, attempted to cause) the death of the victim; and (ii) that the court shall not accede to the application or make any order unless it is satisfied, on the balance of probabilities, that either the offender has been convicted of murder, attempted murder or manslaughter or, on the

balance of probabilities, has unlawfully killed the victim (and any such order shall be expressed to be made solely for the purposes of such proceedings and to have effects as a matter of civil law only); and (iii) that in this context “unlawfully killed” means that the offender has, by his or her wrongful act, caused (or, as the case may be, attempted to cause) the death of the victim, and that the wrongful act was intentional, or reckless, or grossly negligent or that it resulted from excessive self-defence or provocation. (paragraph 4.39)

18. The Commission recommends that: (a) proceedings may be brought by an offender in which he or she may adduce evidence that, although no prosecution was brought or finding made under the *Criminal Law (Insanity) Act 2006* in respect of his or her case, if such a prosecution had been brought a finding would have been made that he or she was either unfit to be tried or was not guilty by reason of insanity in accordance with the 2006 Act; and (b) if the court is satisfied on the balance of probabilities that the offender has made out his or her case, it may make an order that the public policy principles shall not apply to the offender; and any such order shall be expressed to be made solely for the purposes of such proceedings and to have effects as a matter of civil law only. (paragraph 4.40)
19. The Commission recommends that the reforms proposed in this Report should be incorporated into the *Civil Liability Act 1961* immediately before Part IV of the 1961 Act (Fatal Accidents) and would therefore form a new Part IIIA of the 1961 Act. (paragraph 4.41)
20. The Commission recommends that the court shall, other than in exceptional circumstances, order that the costs of the proceedings are to be borne by the offender. (paragraph 4.60)
21. The Commission recommends that, in proceedings involving the public policy principles, a conviction of a person for the murder, attempted murder or manslaughter of another person is conclusive evidence that the person is guilty of that offence for the purposes of such proceedings. (paragraph 4.65)
22. The Commission recommends that any liability of the offender in such proceedings shall not alter or affect any other civil liability of the offender that may arise from the act constituting the homicide, including but not limited to liability under sections 48 and 49 of the *Civil Liability Act 1961* (this proviso being without prejudice to the proviso to similar effect recommended in paragraph 2.81). (paragraph 4.67)
23. The Commission recommends that where a person has died in circumstances that give rise to a criminal investigation in respect of which a prosecution for murder or manslaughter is or may be pending, an interested person may enter a caveat in the Probate Office of the High Court concerning the estate of the deceased, and while such a caveat is in force, there shall be no transmission of any estate or interest affected by the caveat. (paragraph 4.73)
24. The Commission recommends that a person who is convicted of murder or manslaughter should be presumed to be unsuitable to administer the estate of the deceased and that no grant of probate or letters of administration in the estate shall issue to such person notwithstanding that such person is the

nominated executor of the deceased or the person who would but for this recommendation be the person entitled as of right to extract letters of administration intestate. This presumption is rebuttable, in order to provide for those circumstances in which the court in its discretion orders that the public policy principles may be modified or disapplied in cases of manslaughter, as recommended in Chapter 3 of the Report. (paragraph 4.74)

**APPENDIX: DRAFT CIVIL LIABILITY (AMENDMENT) (PREVENTION OF
BENEFIT FROM HOMICIDE) BILL 2015**

CONTENTS

Section

1. Short title and commencement
2. Person who commits homicide not to benefit
(new Part IIIA, ss.46A to 46G, of Civil Liability Act 1961)
 - 46A Interpretation (Part IIIA)
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ACTS REFERRED TO

Civil Liability Act 1961 (No.41 of 1961)

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No.24 of 2010)

Criminal Law (Insanity) Act 2006 (No.11 of 2006)

Land and Conveyancing Law Reform Act 2009 (No.27 of 2009)

Succession Act 1965 (No.27 of 1965)

**DRAFT CIVIL LIABILITY (AMENDMENT) (PREVENTION OF BENEFIT FROM
HOMICIDE) BILL 2015**

BILL

entitled

An Act to amend the Civil Liability Act 1961 to provide for the effects in civil law of the principle that a person should be precluded from benefitting from committing any homicide and the principle that no cause of action arises from one's own wrongful act, to amend the Succession Act 1965 and to provide for related matters.

Be it enacted by the Oireachtas as follows:

Short title and commencement

1. — (1) This Act may be cited as the Civil Liability (Amendment) (Prevention of Benefit from Homicide) Act 2015.

(2) This Act comes into operation on such day or days as the Minister for Justice and Equality may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory Note

Section 1 contains standard provisions on the Short Title of the Bill and commencement arrangements.

Person who commits homicide not to benefit (new Part IIIA of Civil Liability Act 1961)

2. — The Civil Liability Act 1961 is amended by the insertion of the following Part after Part III:

“¹PART IIIA

PERSON WHO COMMITS HOMICIDE NOT TO BENEFIT

Interpretation (Part IIIA)

46A. — In this Part —

¹ The double opening quote indicates the start of the text proposed to be inserted into the *Civil Liability Act 1961*.

‘the Act of 1965’ means the Succession Act 1965,

‘the Act of 2006’ means the Criminal Law (Insanity) Act 2006,

‘the Act of 2009’ means the Land and Conveyancing Law Reform Act 2009,

‘the Act of 2010’ means the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,

‘child’ means a person who is under the age of 18 years or if the person has attained that age is receiving full-time education or instruction at any university, college, school or other educational establishment and is under the age of 23 years,

‘dependent person’ means a person of any age whose capacity (including decision-making capacity)² is such that it is not reasonably possible for the person to maintain himself or herself fully,

‘the court’ means the Circuit Court (where the property involved falls within its civil jurisdiction) or the High Court (where the property involved falls outside the civil jurisdiction of the Circuit Court).

Explanatory Note

Section 46A contains definitions for the purposes of the proposed Part IIIA to be inserted into the *Civil Liability Act 1961* (and which would comprise 7 new sections of the 1961 Act, sections 46A to 46G), as recommended in **paragraph 4.41** of the Report.

Person who commits homicide not to benefit

46B. —(1) Subject to the following provisions of this Part, a person (referred to subsequently in this Part as ‘the offender’) who is convicted of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the property or estate of that other (referred to subsequently in this Part as ‘the victim’).

(2) (a) In *subsection (1)* –

‘property’ means all property of whatever kind in which the victim has an interest, whether real or personal property or any part or combination of such property, including land, goods, money, property held under a trust, or the proceeds of an insurance policy or pension (whether such a pension arises from a pension contract or trust or by virtue of statute), and whether or not such property forms part of the estate of the victim, and

² This refers to decision-making capacity within the meaning of the *Assisted Decision-Making (Capacity) Bill 2013*.

'interest' includes any legal or beneficial interest, actual or contingent, whether that interest has vested or is an interest in remainder.

(b) Accordingly, the offender shall be precluded by *subsection (1)* from taking any share or interest in any interest of the victim in property which would otherwise have passed to the offender on the death of the victim.

(3) *Subsection (1)* shall not apply to any person who aids, abets, counsels or procures the commission of an offence referred to in *subsection (1)*.

(4) *Subsection (1)* shall not apply where a person has been found to be unfit to be tried or not guilty by reason of insanity in accordance with the Act of 2006.

(5) (a) *Subsection (1)* shall not apply in respect of a share arising under a will made by the victim after the date when an offence referred to in *subsection (1)* was committed.

(b) Accordingly, subject to any enactment or rule of law in respect of wills and testamentary capacity, the victim of an offence referred to in *subsection (1)* may, after the date the offence was committed, make whatever provision in his or her will as he or she sees fit.

(6) An offender shall be precluded from making an application under section 67A(3) or section 117 of the Act of 1965.

(7) Any share which the offender is precluded from taking by this Part shall be distributed as if the offender had died before the victim.

Explanatory Note

Section 46B (to be inserted into the *Civil Liability Act 1961*) implements a number of the recommendations in the Report concerning how the two public policy principles, that a person is precluded from benefitting from committing any homicide and that no cause of action arises from one's own unlawful act (and which are referred to in the Long Title to the Bill), should be applied in practice. Currently, section 120 of the *Succession Act 1965* contains a number of rules related to those principles to preclude such a person from inheriting from the victim. The Report recommends that, because the principles have arisen in a wider set of situations (that is, outside inheritance/succession law), such as where a joint tenancy, an insurance contract or pension may be involved, the relevant provisions of section 120 of the 1965 Act should be repealed and replaced with a more generally applicable set of statutory rules.

Thus, *section 46B(1)* provides that, subject to the other proposed sections of Part IIIA (*sections 46C to 46G*, below), a person (referred to as "the offender") who is convicted of murder, attempted murder or manslaughter of another person is to be precluded from taking any share in the property or estate of that other person (referred to as "the victim"). This involves, in part, retention of elements currently found in section 120(1) of the 1965 Act and, in part, reforms

recommended in the Report to extend the rule to the wider setting in which the issue has arisen.

The reference to murder, attempted murder and manslaughter implements the recommendation in **paragraph 3.29** that the rule precluding a person from benefitting from his or her wrongdoing should continue to apply to those three offences. By not including any other offences, it also implements the recommendation in **paragraph 3.30** that, in accordance with the public policy principles on which this rule is based (discussed in Chapter 1 of the Report), the current scope of the rule is appropriate and should not be extended to other offences that lead to death, such as dangerous driving causing death.

The inclusion of “property” before “or estate” anticipates *section 46B(2)*, below, which implements the recommendation in **paragraph 3.12** that the scope of the rule should be confirmed to extend to all forms of property interests.

The proviso that the rule precluding a person from benefitting from his or her wrongdoing is subject to the remaining provisions in Part IIIA (*sections 46C to 46G*) takes account of the Commission’s recommendations on:

- the application of the rule in cases involving joint tenancies (see *section 46C*, below);
- the modification of the rule in manslaughter cases (see *section 46D*, below); and
- the civil nature of proceedings under the Bill (see *section 46E*, below).

Section 46B(2) implements the recommendation in **paragraph 3.12** that the scope of the rule should be confirmed to extend to all forms of property interests, so that an offender should be precluded from taking any interest in property of whatever kind in which the victim has an interest, whether real or personal property or any part or combination of such property, including land, goods, money, property held under a trust, or the proceeds of an insurance policy or of a pension (whether such a pension arises from a pension contract or trust or by virtue of statute), and whether or not such property forms part of the estate of the victim; that “interest” includes any legal or beneficial interest, actual or contingent, and whether such interest has vested or is an interest in remainder; and that accordingly, the offender should be precluded from taking any share or interest in any interest of the victim in property which would otherwise have passed to the offender on the death of the victim.

Section 46B(3) implements the recommendation in **paragraph 3.29** that the rule should not apply to any person who aids, abets, counsels or procures the commission of the offences.

Section 46B(4) implements the recommendations in **paragraph 4.36** that: it should continue to be the case that the rule does not apply where a person has been found not guilty by reason of insanity in accordance with the *Criminal Law (Insanity) Act 2006*; and that it should also be expressly provided that the rule does not apply where a person has been found unfit to be tried under the 2006 Act. See also *section 46E(4)*, below.

Section 46B(5) retains the proviso, currently in *section 120(1)* of the 1965 Act, that the rule does not apply to a share arising under a will made after an act constituting any of the three homicide offences mentioned in *section 46B(1)* has

occurred. It therefore implements the recommendation in **paragraph 3.31** that the rule is subject to the ability of the victim of murder, attempted murder or manslaughter to make whatever provision he or she wishes in the aftermath of the acts constituting any of those offences. This is in turn subject to the law concerning wills, including testamentary capacity, many of which are set out in Part VII of the *Succession Act 1965*. The relocation of the proviso in a separate subsection clarifies the current position that, for example, after an attempted murder the victim retains the power to, in effect, forgive the offender and to bequeath something to him or her through a will. While this is most likely to apply in cases of attempted murder, it may also apply where a person has been badly wounded, then makes a new will that includes the offender before then dying. This will be the case regardless of whether the offender is later charged with or convicted of murder or manslaughter. Although the rule will often apply where there has been a conviction, as already noted *section 46E*, below, does not require a conviction for the rule to apply. In any of these instances, the crucial matter is that the will is made after the act constituting the offence, and it becomes irrelevant therefore, for the purposes of the rule, whether the offender is later convicted.

Section 46B(6) implements the recommendation in **paragraph 3.54** that the rule should be extended to prevent the offender from making an application under section 67A(3) of the *Succession Act 1965*, as inserted by the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. Currently, section 120 of the 1965 Act precludes an offender from making an application under section 117 of the 1965 Act. Section 67A(3) of the 1965 Act allows the child of a person in a civil partnership who dies intestate to apply, based on a needs test, for a share in the estate of his or her parent. Section 117 of the 1965 Act provides for an application for “just provision” out of the estate of a parent. The extension of the rule to section 67A(3) is also subject to the discretion to modify or disapply the rule in cases of manslaughter: see *section 46D*, below.

Section 46B(7) retains the “pre-decease” rule currently set out in section 120(5) of the 1965 Act and it adds that this applies to the new provisions in *sections 46C to 46F* of the Bill, below.

Section 46B, in order to implement other recommendations in the Report, does not replicate some other elements currently found in section 120 of the 1965 Act. These are:

- section 120(4) of the 1965 Act, which deals with offences other than the homicide offences in section 120(1): this has been omitted to implement the recommendation in **paragraph 3.68** that these should not be retained in the reformed and extended rule and should be repealed;
- section 120(2), 120(2A), 120(3) and 120(3A) of the 1965 Act, which deal with disinheritance associated with desertion: these have been omitted to implement the recommendation in **paragraph 1.20** that they are not relevant to the homicide-related matter with which this project is concerned (and will therefore be retained in section 120).

Application of section 46B to joint tenancy

46C.— (1) (a) Where the offender and the victim held property under a joint tenancy, the offender shall be precluded from obtaining the

benefit of the right of survivorship, and the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender shall stand severed from the date when an offence referred to in *section 46B(1)* was committed, and in any proceedings brought under this Part the court shall make an order to that effect.

- (b) Pending any determination by the court in any proceedings brought under this Part, the legal title in the property shall be held in trust and subject to the respective beneficial interests of the victim and the offender.
- (c) Unless otherwise provided (whether in a deed creating the joint tenancy or otherwise by operation of law), and subject to the subsequent provisions of this section, it shall be presumed until the contrary is shown that, upon severance in accordance with *paragraph (a)*, the victim (or, as appropriate, the estate of the victim) holds at least half of the interest in the property.

(2) Where proceedings are brought under this Part, the amount and value of the offender's interest in the property shall be determined by the court.

(3) The court shall, in determining the amount and value of the offender's interest in the property, make such order as appears to the court to be just and equitable having regard to the fact that the right of survivorship was accelerated by the act constituting an offence referred to in *section 46B(1)* and to all the circumstances.

- (4) The court shall, in determining the amount and value of the offender's interest in the property, have regard, where relevant, to the following circumstances—
 - (a) any contributions, direct or indirect, made by the offender and the victim to the property held under the joint tenancy, including the relative values of their contributions,
 - (b) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants within the meaning of the Act of 2010, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent person and any contribution made by either of them by looking after the home or caring for the family,
 - (c) the age and financial needs, obligations and responsibilities of any dependent, including any child, of the victim,
 - (d) the age and financial needs, obligations and responsibilities of the offender,

- (e) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute,
 - (f) whether the commission of an offence referred to in *section 46B(1)* resulted in a payment under a contract of life insurance, including the discharge of an outstanding mortgage debt,
 - (g) any civil liability on the part of the offender arising from the act constituting an offence referred to in *section 46B(1)*, including any liability under sections 48 and 49,³
 - (h) the nature of the offender's conduct in relation to the offence and, in particular —
 - (i) whether the offender's act constituted the offence of murder or attempted murder, or
 - (ii) if the offender's act constituted the offence of manslaughter, whether it was voluntary or involuntary manslaughter,
 - (i) the presence of diminished responsibility (within the meaning of the Act of 2006), where relevant,
 - (j) whether there was a motive or intention to cause death, and
 - (k) any other matters which may appear to the court to be relevant.
- (5) (a) Where *section 46B(1)* applies and the offender held property under a joint tenancy with the victim and one or more other persons, the offender's interest in the joint tenancy shall stand severed in accordance with *subsection (1)*, and the joint tenancy shall, subject to *paragraph (c)*, continue between the one or more other persons (referred to subsequently in this Part as 'innocent joint tenants'), who shall take the victim's interest by survivorship.
- (b) Where *paragraph (a)* applies the offender's remaining interest shall be subject to the power of the court to determine that interest in accordance with *subsections (2) and (3)*.
- (c) Where any remaining innocent joint tenant no longer wishes to continue as joint tenant with the offender, he or she may apply for relief under sections 30 and 31 of the Act of 2009.

Explanatory Note

Section 46C (to be inserted into the *Civil Liability Act 1961*) implements the recommendations in Chapter 2 of the Report concerning the application of the rule in *section 46B* to the case where property is held in a joint tenancy.

³ This refers to sections 48 and 49 of the *Civil Liability Act 1961*.

Section 46C(1) implements the recommendations in **paragraph 2.79**: (a) that where the offender and the victim held property under a joint tenancy, the offender shall be precluded from obtaining the benefit of the right of survivorship, and the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender shall stand severed from the date when an offence referred to in *section 46B(1)* was committed, and in any proceedings brought under the Bill the court shall make an order to that effect; (b) that pending any determination by the court in any proceedings brought under this Bill, the legal title in the property shall be held in trust and subject to the respective beneficial interests of the victim and the offender; and (c) that, unless otherwise provided (whether in a deed creating the joint tenancy or otherwise by operation of law), it shall be presumed (the burden being on the offender to establish otherwise in any proceedings under this Bill) that, after severance, the victim (including where relevant the estate of the victim) holds at least half of the interest in the property. It is important to include “where relevant the estate of the victim” as this applies where succession is involved, whereas the expanded scope of the rule proposed in the Report includes circumstances where succession is not involved, as in the case of a joint tenancy and also where the proceeds of a life insurance policy or pension is involved.

Section 46C(2) implements the recommendation in **paragraph 2.80** that where proceedings are brought under this Bill, the amount and value of the interest to be held by the offender shall be determined by the court.

Section 46C(3) implements the recommendation in **paragraph 2.80** that the court shall, in determining the amount and value (which may be above or below half of the interest in the property), make such order as appears to the court to be just and equitable, having regard to: (i) the fact that the right of survivorship was accelerated by the act of the offender constituting any of the offences listed in *section 46B(1)*, and (ii) all the relevant circumstances, including those set out in *section 46C(4)*, below.

Section 46C(4) implements the recommendation in **paragraph 2.82** that, in determining the amount and value that is just and equitable under *section 46C(2)*, the court shall have regard, where relevant, to the following: (a) the contributions, direct or indirect, made by the offender and the victim to the jointly held property, including whether their respective contributions were equal or not; (b) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; (d) the age and financial needs, obligations and responsibilities of the offender; (e) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (f) that the act constituting the homicide resulted in a payment under a life insurance contract, whether this involves the discharge of an outstanding mortgage debt or the payment of any other sum under the life insurance contract; (g) any civil liability on the part of the offender arising from the act constituting the homicide, including but not limited to liability under sections 48

and 49 of the *Civil Liability Act 1961*; (h) the nature of the offender's conduct related to the offence, that is, whether the offender's act constituted the offence of murder or attempted murder (which would be intentional or reckless) or, if the offender's act constituted the offence of manslaughter, whether it was voluntary manslaughter (which could arise from excessive use of force in self-defence or from the defence of provocation) or involuntary manslaughter (which would have involved gross negligence, rather than any actual intentional conduct by the offender; (i) where relevant, the presence of diminished responsibility, which is a defence under the *Criminal Law (Insanity) Act 2006*; (j) whether there was a motive or intention to cause death; and (k) any other matters which may appear to the court to be relevant.

Section 46C(5) implements the recommendations in **paragraphs 2.92** that: (a) where there are more than two joint tenants, the joint tenancy should continue between any remaining innocent joint tenants (that is, joint tenants other than the victim and the offender), who would take the deceased person's interest by survivorship, but that the offender's interest would be severed; (b) that the offender's remaining interest would also be subject to the power of the court to determine that interest in accordance with the criteria already recommended in paragraphs 2.63-2.66 of the Report, and set out in *section 46C(2) to (4)*, above; and (c) that, where any remaining innocent joint tenant no longer wishes to continue as joint tenant with the offender, an application may be made under sections 30 and 31 of the *Land and Conveyancing Law Reform Act 2009* to resolve this. As discussed in the Report, a court has wide-ranging powers under sections 30 and 31 of the 2009 Act, including the power to order the sale of jointly held property.

Court's discretion to modify or disapply section 46B in manslaughter

46D. —(1) Where the offender has been convicted of manslaughter a court may, in its discretion in any proceedings brought under this Part, make an order to modify the application of or disapply completely *section 46B(1)*, if the Court is satisfied that the interest of justice so requires.

(2) In exercising its discretion under *subsection (1)*, the court shall have regard to all of the circumstances of the case, including—

- (a) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants within the meaning of the Act of 2010, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family,
- (b) any income or benefits to which the offender or the victim is entitled, including by or under any contract, trust or statute,

- (c) the age and financial needs, obligations and responsibilities of any dependent, including any child, of the victim,
- (d) the age and financial needs, obligations and responsibilities of the offender,
- (e) the nature of the offender's conduct in relation to the offence and, in particular, whether the offence was voluntary or involuntary manslaughter,
- (f) the presence of diminished responsibility (within the meaning of the Act of 2006), where relevant, and
- (g) any other matters which may appear to the court to be relevant.

(3) In exercising its discretion under *subsection (1)*, the court may, having regard to the matters set out in *subsection (2)*, and notwithstanding *section 46B(5)*, make an order allowing the offender to make an application under *section 67A(3)* or, as appropriate, *section 117* of the Act of 1965.

Explanatory Note

Section 46D(1) (to be inserted into the *Civil Liability Act 1961*) implements the recommendation in **paragraph 3.47** that in a case involving manslaughter a court may, in its discretion, make an order to modify or disapply completely the rule in *section 46B(1)*, above, if the Court is satisfied that justice requires the effect of the rule to be modified or disappplied.

Section 46D(2) implements the recommendation in **paragraph 3.48** that, in exercising the discretion to modify or disapply completely the rule, the court should have regard to all of the circumstances of the case, including: (a) in a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or *in loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family; (b) any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute; (c) the age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim; (d) the age and financial needs, obligations and responsibilities of the offender; (e) the nature of the offender's conduct related to the offence, that is, whether the offence was voluntary or involuntary manslaughter; (f) where relevant, the presence of diminished responsibility, which is a defence under the *Criminal Law (Insanity) Act 2006*; and (g) any other matters which may appear to the court to be relevant.

Section 46D(3) implements the recommendations in **paragraph 3.54** that, in exercising the discretion to modify or disapply completely the rule, the court may, subject to the same criteria as set out in **paragraph 3.48** of the Report (see *section 46D(2)*, above), make an order allowing the offender to make an application under *section 67A(3)* or, as the case may be, under *section 117* of

the *Succession Act 1965*. Section 67A(3) of the 1965 Act allows the child of a person in a civil partnership who dies intestate to apply, based on a needs test, for a share in the estate of his or her parent. Section 117 of the 1965 Act allows a child to seek a share of his or her deceased parent's estate if it can be established that the parent did not make "proper provision" for the child in accordance with his or her means, whether by will or otherwise.

Civil nature of proceedings under this Part

46E. — (1) Proceedings under this Part are civil proceedings and accordingly may be brought where —

- (a) there has been no criminal prosecution of the offender (who, for the purposes of this section, other than *subsection (5)*, need not have been convicted of an offence referred to in *section 46B(1)*) in the State in connection with an offence referred to in *section 46B(1)* (which shall include a case where no proceedings were held or findings made under the Act of 2006), including where this is because the relevant act occurred outside the State, or
- (b) though there has been such a prosecution, whether in or outside the State, the offender has been found not guilty (including after an appeal).

(2) Proceedings under this Part may be brought by —

- (a) any interested person who may apply to the court for an order under *section 46B* precluding the offender from taking any share in the property or estate of the victim or for an order under *section 46C(1)* or a determination under *section 46C(2)*, or
 - (b) any interested person, or the offender, who may apply to the court for a determination under *section 46C(2)* or for an order under *section 46D* disapplying or modifying the application of *section 46B*.
- (3) (a) In proceedings brought under this Part, any matter shall be established in evidence on the balance of probabilities.
- (b) Without prejudice to the generality of *paragraph (a)*—
- (i) a person bringing proceedings for the purposes set out in *subsection 2(a)* shall establish to the satisfaction of the court that, on the balance of probabilities, the offender's wrongful act caused (or, as the case may be, attempted to cause) the death of the victim, and
 - (ii) the court shall not accede to the application or make any order under this Part unless it is satisfied, on the balance of probabilities, either that the offender has been convicted

of an offence referred to in *section 46B(1)* or, on the balance of probabilities, has unlawfully killed the victim (and any such order shall be expressed to be made solely for the purposes of this Act and to have effects as a matter of civil law only), and

(iii) in this paragraph ‘unlawfully killed’ means that the offender has, by his or her wrongful act, caused (or, as the case may be, attempted to cause) the death of the victim, and that the wrongful act was intentional, or reckless, or grossly negligent or that it resulted from excessive self-defence or provocation.

(4) (a) In proceedings under this Part, an offender may adduce evidence that, though no prosecution was brought or finding made under the Act of 2006 in respect of his or her case, if such a prosecution had been brought a finding would have been made either that he or she was unfit to be tried or was not guilty by reason of insanity in accordance with the Act of 2006.

(b) If the court is satisfied on the balance of probabilities that the offender has made out his or her case under *paragraph (a)*, it may make an order that *section 46B* shall not apply to the offender (and any such order shall be expressed to be made solely for the purposes of this Act and to have effects as a matter of civil law only).

(5) In proceedings under this Part, the conviction of a person for the murder, attempted murder or manslaughter of another person shall be conclusive evidence of that fact for the purposes of *section 46B(1)*.

(6) Any liability of the offender under this Part does not alter or affect any other civil liability of the offender arising from the act constituting the homicide, including liability under *sections 48 and 49*.⁴

(7) For the purpose of proceedings under this Part, “interested person” includes—

- (a) a person who is entitled to an interest in any property of the victim,
- (b) the executor or personal representative of the estate of the victim,
- (c) a beneficiary under the will of the victim or a person who is entitled to an interest in any property on the intestacy of the victim,
- (d) a person claiming through the offender, or
- (e) any other person who may have an interest in the outcome of such proceedings.

⁴ This refers to sections 48 and 49 of the *Civil Liability Act 1961*.

Explanatory Note

Section 46E(1) (to be inserted into the *Civil Liability Act 1961*) implements the recommendations in **paragraph 4.37** that proceedings under this Bill are civil proceedings and accordingly may be brought where: (a) there has been no criminal prosecution of the offender in the State in connection with any act constituting an offence listed in *section 46B(1)*, including where this is because the act constituting the offence occurred outside the State, or (b) even where there has been such a prosecution, whether in the State or outside the State, the offender has been found not guilty (including after an appeal).

Section 46E(2) implements the recommendations in **paragraph 4.38** that proceedings under this Bill may be brought by: (a) any interested person, who may apply to have the offender precluded from taking any share in the estate of or property of the victim in accordance with the rule in *section 46B(1)* or for the purposes of having a determination made under *section 46C*; or (b) any interested person, or the offender, who may apply for the purposes of having a determination made under *section 46C* or to have the rule in *section 46B(1)* disapplied or modified in accordance with *section 46D*.

Section 46E(3) implements the recommendations in **paragraph 4.39** that: (a) in proceedings brought under this Bill, any matter must be established in evidence on the balance of probabilities; and (b) that without prejudice to this general requirement: (i) a person bringing proceedings under the Bill must establish on the balance of probabilities that the offender's wrongful act caused (or, as the case may be, attempted to cause) the death of the victim; and (ii) that the court shall not accede to the application or make any order under this Bill unless it is satisfied, on the balance of probabilities, that either the offender has been convicted of an offence referred to in *section 46B(1)* or, on the balance of probabilities, has unlawfully killed the victim (and any such order shall be expressed to be made solely for the purposes of this Act and to have effects as a matter of civil law only), and (iii) that in this context "unlawfully killed" means that the offender has, by his or her wrongful act, caused (or, as the case may be, attempted to cause) the death of the victim, and that the wrongful act was intentional, or reckless, or grossly negligent or, where intentional, that it resulted from excessive self-defence or provocation. This definition is intended to be consistent with the Commission's recommendations to exclude from the scope of the Bill any form of unlawful killing such as dangerous driving causing death (and thus to include murder, attempted murder and manslaughter only).

Section 46E(4) implements the recommendations in **paragraph 4.40** that, in proceedings under this Bill: (a) an offender may adduce evidence that, although no prosecution was brought or finding made under the *Criminal Law (Insanity) Act 2006* in respect of his or case, if such a prosecution had been brought a finding could have been made that he was either unfit to be tried or was not guilty by reason of insanity in accordance with the 2006 Act; and (b) that if the court is satisfied on the balance of probabilities that the offender has made out his or her case, it may make an order that *section 46B* shall not apply to the offender (and any such order shall be expressed to be made solely for the purposes of this Act and to have effects as a matter of civil law only, again underlining the civil nature of the proceedings provided for in this Bill).

Section 46E(5) implements the recommendation in **paragraph 4.65** that in proceedings involving the rule under *section 46B(1)*, a conviction of a person for the murder, attempted murder or manslaughter of another person shall be conclusive evidence that the person has committed the act constituting that offence.

Section 46E(6) implements the recommendation in **paragraph 4.67** that any liability of the offender in proceedings involving the rule under *section 46B(1)* does not alter or affect any other civil liability of the offender, including but not limited to liability under *sections 48 and 49* of the *Civil Liability Act 1961*. This proviso is without prejudice to the proviso in *section 46C(3)(g)*, above (which is limited to cases involving a joint tenancy).

Section 46E(7) implements the recommendation in **paragraph 4.38** that that an interested person should be defined to include: a person who is entitled to any property interest of the victim; the executor or personal representative of the estate of the victim; a beneficiary under the will of the victim or a person who is entitled to any property interest on the intestacy of the deceased person; a person claiming through the offender; or any other person who has an interest in the outcome of any proceedings to which the Bill refers.

Costs in proceedings under this Part

46F.—In proceedings under this Part, the court shall, other than in exceptional circumstances, order that the costs of the proceedings shall be borne by the offender (which for the purposes of this section shall include any person against whom an order has been made under *section 46E(3)(b)*).

Explanatory Note

Section 46F (to be inserted into the *Civil Liability Act 1961*) implements the recommendation in **paragraph 4.60** that in proceedings under this Bill, the court will, other than in exceptional circumstances, order that the costs of the proceedings are to be borne by the offender.

Related matters arising in connection with probate proceedings

46G.— (1) Where a person has died in circumstances that gave rise to a criminal investigation in respect of which a prosecution for murder or manslaughter is or may be pending, an interested person may enter a caveat in the Probate Office of the High Court concerning the estate of the deceased, and while such a caveat is in force, there shall be no transfer of any estate or interest affected by the caveat.

(2) A person who is convicted of the murder or manslaughter of another shall be presumed, until the contrary is shown, to be unsuitable to administer the estate of the deceased and, accordingly, no grant of probate or letters of administration in the estate shall issue to such person notwithstanding that such person is the nominated executor of the deceased or the person who would but for this

subsection be the person entitled as of right to extract letters of administration intestate of the deceased person's estate."⁵

Explanatory Note

Section 46G(1) (to be inserted into the *Civil Liability Act 1961*) implements the recommendation in **paragraph 4.73** that where a person has died in circumstances that give rise to a criminal investigation in respect of which a prosecution for murder or manslaughter is or may be pending, an interested person may enter a caveat in the Probate Office of the High Court concerning the estate of the deceased; and that, while that caveat is in force, there must be no transfer of any estate or interest affected by the caveat. The Commission notes in the Report that interested parties may seek injunctive or related relief which can justify the entry of a *lis pendens* in order to prevent the survivorship rule having effect in the case of property held in a joint tenancy, or to prevent the sale of any property in respect to which the Bill applies.

Section 46G(2) implements the recommendation in **paragraph 4.74** that a person who is convicted of murder or manslaughter should be presumed to be unsuitable to administer the estate of the deceased and that no grant of probate or letters of administration in the estate shall issue to such person notwithstanding that such person is the nominated executor of the deceased or the person who would but for this recommendation be the person entitled as of right to extract letters of administration intestate of the deceased person's estate. This presumption is rebuttable, in order to provide for those circumstances in which the court in its discretion orders that the disinheritance rule should not be applied, as provided for in *section 46D*, above, in cases of manslaughter.

Repeals

3. — Section 120(1) and (4) of the Succession Act 1965 are repealed.

Explanatory Note

Section 3 of the Bill implements the recommendation in **paragraph 3.31** that section 120(1) of the *Succession Act 1965* should be repealed. Section 120(1), which is limited to preventing a person who commits homicide from inheriting property that forms part of the estate of the victim, is being replaced by the more wide-ranging rule inserted by *section 3* of the Bill, above, which applies to all kinds of property of the victim. Section 120(4) of the 1965 Act, which deals with offences other than the homicide offences in section 120(1), is being repealed without replacement to implement the recommendation in **paragraph 3.68** that these should not be retained in the reformed and extended rule in this Bill.

⁵ The double closing quote indicates the end of the text proposed to be inserted into the *Civil Liability Act 1961*.



The Law Reform Commission is an independent statutory body established by the Law Reform Commission Act 1975. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its Fourth Programme of Law Reform was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation project makes legislation more accessible online to the public. This includes the Legislation Directory (an electronically searchable index of amendments to Acts and statutory instruments), a selection of Revised Acts (Acts in their amended form rather than as enacted) and the Classified List of Legislation in Ireland (a list of Acts in force organised under 36 subject-matter headings).

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