

## LEGITIMATE EXPECTATION/ PROMISSORY ESTOPPEL

These claims can arise as an adjunct to s.117 claim or as stand-alone claims.

In the case of legitimate expectation the deceased must have made a representation to another in respect of a specific property, that other must have relied on that representation to their detriment and the deceased fails to fulfil that promise by gifting that property to another or by failing to make a will and therefore the rules of intestacy apply.

A typical example of this is whereby a family member has worked on a family farm or business, in the belief and on the basis of representations made to them that the farm or business would be theirs on the death of the deceased. In relying on this representation that forego other business opportunities or job offers,

Another example of a legitimate expectation claim is where a family member or carer moves in to live with an elderly person and carries out improvements to the property in the belief that the dwelling will be left to them.

In terms of a timeframe, in this instance s.9 of the Civil Liability Act 1961 applies;

It states that in respect of any claim against an estate that;

- Proceedings must be pending at the date of death;
  - Be brought within the relevant period pertaining to a cause of action
- OR**
- Be brought within 2 years of the date of death, whichever period expires first.

Successful proceedings under this section can lead to a declaratory order and/or damages in lieu.

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## LEGAL RIGHT SHARE

If the testator / testatrix dies either wholly or partially intestate leaving a spouse and no children, the surviving spouse is entitled to a legal right share of one-half of the estate (s111 (1))

If the testator / testatrix dies either wholly or partially intestate leaving a spouse and children, the surviving spouse is entitled to a legal right share of one-third of the estate (s111 (2)).

A spouse is entitled to make a devise to their spouse in a will, but it should be specified whether this devise will be in addition or in satisfaction of the LRS.

s.115(4) A personal representative is obliged to notify a surviving spouse of their right of election.

Under s.115 this right of election is not exercisable after the expiration of six months from the receipt by the spouse of such notification, or one year from the first taking out of representation of the deceased's estate, whichever is the later.

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## SUMMARY

- No gift – entitled to automatically to LRS
- Gift under will in addition to Legal right Share – surviving spouse takes LRS + gift (LRS vests automatically)
- Gift under will not expressed if in addition to Legal Right Share – Right of election – elect to take either LRS or gift under the will (s115(1)(a))

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## APPROPRIATION

Section 56 allows a surviving spouse to compel the PR to exercise his rights of appropriation in respect of the dwelling contained within the deceased's estate and in which the surviving spouse was ordinarily resident as per s. 56(1) together with the chattels therein as per s. 56(2).

Section 56 applies regardless of whether the deceased died testate, intestate or partially intestate. The dwelling is appropriated by means of satisfaction of the surviving spouse's legal right share or share by testacy or intestate entitlement.

The personal representative has a duty to notify the surviving spouse in writing of the rights conferred by this section. (s.56 (4))

The surviving spouse has six months from the receipt of this notification or one year from the first taking out of representation of the deceased's estate, whichever is the later, in which to exercise this right (s.56 (5) (a)).

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## WHO IS THE SURVIVING SPOUSE WHO QUALIFIES FOR LRS?

- Spouse' - validly married to the deceased (*Civil Registration Act 2004*)
- Recent amendment includes civil partner (*Civil Partnership and Cohabitants Act 2010*)
- LRS must not have been renounced in an ante-nuptial contract or in a post-marriage contract (s.113)
- In writing and during the testator's lifetime
- It is important to note the different situations between judicial separation and divorce

### Judicial separation –

- The surviving spouse still qualifies unless the court extinguishes the share by making an order under s.12 of the FLA 1995.
- *Moorehead v Tiilikainen* 1999 in which an execution agreement was executed which renounced their rights under succession. However the agreement contained a proviso that if by mutual consent they cohabited as man and wife for a continual period of 12 months all covenants contained in the agreement should cease – which did actually happen.

### Divorce –

- Former spouse is no longer entitled to claim a share as cease to be spouses --- s. 18 of the Family Law (Divorce) Act 1996 – courts discretion to grant provision of estate to former spouse
- See also s25 of of the Family Law Act 1995

## Loss of spousal entitlement – Desertion.

- If a spouse is guilty of desertion of his spouse for 2 years or more continuously up to the time of the deceased's death – he is precluded from taking any share in the estate as a legal right or upon intestacy – s.120 of 1965 act

## Loss of spousal entitlement- Crime

- A spouse convicted of an indictable offence against the other spouse and imprisoned for 2 or more years will lose his succession rights
- S.120 (4) killing your spouse

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## SECTION 117 APPLICATIONS

Unlike spouses, children are not given an absolute right to any part of the testator's estate.

Instead s.117 permits children to make an application to the court for redress if they feel their deceased parent has not made proper provision for them in accordance with his or her means.

If the court accedes to such an application, it has an absolute discretion to make such provision for the child, as it considers just and equitable.

The court is not however, permitted to make provision for a child, which interferes with the LRS of a surviving spouse, nor with a gift by will or share on intestacy of a parent of the child as per s.117 (3).

Any application by or on the behalf of a child seeking an order for provision must be made within 6 months of a grant of representation first having been taken out as per s.117 (6) as amended by *section 46 of the Family Law (Divorce) Act 1996*.

Under s.117 (1) in deciding on such an application, the court will consider whether 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 during his lifetime.

Under s.117 (2) 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.

Factors which the court will consider in assessing whether the testator at the date of death has failed in his moral duty to make proper provision for a child include inter alia;

- *The amount left to the surviving spouse or the value of the legal right share, depending on which the spouse elects to take.*
- *The number of the testator's children, their ages, and their positions in life at the time of the testator's death.*
- *The means of the testator.*
- *The age, financial position and prospects in life of the child whose position is being considered.*
- *Whether the testator already made proper provision in his lifetime for the child.*

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## RELEVANCE OF THE BEHAVIOUR OF THE CHILD?

The onus on the parent may be further diminished by the behaviour of the claimant.

## FOR MORE INFORMATION

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