

THE CIVIL LIABILITY (AMENDMENT) (PREVENTION OF BENEFITS FROM HOMICIDE) BILL 2017

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Schedule

Matters to be addressed in the course of scrutiny

PART A: Policy and Legislative Analysis

The 'policy issue' and the policy and legislative context

- 1 Define the problem / the policy issue which the Bill is designed to address; to what extent is it an issue requiring attention? What is the scale of the problem and who is affected? What is the evidence base for the Bill?

In my submission, I address the question of the evidence base for the Bill and indicate that there appears to be a false perception that a 'loophole' exists in favour of killers in the context of joint tenancies over property.

- 2 What is the current policy and legislative context, including are there any proposed Government Bills or general schemes designed to address the issue? Have there been previous attempts to address the issue via legislation?

The issue has, in part, been addressed in s.120 of the Succession Act 1965.

- 3 Is there a wider EU/international context?

The approach in other comparable jurisdictions is addressed in my submission.

Implications and implementation of the Bill's proposals

Policy implications / implementation

4 How is the approach taken in the Bill likely to best address the policy issue?

In my submission, I suggest that in various ways the Bill, in its current form, does not represent the best way to address the underlying policy issue.

5 What alternative and/or additional policy, legislative and non-legislative approaches were considered, including those proposed by the Government and what, does the evidence suggest, are the differences between and the merits of each?

I suggest alternative approaches on various issues in my submission.

6 Are there Government-sponsored Bills (or General Schemes) which are related to and/or broadly aim to address the same issue? Are there merits in combining them?

I am not aware of Government-sponsored Bills or Scheme addressing this issue.

7 What are the specific policy implications of each proposal contained within the Bill (environmental / economic / social / legal)?

My submission addresses the legal issues raised by the Bill.

Has an impact assessment (environmental/ economic /social / legal) been published (by Government or a third party) in respect of each proposal contained within the Bill?

The Bill replicates the proposals advanced by the Law Reform Commission in a 2015 Report on the subject.

8 Could the Bill, as drafted, have unintended policy consequences, if enacted?

Yes, as explained in my submission.

9 Has the Committee taken due consideration of the opinion of the European Central Bank (ECB) on the Bill, if applicable?

No comment.

10 How would the Bill, if enacted, be implemented?

No comment.

11 Are there appropriate performance indicators which the Department, or whoever is ultimately charged with implementing the Bill, can use to assess the extent to which it meets its objective? Does it include formal review mechanisms?

No comment.

Cost evaluation

12 Will there be enforcement or compliance costs?

No comment.

13 What are the likely financial costs of implementing the proposals in the Bill, and what is the likely overall fiscal impact on the exchequer?

No comment.

14 Have cost-benefit analyses (CBA) been provided / published (by Government or a third party) in respect of each proposal contained within the Bill? Will benefits /costs impact on some groups / stakeholders more than others?

Unless uncertainties in the drafting are corrected, the legislation could lead to unnecessary litigation, thus creating greater legal costs for the families of the victims of homicide.

PART B - Legal Analysis

[Note - In conducting scrutiny under Part B, the Committee shall have regard to whether the Bill has been cleared by the OPLA drafting service]

15 Is the draft PMB compatible with the Constitution (including the 'principles and policies' test)?

In my view, there is a constitutional problem with the provisions of the Bill in relation to joint tenancies, as I explain in my submission.

16 Is the draft PMB compatible with EU legislation and human rights legislation (ECHR)?

It is possible, although my submission does not engage with this issue, that the provisions in the Bill related to joint tenancies could be incompatible with the ECHR as well as being potentially unconstitutional.

17 Is there ambiguity in the drafting which could lead to the legislation not achieving its objectives and/or to case law down the line?

Yes, as explained in my submission.

18 Are there serious drafting deficiencies or technical drafting errors (e.g. incorrect referencing to Acts etc.)?

Yes, as explored in my submission. One simple example is the fact that the short title at the start of the Bill is slightly different to the short title provided for in the body of the Bill.

19 Are there potential unintended legal consequences which may stem from the PMB as drafted?

Yes, as explained in my submission.

20 Are appropriate administrative and legal arrangements necessary for compliance and enforcement of the provisions of the Bill included? (e.g. if draft Bill contains a prohibition, whether the necessary criminal sanctions - including the class of fine - are included).

This does not appear to be a problem with the Bill.

1. OPENING STATEMENT

Introduction

I'm grateful for the invitation to attend today to discuss this Bill with you. I am a professor in the Law School at University College Cork where I have taught land law, succession, and trusts for the past 30 years. I have published three books on those areas, as well as over 60 legal articles and book chapters, including a 2016 article which analyses in detail the proposals of the Law Reform Commission (LRC) in this area. These LRC proposals have been adopted without change in this Bill.

The Bill has many positive aspects but also needs significant improvement in a number of areas – in some respects it is too generous to killers, and in others it goes too far in stripping them of property and risks being struck down as unconstitutional. There are also various problems with the drafting that could lead to unintended consequences.

Misconceptions about Joint Tenancy and Homicide: There is No 'Loophole'

There is a risk of misunderstanding the current law in Ireland in relation to property held in joint tenancy, a type of co-ownership where the interest of a deceased co-owner disappears and the surviving joint tenant or joint tenants benefit from the right of survivorship. It is not, as has been suggested in the media, a case of 'killer takes all'. A more accurate formula would be 'killer retains half'; the fact that this rule was established by the courts and operates through the technical means of a trust does not diminish its legal force. The current Irish position is the same as in virtually all jurisdictions that have the legal concept of the joint tenancy, including England and Wales, Canada, Australia, and New Zealand (where there has been recent and comprehensive legislative reform). There is no 'loophole' in Irish law in favour of killers.

Risk of Unconstitutionality

The Law Reform Commission recognised that depriving a killer of his own property would amount to imposing an additional punishment for a crime and would be unconstitutional. It would be an arbitrary attack on property rights to

strip a killer of his pre-existing property rights in the context of jointly held assets only, while not operating a forfeiture principle in respect of other assets.

To try to get around this problem, the Law Reform Commission proposed to grant the court discretion to reduce the killer's half share in property that had previously been held in joint tenancy, an approach which is reflected in the proposed s.46(C) of the Civil Liability Act. No other jurisdiction has adopted this strategy. Since the discretion would allow the court to choose to strip the killer of property that belonged to him prior to his crime, the constitutional objection remains.

Some Other Problems with the Bill

1. Exclusion of Accessories to Murder

Section 46B(3) excludes a person who aids, abets, counsels or procures the commission of murder, manslaughter, and attempted murder. No other common law jurisdiction draws the distinction proposed by the Bill, and it would, absurdly, allow a person who hired a hitman to kill his spouse to benefit from the victim's will.

2. The Repeal of s.120(4) of the Succession Act

Section 2 of the Bill repeals s.120(4) of the Succession Act, without replacement. Unfortunately, this means that a spouse who has been convicted of a serious offence, short of homicide, against the deceased or his or her child – eg by raping the spouse or molesting the family's children – would still be entitled to insist on his automatic legal right share of one-third or one-half of the deceased's estate, despite the victim having excluded him by her will.

3. The Inclusion of Attempted Murder

This perpetuates an anomaly introduced by s.120(1) of the Succession Act 1965. In the case of attempted murder, the victim is not dead and so there is no possibility of a benefit accruing to the (non-)killer by virtue of his crime. Therefore, the central purpose of the Bill is not engaged. No other common law

jurisdiction takes the approach of treating attempted murder in the same way as homicide.

4. Exclusion of Killers who are Unfit to be Tried

Those who are unfit to stand trial are exempted by the proposed s.46B(4). This is misconceived because what determines the killer's blameworthiness is his mental state *at the time of the crime* and, as the Bill makes clear elsewhere, no conviction or trial is necessary to trigger the application of the rule.

Conclusion

Legislative reform in this area is desirable to clarify the details of the current law. This would help the families of victims by reducing the need for litigation and, therefore, reducing legal expenses and avoiding delay. As well as the five points I have mentioned so far, there are many other complex and technical issues raised by the Bill (which I explain in detail in an annotation of the text of the Bill at the end of my submission). Very careful drafting is required. If the time is not taken to get this Bill right, it will make the current legal position worse rather than better.

2. Detailed Submissions on Key Points

- A. *Exclusion of Accessories to Murder*
- B. *Exclusion of Killers Who are Unfit to be Tried*
- C. *The Repeal of s.120(4) of the Succession Act*
- D. *Discretion in Relation to Joint Tenancies*
- E. *The Inclusion of Attempted Murder and the Exclusion of Assisted Suicide and Infanticide*

A. Exclusion of Accessories to Murder

This has already been identified as a potential problem in the Second Stage Debates. Under section 46B(3), to be inserted by the Bill, the rule against benefitting from homicide ‘shall not apply to any person who aids, abets, counsels or procures the commission of’ murder, attempted murder, or manslaughter. Starting from the assumption that the current rule in section 120(1) does not apply to such a person, the Law Reform Commission concluded that this position should be maintained in its proposed new statutory regime. This approach involved rejecting the view of ‘most consultees’. The LRC reasoned that ‘what constitutes such a level of participation can vary enormously and, furthermore, the terms “aid” and “abet” are not subject to clear definitions’. The LRC emphasised that its Report was ‘concerned with civil liability... 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’. Thus, ‘[g]iven 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... concluded that in the current context they should not be equated with the act of the person who carries out the offence’. This approach is followed in the Bill.

In fact, the LRC was mistaken in its view that the current law (whether under section 120(1) or under the common law applicable outside the succession context) treats accessories as outside the forfeiture rule and, in my view, it was seriously misguided in concluding that it would be appropriate to provide for such an exclusion in reforming legislation. To deal first with the current law, the key point is that a person who ‘aids, abets, counsels or procures’ the commission of an offence is simply guilty of the relevant offence. Under

section 7(1) of the Criminal Law Act 1997, '[a]ny 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'. The accessory is convicted of the same offence as the principal and, so, a person who assists in a murder is guilty of the offence of murder. Such an offender, therefore, automatically comes within the common law rule applicable to the offences in question and also within the scope of s 120(1), which refers to those 'guilty' of murder, manslaughter or attempted murder. The argument in this paragraph is supported by the fact that it was assumed, without discussion, that the forfeiture principle was applicable in *Nevin v Nevin* [2013] IEHC 80 notwithstanding the fact that the person against whom the forfeiture principle was applied, Catherine Nevin, was described at her murder trial as having 'had [her] husband assassinated'. She had procured his killing by a contract killer or killers and so was convicted of the offence of murder and was, therefore, covered by section 120(1).

It has been argued, thus far, that the current law covers those who are guilty of homicide as accessories. In terms of whether the law should be changed to exclude such persons, the reasons given by LRC are plainly inadequate. In the first instance, it seems doubtful that the civil law should second-guess the criminal law in the manner advocated by the LRC. The definition of accessory liability is regarded as sufficiently clear (in a murder case) to justify stigmatising a criminal defendant who satisfies it as a murderer and subjecting him or her to a compulsory life sentence. Can our legal system, at the same time, sensibly regard that definition as too vague to justify imposing the civil law consequence of depriving the accessory of a proprietary benefit?

As well as referring to the lack of clarity around the definition of accessory liability, the LRC also emphasised that such liability could involve a wide range of moral culpability. In response to this, it can again be noted that the criminal law regards the culpability involved as sufficient to justify conviction for the principal offence. There is, in any case, another point to consider. The fact that accessory liability involves a wide range of moral culpability means that, as well as cases where the culpability of the accessory is less than that of the principal, there are also cases where the accessory's culpability is equal to, or

greater than, that of the principal. In this context, it has been suggested – by the eminent jurist, Glanville Williams, who was responsible for the drafting of the Civil Liability Act 1961 – that ‘Lady Macbeth was worse than Macbeth’. One obvious example is the head of a criminal gang who orders killings to be carried out but keeps his own hands ‘clean’. It seems clearly inappropriate that the law should be set up so that a murderer can be certain of escaping the consequences of the forfeiture rule, simply by avoiding personally carrying out the murder. The proper approach, it is submitted, is clearly that there should be no special exemption for those who are guilty because they were accessories. It should be emphasised that the idea of excluding accessories does not appear to be accepted in any other jurisdiction.

It was suggested in the Second Stage Debate that it could be possible to give the court discretion to exempt accomplices from the rule against benefitting. In my view, there is no convincing reason to treat them as being, in general, less culpable than principal offenders. Therefore, I would argue against providing special treatment for them. The Bill currently allows the court discretion to allow those who have been responsible for the manslaughter of the victim to inherit from the victim’s estate. This discretion does not extend to those guilty of murder as principal offenders, and, in my view, if this approach is maintained then the discretion should also not apply to those guilty of murder because they were accomplices.

B. Exclusion of Killers Who Are Unfit to be Tried

The Bill sensibly maintains the current position whereby the rule against benefitting does not apply to a person to whom the defence of insanity is available. Unfortunately, the Bill follows the view of the Law Reform Commission that a similar exclusion should apply where a person has been found unfit to be tried. The rationale for this approach was stated to be that:

[T]he 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.

However, this overlooks a point that is heavily stressed in the LRC Report and in the Bill, ie that the application of the forfeiture rule is a civil law matter which does not depend on a conviction and does not involve dealing with the defendant within 'the criminal justice system'.

The issue of fitness to be tried, which involves an assessment of the defendant's mental state at the time of a possible trial, is logically distinct from the issue of whether the insanity defence would apply to the defendant's prior actions in killing the victim, which involves an assessment of the defendant's mental state at that earlier time. It is possible that, due to a subsequent deterioration in his mental state (possibly as a consequence of having committed the homicide as was noted by one New Zealand judge), a person could be found unfit to be tried even though he was fully sane at the time of the homicide. The general approach taken by the Bill involves a willingness to apply the forfeiture rule to situations where the defendant has not been the subject of a criminal trial, for example because he or she has died before having been tried for the alleged homicide. Cases where the alleged perpetrator is unfit to be tried should be treated in the same way as any other case where there has been no conviction.

C. The Repeal of Section 120(4) of the Succession Act

Section 2 of the Bill repeals section 120(4) of the Succession Act, without replacement. For reasons that I will now explain, this is not advisable.

Section 120(4) provides that a person who has been found guilty of a (defined type of) serious offence against the deceased, or his or her spouse, civil partner, or child, cannot take advantage of the rules in the Succession Act that prevent a person from disinheriting his or her family. The subsection is relevant to crimes committed by a spouse, civil partner, or child of the deceased person. In the case of children, it prevents them from making an application for greater provision under section 117 of the Succession Act and, in the case of spouses or

civil partners, it prevents them from insisting on their fixed 'legal right share' of the victim's estate. This legal right share is one-third if the deceased has surviving children and one-half if the deceased does not have surviving children. A child or spouse or civil partner can still inherit under the victim's will or intestacy; they simply lose their right to complain if the victim chooses to make limited provision for them or to disinherit them completely.

In relation to applications under section 117, the court is given discretion as to whether to grant extra provision to the applicant child on the basis that the deceased parent has failed in his or her moral duty to make proper provision for the child. The child has no entitlement to any fixed fraction of the estate. Because the regime under section 117 is discretionary, it is possible to make a case in favour of removing the protection represented by section 120(4). Even if a child is permitted to make an application under section 117, despite having been guilty of a serious crime against the testator, or against the testator's spouse, civil partner or other children, the court will be able to take that fact into account in exercising its discretion concerning the child's application.

Unfortunately, however, the position is different in relation to the legal right share of a spouse or civil partner. This is automatic, rather than discretionary, and so there is no mechanism which can fulfill the same function as section 120(4) if it were repealed. The repeal of section 120(4) which is proposed by the Bill, following the recommendation of the LRC, would have indefensible results in practice. It could mean, for example, that a spouse who had been convicted of serious sexual offences against the children of the deceased, or of raping the deceased, would be entitled to insist upon a legal right share even if expressly disinherited by the will of the victim. This result could only be avoided if the parties had been divorced prior to death or if, prior to the death of the victim, there had been a formal judicial separation and an order had been made to extinguish the succession rights of the criminal. This will not always be the case, and so it is not safe to repeal section 120(4). The LRC, in making the recommendation to repeal the subsection, failed to consider the fact that, unlike a child's rights under section 117, the legal right share of the spouse or civil partner is non-discretionary. As a compromise, it would be acceptable to

amend rather than repeal section 120(4), so that it would not apply to crimes committed by children but only to those committed by spouses or civil partners.

D. The Inclusion of Attempted Murder and the Exclusion of Assisted Suicide and Infanticide

(i) Attempted Murder

Unfortunately, in its Report which formed the basis for the regime in the Bill, the Law Reform Commission did not discuss the question of whether attempted murder should be included in a reformed codification of the forfeiture rule. It simply assumed that its inclusion was appropriate because it is included in the current section 120(1) of the Succession Act 1965. However, if one reads the Oireachtas debates that preceded the Succession Act 1965, it is clear that the inclusion of attempted murder was strongly challenged at the time as being illogical. The basic point is that attempted murder is distinguished from murder and manslaughter by the survival of the victim. If the offender has not caused the death of the testator, it cannot be said that allowing him to inherit from the victim, when the victim ultimately dies, will allow him to benefit from his crime. The position is similar in the context of joint tenancies. The fact that one of the joint tenants attempts to murder another joint tenant does not trigger the right of survivorship; the victim of the relevant crime is not dead and (unless this Bill changes the position) continues to be a joint tenant in the eyes of the law. There is no possibility of the criminal benefitting from his crime.

It does not appear that any other common law jurisdiction regards attempted murder as falling within the scope of the rule under discussion. While it is true that a person who has, in the past, attempted to murder another person is likely to be regarded by that other person as 'unworthy to succeed', it does not seem necessary for the law to intervene to automatically exclude the perpetrator from inheriting. Under the Bill, other extremely serious offences against an individual such as rape or assault causing serious harm, or the murder of the individual's spouse, do not serve to make the offender automatically unworthy to succeed. As with these other offences, the victim of attempted murder will normally have the opportunity to take steps, on his or her own initiative, to

disinherit the perpetrator, and it is difficult to see the need to single out the offence of attempted murder for special treatment in terms of automatic exclusion of the perpetrator.

In the context of joint tenancies, it is even harder to justify the Bill's approach of treating attempted murder on a par with murder or manslaughter. The essence of the relevant provisions of the Bill is that the joint tenancy would be severed and the court would have a discretion, in accordance with a list of factors, to adjust the respective fractional shares of the parties under a tenancy in common. The consequence is that, as with the murder or manslaughter of a joint tenant, the attempted murder of a joint tenant would trigger an immediate severance of the joint tenancy. However, whether the automatic severance of a joint tenancy is favourable to the perpetrator or to the victim depends on which one ultimately lives longer and, therefore, stands to benefit from the operation of the right of survivorship. Consider a case where a husband stabs his wife and then takes his own life. If the wife were to survive in this example, the terms of the Bill would prevent the wife from benefitting from the right of survivorship as she otherwise would have; the attempted murder would cause an immediate severance of the joint tenancy, thus favouring the criminal's estate. The law should not react to the attempted murder of one joint tenant by another by imposing the double-edged consequence of automatic severance, which is as likely to benefit the perpetrator as the victim.

It is also hard to see why, in the context of attempted murder, the law should give the court a discretion to reduce the perpetrator's share under the tenancy in common that would arise upon the severance of the joint tenancy. Firstly, there is nothing to prevent the victim from taking steps on his or own initiative to sever the joint tenancy and, secondly, the steps available to the victim would not include reducing the perpetrator's fractional share under the tenancy in common that would result. Any reduction in the perpetrator's share would amount to the arbitrary imposition, outside of the criminal process, of an additional punishment for the perpetrator's crime; the argument that this is unconstitutional is stronger in this context because the crime in question did not cause the victim's death and would have had no legal consequences on the joint tenancy if the Bill had not intervened.

On the whole, I suggest that the appropriate approach is to exclude attempted murder from the proposed statutory scheme.

(ii) Assisted Suicide and Infanticide

At one point in the LRC Report, it is stated that ‘most consultees’ took the view that the forfeiture rule should be applied to ‘cases of assisted suicide’. Surprisingly, there is no further discussion of the point in the Report and the offence is not mentioned in the LRC’s Draft Bill and, therefore, not in the current Bill. On balance, I think that the inclusion of the offence of assisting suicide would be the appropriate choice. Some cases of assisting suicide seem clearly to involve a sufficient level of culpability to justify preventing the perpetrator from benefiting, eg where, with the intention of benefitting thereby, the perpetrator plays a crucial role in inducing the deceased to commit suicide; these cases should not be allowed to fall outside the net when it is possible to deal with cases involving lesser culpability by granting partial or total relief in pursuance of the proposed statutory discretion.

Infanticide also does not appear to be covered by the LRC’s proposals. This exclusion may not be logical because, although infanticide is a distinct offence, Irish criminal law effectively equates it with an offence which is covered by the Bill, ie manslaughter on the grounds of diminished responsibility (see Infanticide Act 1949, s 1 as amended by s 22 of the Criminal Law (Insanity) Act 2006). Although the case is perhaps not as strong as the case for including assisted suicide (and the point may also be less important in practical terms), it may be that the offence of infanticide should also be included in the Bill.

E. Discretion in Relation to Joint Tenancies

This issue is very important in the context of the Bill but also more complex than the issues discussed thus far. Therefore, the following discussion is comparatively lengthy.

The case where one joint tenant kills another is not covered by section 120(1) of the Succession Act. In the context of a joint tenancy, the killer stands to benefit through the right of survivorship and, where there were initially only two

joint tenants, would become the sole owner of the property by virtue of the operation of that right. In the Report from which the provisions of the Bill have been adopted without change, the Law Reform Commission noted that the approach that has been taken ‘whether in case law or in legislation, in virtually every common law jurisdiction’ is that the victim’s death is regarded as triggering a severance of the joint tenancy, with the killer and the victim’s estate (excluding the killer) holding the property from that time as tenants in common in equal shares in equity. As explained by the Victoria Law Commission in 2014, under this approach, there is ‘neither a gain nor a loss for any of the joint tenants’ with the killer ‘being prevented from enlarging their share while not being stripped of their existing legal interest’. This is the approach that was applied by Laffoy J in *Cawley v Lillis* [2012] 1 IR 281.

Although the majority of submissions favoured the ‘half share’ approach that had been taken in *Cawley*, the LRC’s Report advocated an approach that had not been mentioned in the preceding Issues Paper in 2014 and which, therefore, had not been the subject of consultation. This approach, moreover, does not appear to have been favoured in any other jurisdiction up to now. According to the LRC, it ‘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’. Under the approach in question, the killer would not benefit from the right of survivorship but there would instead be a tenancy in common between the parties. It would be for the court to determine, in accordance with a long list of factors, the extent of the parties’ interests under this tenancy in common on the basis of what is ‘just and equitable’, but there would be a presumption that the victim would hold at least half of the interest in the property. The LRC noted that ‘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%’. However, the LRC took the view that this would not be unconstitutional because it would arise from ‘a case-by-case approach’.

Assessing the Proposal in the Bill: Is There a Loophole in the Current Law?

The killing of Celine Cawley by Eamonn Lillis set off a 'media frenzy' (Conor Lally, Irish Times, April 2015) which lasted even past his release from prison after serving his sentence for manslaughter. The tone of the coverage of the case is illustrated by headlines such as: 'Wife-killer Eamonn Lillis now a millionaire thanks to tragic Celine Cawley'. The implication of much of the news coverage was that an injustice had been done, with Lillis managing to profit from the crime of killing his wife, in circumstances where he emerged with a one-half share in property that had been jointly owned prior to the homicide.

It is important, however, to understand that the current position in Ireland cannot reasonably be categorised as a 'loop-hole' in favour of killers. Our law is the same as it is in England and Wales, where the rule preventing a killer from benefitting was also developed by the courts. Unlike in Ireland, the law of succession was never codified by statute, so that in England and Wales even the rule against inheriting under the victim's will is non-statutory. Two modern English statutes, the Forfeiture Act 1982, and the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, modify the common law rule at the margins but it was not found necessary to modify the rule itself or to restate it in statutory form. In New Zealand, where the law in this area was reformed by statute in 2007, the effect of the rule at common law was preserved, so that the homicide severs the joint tenancy, and the killer retains half. The initial proposal in New Zealand was that the killer would be deprived of any share but, when the issues were ventilated in detail in parliament, this proposal was abandoned as inappropriate. In 2014, the Law Reform Commission of Victoria in Australia reviewed the area in detail and once more recommended that the existing position at common law be maintained, with the killer retaining half of property held in joint tenancy. This represents the current position in Australia and Canada. Thus, the Irish law on the joint tenancy point reflects the position in virtually all jurisdictions that have the legal concept of the joint tenancy. The only exceptions are a couple of US state jurisdictions that (departing from the approach in the large majority of US states) have favoured the approach of leaving the killer with nothing, an approach which the Law Reform Commission conceded would be contrary to the Irish Constitution.

There have been references in media reports to the position in France, suggesting that the family of the victim in the *Cawley v Lillis* case was able to obtain all the interest in property that was jointly owned in that country, with the implication that the French system is more just than the Irish system. The LRC did not place any reliance on French law in formulating its proposal. As far as I have been able to establish, beyond a bare statement of the outcome in respect of the particular property in the *Cawley v Lillis* case, no analysis or explanation has emerged as to the operation of the law in France in this area. The legal concept of a joint tenancy does not exist in France. It is likely that the property referred to in media reports was held *en tontine*, a contract-based legal arrangement that was developed in France to circumvent the automatic entitlement of children to inherit in French law (for discussion, see Dyson 'The tontine in French law, with some English comparisons' [1993] *The Conveyancer and Property Lawyer* 446). This is a different form of ownership to the joint tenancy, operating within a very different law of property and succession, in a civil law rather than a common law jurisdiction, and against a different constitutional background. On the basis of the evidence that I have seen up to now, no persuasive argument in support of the proposal in the Bill has been made by reference to the French position.

Can the Approach in the Bill be Justified?

The LRC proposal, adopted in the Bill, represents a novel departure in this area of the law. Unfortunately, its justification is not spelled out in the LRC Report. Therefore, it is necessary in to draw out, and evaluate in turn, the possible arguments in favour of the proposal. In part, these arguments are suggested by various aspects of the detailed list of factors which, under the proposal in the Bill, would guide the court's exercise of discretion. This means that the discussion which follows will also involve a consideration of these factors. The ultimate conclusion will be that the approach in the Bill is not a convincing one and should not be supported.

(i) Depriving the Offender

The argument which is implicit in the LRC's discussion – that its proposed approach comes as close as is constitutionally permissible to a 'total deprivation rule' – does not take us very far in the absence of an explanation as to why that rule should be regarded as attractive in principle. It comes up against the objection that the LRC saw to the total deprivation rule, ie that 'it would involve an impermissible deprivation of existing property rights and a reintroduction of the feudal forfeiture doctrines ... which were abolished by the Forfeiture Act 1870'. The principle underlying this objection is that the punishment for a crime should be determined by the criminal law, in accordance with the established principles of sentencing, and should reflect the various rationales for criminal punishment: deterrence, rehabilitation and so on. This means that it would not be appropriate that, in addition to the punishment dictated by the criminal law (which might, in principle, have an impact in property terms, as in the case of a fine), the offender should also suffer a loss in terms of his property entitlements. It would be arbitrary for an offender who happened to be the co-owner of property with the victim to suffer an additional penalty which would not be imposed on other offenders guilty of the same crime.

The objection to depriving the offender of his or her property rights is independent of the nature of the crime which the offender has committed. Thus, it does not represent a solution to suggest that the offender would be subject to a deprivation of property, on top of the appropriate criminal sanction, only on a 'case by case basis'. If the idea of stripping the offender of some of his or her assets is unconstitutional in itself (unless it forms part of a sentence for the crime in question), then it is wrong even where the offender has committed a particularly callous crime. This means that the constitutional objection cannot be overcome simply by means of the introduction of a discretion which focuses, as do factors (h) to (j) in s.46C(4) in the Bill, on the gravity of the offence that has been committed. Nor, of course, would it be sufficient in itself to assert that the loss of property rights is a 'civil' matter and is 'not punitive' in nature; this assertion would have to be justified through the identification of some specific civil law principle or principles that provided a justification for the loss of

property rights that was independent of the fact that the offender has committed the crime in question. Possible justifications of this nature are considered below.

(ii) O'Brien v McCann and Other Benefits Flowing from the Homicide

The LRC suggested that the decision of Judge Dunne in the 1998 Circuit Court case of *O'Brien v McCann* 'indicates that it is already possible under the current law to reduce the share left to an offender well below 50%'. In *O'Brien*, a husband had murdered his wife. The husband and wife had owned the family home as joint tenants. As a result of the wife's death, the outstanding mortgage of IR£50,000 was discharged by the couple's insurance company. Judge Dunne held that the effect of the murder was that the joint tenancy between the parties had been severed. She also held that the husband 'was not entitled to the benefit of the discharge of what would have been his liability under the terms of the mortgage, a discharge that had occurred by reason of his wrongful act'. Therefore, she ordered that an amount representing half of the discharged mortgage should be deducted from his share of the proceeds of sale. In linked proceedings, Judge Dunne ordered that the husband should pay the victim's mother IR£9,300 under the Civil Liability Act 1961 (see sections 48 and 49) 'for mental stress and funeral expenses'. The husband was also ordered to pay legal costs of IR£20,000. The LRC commented that the final result was that, after various deductions, the husband was left with a sum 'which represented ... 15.7% of the total value of the family home'. The LRC argued that the case showed that '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'.

However, *O'Brien* does not actually support the LRC's proposed position that the court would have discretion 'to reduce the "starting point [of 50%]" for the offender by such amount as the court considers just and equitable'. The central point overlooked by the LRC in its analysis of *O'Brien* is that the case involved two separate applications of the public policy principle against a killer profiting from his or her crime. The first one ensured that the killer did not benefit from the operation of the right of survivorship in respect of the joint tenancy. The second, and logically distinct, application of the principle ensured

that the killer could not profit from an insurance policy that had been taken out on the life of the victim. This is a well-recognised occasion for the application of the principle. As in the English case of *Davitt v Titcumb* [1990] 1 Ch 110, the consequence of preventing the killer from benefitting under the insurance policy was that the money that repaid the mortgage was regarded as emanating from the victim. Thus, the victim had paid more than her share of the joint indebtedness and was regarded as being entitled, on the basis of general equitable rules, to a contribution from her co-debtor. This indicates that the fact that Judge Dunne applied the public policy principle to prevent the husband from profiting from the insurance policy was *not* an indication that, in a case in which the parties were joint tenants, the court has an open-ended discretion to reduce the killer's fractional entitlement upon severance on the basis of what seems just and equitable. Similarly, the fact that the killer was liable to pay damages under the Civil Liability Act 1961 and to pay legal costs are logically unconnected to the parties' respective fractional entitlements under the tenancy in common resulting from the severance of the parties' joint tenancy.

Thus, it is not possible to accept the LRC's reading of *O'Brien* as indicating that, even in the absence of legislative reform, the law already allows the court a discretion to adjust the proportional entitlements of the parties under the tenancy in common that results when the homicide creates a severance of the parties' joint tenancy. For the same reasons, one cannot accept as appropriate the proposal to include, on the list of factors to guide the court in the exercise of its proposed discretion, a reference to whether the homicide triggered a payment under a life insurance policy and to 'any civil liability on the part of the offender arising from the act constituting the homicide' (see section 46C(4), factors (g) and (h) respectively, and note also factor (e)). Where the offender stands to obtain a benefit from an insurance policy related to a mortgage, the public policy principle is applicable to that benefit but this would be the case even if there were no joint tenancy. This is neatly illustrated by the facts of *Davitt v Titcumb* (above) where the parties were already tenants in common prior to the homicide and there was no question of the killer benefitting from the right of survivorship. It only causes confusion to sweep logically distinct matters, such as the application of the public policy principle to the proceeds of an insurance

policy, or the offender's liability under the Civil Liability Act or to pay legal costs, into a broad judicial discretion to adjust the parties' entitlements in real property that was held in joint tenancy prior to the homicide.

(iii) Justificatory Arguments Suggested by the Inclusion of 'Family Law' Factors

The first four factors in the list in section 46(b)(4) in the Bill are adapted versions of those that apply when property adjustment or pension adjustment orders are made under section 16 of the *Family Law Act 1995*. One of these factors refers to the direct and indirect contributions made by the offender and the victim to the jointly-held property and the second factor covers, in cases where the parties were spouses, civil partners or cohabitants or were parents, guardians or *in loco parentis* to a child or other dependent person, their contributions (broadly defined) to the welfare of the family. Then there are references to 'the age and financial needs, obligations and responsibilities' of the offender, and of any child or dependent of the victim.

In terms of why the issue of the parties' contributions to the jointly-held property was regarded as worthy of specific mention, it may be noted that one aspect of the perceived injustice of the outcome in *Cawley v Lillis* was that Lillis emerged with an equal share of the jointly-held assets, even though Celine Cawley had made a greater contribution to the generation of the family's wealth. Leaving aside the situation where the parties are spouses, civil partners or cohabitants, which will be discussed below, it is not easy to see a principled reason why weight should be given to the fact that the victim made a greater contribution to the acquisition of the asset in question (unless a resulting trust had arisen, leading to a tenancy in common in equity in the proportions of the parties' contributions with no right of survivorship, in which case there would be no need for the law to intervene to prevent the killer from benefitting). Once one person has made a gift to another person, the recipient becomes the owner and obtains property rights over the subject matter of the gift; the giving of the gift becomes merely part of the history of the matter. Therefore, it is as much an interference in the property rights of the killer to divest him of a property right which, as a matter of history, resulted from a gift from the victim as it would be to divest him of another property right. Moreover, it would surely be arbitrary to

provide for the cancellation of a gift that has resulted in the joint ownership of property between the killer and the victim but to leave untouched in the hands of the killer any outright gift made by the victim.

Similarly, again considering cases where the parties are not spouses, civil partners or cohabitants, it is not easy to see the logic of taking into account the respective financial positions of the killer and of any dependents of the victim. Why should the homicide be regarded as the trigger for the operation of a new jurisdiction allowing the court to redistribute the property entitlements of the killer and the victim's estate on the basis of an all-things-considered discretion? It should also be noted that, arbitrarily, such a discretion would operate only where the parties happened to hold property under a joint tenancy and would only allow the adjustment of the parties' entitlements in the jointly owned property and not in any other property. This arbitrariness point is important in the context of assessing the constitutionality of the provision; in the case law on constitutional rights, arbitrariness is a key factor indicating unconstitutionality: see the test stated by Costello J in *Heaney v Ireland* [1994] 3 I.R. 593, 602.

Even where the parties were spouses, civil partners or cohabitants, it does not seem possible to justify allowing the court to adjust the parties' entitlements in the jointly owned property on the basis of the 'family law-style' factors that are included in the LRC's proposal. Although this is not articulated in the LRC Report, the underlying premise of this part of the proposal may be a feeling that the killer has deprived the victim of the possibility of making a claim against the killer's wealth. If the parties were married, or in a civil partnership, or were qualifying cohabitants under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, if the relationship had broken up during the lifetimes of the parties, or had ended with the death of the killer, the victim would have been able to claim under the applicable legislation. Under such legislation, the victim could have been recompensed for matters such as those identified in the LRC proposal, eg the fact that he or she made contributions to the welfare of the family which exceeded those of the other partner. The LRC's thinking may have been that, by killing the victim, the killer has robbed the victim of the potential opportunity to make a legislative claim

and that this should be taken into account when one is considering how the ownership of the jointly owned property should be shared.

This is an interesting argument but there are difficulties. If it were thought necessary to create an avenue of recourse for the estate of a victim of homicide, perpetrated by a spouse or civil partner or qualifying cohabitant, where the victim has been deprived of the opportunity to make a claim for financial provision, it seems clear that this should be done as part of the relevant family law legislation. It would be arbitrary for this jurisdiction to be triggered only where the parties owned property as joint tenants and to stipulate that the jurisdiction can only operate to allow the adjustment of the parties' entitlements to that jointly owned property and, therefore, cannot be applied in relation to any other property of the parties. Most other jurisdictions have not found it necessary to create this refinement in the family law statutes governing financial provision (although New Zealand, which – unlike Ireland – operates a system where a spouse is normally entitled to one-half of the 'relationship property' is an exception). This may be because the event of homicide is relatively rare and carries severe criminal law penalties for the perpetrator. Also, it may be explicable on the basis it would not be easy to shape the contours of a property adjustment regime that would apply when a relationship was brought to an end by the fact that the potential claimant was killed by the other partner. It would arguably be difficult to ensure that the exercise of a judicial discretion in such circumstances did not, in practice, result in the stripping of the assets of the killer.

The issue requires more thought and analysis and it may be that the best way forward would be, having modified the current Bill to adopt the 'half share' solution that is advocated below, to investigate further the possibility of a separate reform of the family law legislation to permit, in specified circumstances, an application to be made on behalf of the estate of a deceased person for provision from the estate of the surviving spouse or civil partner or cohabitant. This approach might possibly offer a solution to the legal problems highlighted by the tragic *Hawe* case that has been extensively reported in the media. This case has triggered calls for legal reform but, as I understand it, the current Bill would not be of any assistance in a case where (as reported to have

occurred in the *Hawe* case) a killer emptied a joint bank account prior to the homicide, thus gaining sole ownership of the money in question.

3. A Suggested Approach

It has just been argued that the approach in the Bill is not defensible. While it is not perfect, the most appropriate solution seems, instead, to be the straightforward approach of treating the homicide as having triggered a severance of the joint tenancy so that each party would be equally entitled under a beneficial tenancy in common. In seeking to identify an appropriate framework, an obvious starting point is the proposition that the perpetrator of a crime should not be permitted to profit from his crime but, nonetheless, should not be stripped of his pre-existing property entitlements (unless this constitutes a part of the criminal law penalty for the crime in question). The approach that has just been mentioned appears to be, insofar as is practically possible, consistent with this proposition. Prior to the homicide, the interest of the killer was capable of being converted into a one-half share under a tenancy in common (subject to a complication in relation to land which will be mentioned below). Therefore, the value of the killer's interest under the joint tenancy can be seen as identical to the value of a one-half share under a tenancy in common.

It is true that, because of the nature of such ownership, where the parties were joint tenants they were linked together in a 'survivorship game', with the winner taking all the ownership in the property. Could it be said that the killer has cheated in this game and that, even if the killer is restricted to a one-half share, he or she has benefitted by avoiding the risk that he or she might have lost his or her interest in the property due to being the first to die? On this question, Laffoy J commented in *Cawley v Lillis* that, just prior to the homicide, there were 'a number of possibilities as to the ultimate destination of the joint assets, which would have turned on a number of imponderables, for example, whether one or other of the joint tenants would sever the joint tenancy and which of the joint tenants would die first'. She took the view that it was 'not possible to form a view, even as a matter of probability, as to where the ownership of those properties would have ultimately vested' if the homicide had not taken place. Therefore, she concluded that adopting the solution of treating each party as

equally entitled under a beneficial tenancy in common 'viewed objectively at that time, could not be regarded as conferring a benefit on the defendant as a result of the crime he committed'. This seems a reasonable conclusion and the solution it suggests has the great advantage of simplicity. In the Irish context, however, a complication arises in the context of land.

(i) The Effect of Section 30 of the Land and Conveyancing Law Reform Act (LCRLA) 2009

Section 30 of the LCLRA restricts a joint tenant's ability to sever the joint tenancy. To accomplish a severance, a joint tenant of land must either obtain the prior written consent of all the other joint tenants or else obtain a court order under section 31(2)(e) 'dispensing with consent to severance... where such consent is being unreasonably withheld'. The resolution of *Cawley v Lillis* was made far easier by the fact that it dealt with a homicide which took place prior to the advent of the LCLRA. Surprisingly, beyond noting the fact that Laffoy J had referred to section 30 in the case, the LRC did not discuss the relevance of the section at all. However, the effect of section 30 is that, in relation to a joint tenancy over land, it is possible to envisage a case where the solution discussed above would confer a benefit on the killer.

Consider a case where, the other party having refused to consent to a severance, a joint tenant made an unsuccessful application to have the court dispense with the need for that consent on the basis that it was being unreasonably withheld. If the unsuccessful applicant were then to kill the other joint tenant, the killer would clearly obtain a benefit if the effect of the homicide were to work a severance. This benefit might have significant financial value if one aspect of the hypothetical fact situation were that the killer was suffering from a terminal illness and the victim had been in good health. On the position taken in this submission, the aim of the law should be to ensure that the killer obtains no benefit from his crime, while not divesting him of any other property which does not represent a benefit attributable to the crime. Thus, the existence of section 30 suggests that it is necessary to qualify the straightforward severance rule that is appropriate in jurisdictions which do not have this quirk in the law of joint tenancies. This qualification would only be applicable to joint

tenancies over land since no rule equivalent to that set out in section 30 applies to joint tenancies over other forms of property.

The appropriate response in Ireland appears to be that reforming legislation should require the court to seek, in cases involving land, (i) to ascertain whether the killer would obtain any benefit through achieving the severance of the joint tenancy in circumstances where this would not otherwise have been possible and (ii) if it does appear that the killer would obtain such a benefit, to adjust the parties' entitlements so as to ensure that any benefit is erased. In practical terms, the first step would appear to be for the court to consider the following question: would the court have made an order dispensing with the need for the victim's consent to severance if, on the date of the homicide, the killer had made such an application? The framing of this question assumes that the court's decision should not be influenced by the fact that a homicide, in fact, took place. Obviously, the court might be less well-disposed to the perpetrator of such a serious crime but the point at issue is whether a severance would benefit the killer and this requires a comparison between, on the one hand, the killer's position after the homicide and, on the other hand, the killer's position if there had been no homicide (which position, logically, must be assessed without reference to the fact of the homicide).

If the court did determine that the killer would profit by being able to achieve a severance in circumstances where, if the homicide had not taken place, this would not have been possible, it would then be necessary for the court to assess the extent of this benefit and to take steps to reverse it. This could be achieved by giving the court a discretion to reduce the killer's share under a tenancy in common, which would be narrowly constrained by the requirement to do no more than to eliminate any benefit to the killer resulting from the homicide. To determine the extent of the benefit to the killer, it seems that the court would have to assess the likelihood that, but for the homicide, the killer would have predeceased the victim (without having succeeded in a future application to sever and without having been able to obtain a sale of the property by means of an application under section 31 of the LRCLA). Assistance could be obtained from actuarial calculations of life expectancy but there would inevitably

also be an element of judgment that could not easily be reduced to numerical terms.

(ii) Cases Involving Three or More Parties

Additional complications arise where there were three or more joint tenants and one joint tenant has killed another of the joint tenants. The innocent joint tenant/s have not been complicit in the homicide and there is no reason in principle why they should not benefit from the operation of the right of survivorship as against the victim. The proposal in section 46C(5) in the Bill allows the innocent joint tenant/s to so benefit and this seems to be correct. Thus, the victim's share would disappear due to the operation of the right of survivorship. In order to prevent the wrongdoer from profiting in this circumstance, the LRC recommends that the wrongdoer's share be regarded as having been severed at the moment of the homicide, with a tenancy in common coming into existence between the offender and the surviving (innocent) joint tenant/s. If there were initially (say) four joint tenants, the killer would originally have had the potential, after a severance of the joint tenancy, to have a one-quarter share. With the death of the victim, however, the killer's severed share would be one-third. The LRC's proposal is that the court should have discretion to adjust this share of the killer on the basis of the same factors that have been discussed above as guiding the court's discretion in two-party situations. The LRC's proposal in relation to multi-party cases simply represents an adaptation of its proposal in relation to two-party cases, so that the critique that this submission has offered in that respect is equally applicable in the multi-party context.

What is the appropriate approach if one is pursuing the aim, advocated in this submission, of seeking to deprive the offender of any benefit flowing from his or her crime, without risking unconstitutionality by going further and stripping him of existing property rights? At first inspection, it is tempting to argue that the offender's share of the beneficial interest should be reduced so as to allow the victim's estate to retain the value of the victim's original share under the joint tenancy. This would mean that, if there were originally three joint tenants, the offender's one-half share under the tenancy in common with the

surviving joint tenant would be reduced by a one-third share, which would go to the victim's estate, leaving the offender with a one-sixth share in equity. On reflection, the difficulty with this is that it goes beyond preventing the killer from profiting from his crime. The killer began with a (potential) one-third share and, in order to address the consequences of the operation of the right of survivorship in favour of the other joint tenants as well as in favour of the killer, the killer is being left with only a one-sixth share. The aim of preventing the killer from gaining a benefit does not, in principle, extend to the different objective of preventing the victim's estate from losing out to others as a result of the homicide. Preventing the killer from benefitting requires only that the killer's share is reduced to its pre-homicide level; in the three-party situation, that would mean that the victim's estate would receive a one sixth share of the total ownership – this is all that was lost to the killer; the other innocent joint tenant absorbed the other half of the victim's original (potential) one-third share. This solution would leave the killer with one-third of the ownership. If there were four joint tenants initially, then the killer's share would be reduced from one-third down to his pre-homicide level of a one-quarter (potential) share; the victim's estate would take a one-twelfth of the total beneficial ownership away from the killer, and so on. Cases involving multiple joint tenants are unlikely to arise very frequently in practice.

ANNOTATION OF THE BILL WITH DETAILED COMMENTS

AN BILLE UM DHLITEANAS SIBHIALTA (LEASÚ) (COSC LE TAIRBHE A FHÁIL AS DÚNBHÁSÚ), 2017

CIVIL LIABILITY (AMENDMENT) (PREVENTION OF BENEFITS FROM HOMICIDE) BILL 2017

Comment: The short title differs from that in the Draft Bill appended to the Law Reform Commission's Report – the new short title refers to 'Benefits' rather than 'Benefit'. The reason for the change is not clear; it is not carried through in section 3 of the Bill which uses the original short title. In terms of syntax, 'Prevention of Benefit' seems clearly preferable.

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:

Person who commits homicide not to benefit

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

Comment: It is not clear that the Civil Liability Act 1961 is the appropriate place for these provisions. The idea of locating the relevant rules in the Civil Liability Act was put forward by the Law Reform Commission but the argument advanced was not particularly convincing. Possibly because of doubts as to the constitutionality of aspects of its recommendations, the LRC was concerned to emphasise that the rules in the Bill would operate in the civil, rather than the criminal, law context and, therefore, seem to have latched onto the Civil Liability Act partly because its title emphasises the desired point.

The other issues addressed by the Civil Liability Act relate to the law of tort and have no obvious connection with the law of succession to property. A central aspect of the Bill is the principle, currently contained in the Succession Act 1965, that a killer cannot inherit, from the estate of his victim. This involves a disqualification but does not involve imposing 'liability' on the killer at all. Other provisions of the Bill prevent the killer from benefitting from the right of survivorship in the context of joint tenancies or from taking the benefit of an insurance policy on the life of the victim. It does not seem helpful to treat these as instances of 'liability' being imposed on the killer. In fact, framing as a 'liability' the discretion in the Bill to

reduce the killer's share in the context of a joint tenancy merely underscores the constitutional objection that a second penalty is being imposed on the killer because of his crime.

Reform of the law in New Zealand took the form of a stand-alone statute, the Succession (Homicide) Act 2007, and this approach seems to represent a more logical approach than inserting provisions addressing the law of property and succession into the Civil Liability Act 1961.

"PART IIIA PERSON WHO COMMITS HOMICIDE NOT TO BENEFIT

Interpretation (Part IIIA)

46A. In this Part—

'Act of 1965' means the Succession Act 1965;

'Act of 2006' means the Criminal Law (Insanity) Act 2006;

'Act of 2009' means the Land and Conveyancing Law Reform Act 2009;

'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 25 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) 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).

Person who commits homicide not to benefit

Comment: The title of this section, like the title of this Part of the Bill, refers only to a person who commits homicide; however, the relevant section and Part, as currently drafted, also apply to someone who commits attempted murder, which is not homicide.

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’).

Comment: This subsection states that the rule against benefitting from homicide applies to a person ‘who is convicted’ of a relevant offence. However, the intention of s.46E is evidently to apply the rule also to those who have been shown, on the balance of probabilities, to have ‘unlawfully killed’ the victim. The current subsection should, to avoid confusion, be rephrased to include a reference to a finding of unlawful killing. (It will emerge from later comments that, in any case, the drafting around the concept of ‘unlawful killing’ in s.46E is unnecessarily convoluted and leads for various problems; it would be much simpler to refer throughout to a person who was, on the balance of probabilities, guilty of one of the relevant crimes, with an express provision that a conviction shall be conclusive proof of guilt and one crisp statement of the civil law nature of any finding, for the purposes of this Bill, of ‘guilt’ in the absence of a conviction.)

A related problem is that the subsection provides a definition of ‘offender’ which is linked to the fact of a conviction. It refers to ‘a person (referred to subsequently in this Part as “the offender”) who is convicted of the murder, attempted murder or manslaughter of another’. However, notwithstanding this explanation of the meaning of the word ‘offender’ in the Bill as a whole, in s.46E the term ‘offender’ is used to refer to someone who has not actually been convicted of one of these offences.

(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

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

Comment: The drafting here does not seem to be appropriate to a case where the offender stands to benefit from an insurance policy that he has taken out on the life of the victim. The proceeds of an insurance policy which someone else takes out on the victim’s life are not property ‘in which the victim has an interest’; the fact that the death of a person is the trigger for paying out on an insurance policy does not mean that the relevant person has any interest in the policy or its proceeds. The definition of ‘property’ does explicitly refer to ‘the proceeds of an insurance policy’ but this is clearly qualified by the earlier statement that ‘property’ means property ‘in which the victim has an interest’. The position is not changed by the subsequent statement that is not relevant whether the property forms part of the estate of the victim. (In light of this statement, it is somewhat curious that the earlier reference is to property in which the victim ‘has’ an interest, rather than ‘had’ (or ‘has or had’) an interest).

The definition refers to pensions, including those arising by virtue of statute. It seems that the intention is to prevent the killer from claiming the statutory widow's, widower's, or surviving civil partner's pension after the homicide. However, it is again clear that this pension (or eligibility for it) cannot be regarded as 'property in which the victim has an interest'.

(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.

Comment: The problem mentioned in the previous comment is compounded by the drafting of (b). This is because (b) states that the offender shall be precluded from taking 'any share or interest in any interest of the victim in property'; the proceeds of an insurance policy taken out by the killer, to be paid directly by the insurance company to the killer, are clearly not an interest of the victim in property.

(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).

Comment: This exclusion represents a very serious flaw in the Bill as it currently stands. See Section A in my detailed submissions above.

(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.

Comment: See Section B in my detailed submissions above for criticism of the exclusion of those found to be unfit to be tried.

(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.

*Comment: It is tempting to assume that this subsection applies only in relation to attempted murder. However, the LRC intended that it could also apply to murder in a case where the perpetrator inflicts injuries on the victim, who dies some days or weeks later. Such a victim might choose to forgive the perpetrator and make a new will in his favour, and it is arguable that such a will would have been made 'after the date when the offence ... was committed'. It seems more natural to assume that the date on which (for example) the perpetrator shot the victim is the date when he committed his crime, rather than the date, some weeks later, when the victim died (without further intervention on the part of the perpetrator). However, arguably the phrasing is not clear in this respect; speaking for the Supreme Court in *Nevin v Nevin* [2019] IESC 6, [89] O'Malley J stated that the similarly wording exception in*

the existing section 120(1) of the Succession Act 1965 'obviously' only applies in the case of attempted murder. It should be clarified that the intention of the subsection is to apply to a situation where a fatally wounded victim forgives the offender and, prior to death, makes a will in his favour.

A different point is that, as with the existing s.120(1) of the Succession Act, this subsection unfortunately fails to specify that the will made after the commission of the offence must have been made by the testator with knowledge of the fact that the crime was committed by the person in question. Thus, the victim might make a will after the date of the crime but in ignorance of the fact that the beneficiary was responsible for it. It is wrong in principle that this should be treated as forgiveness by the testator. This needs to be clarified by the inclusion of a statement that the later provision for the offender will only be effective if it was made with knowledge that the offender was guilty of the crime in question. The LRC noted that this problem had been pointed out but then failed to address it in the text of its Draft Bill.

(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.

Application of section 46B to joint tenancy

Comment: Various points of principle in relation to this aspect of the Bill are dealt with in detail in Section E of my detailed submissions above. Here I comment on other points related to the drafting of the provision. Some of these, for example the point that severance should only operate where, prior to the homicide, there was a beneficial joint tenancy, would be relevant even if (as I advocate in my detailed submissions above) the discretion to reduce the killer's share below a half share were to be eliminated from the Bill.

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.

Comment: There is an ambiguity in the key statement in s.46C(1)(a) that 'the legal and beneficial interests in the property held under the joint tenancy ... shall stand severed ... from the date when [the] offence ... was committed'. The most obvious way to interpret this would be to mean that the offence will trigger an immediate

severance of the joint tenancy and that this severance will apply both to the legal interests and the beneficial interests. There are two problems with this interpretation. The first is the technical one that, unless a trust has already come into existence, there are no separate beneficial interests in the property and '[t]he legal title carries all rights': Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, 706E–F (Lord Browne-Wilkinson). Therefore, in the absence of a trust, it makes no sense to refer to the beneficial interest 'stand[ing] severed'. The second problem is that this interpretation is contradicted by the statement in s.46C(1)(b) that '[p]ending any determination by the court, the legal title ... shall be held in trust and subject to the respective beneficial interests of the victim and the offender'. This latter provision suggests that there is no immediate severance at law of the joint tenancy and instead, until the court pronounces on the matter, the severance operates only in equity. For these reasons, it may be that the statement that the legal and beneficial interests 'shall stand severed' is intended to convey the fact that a trust has come into existence, with the legal and beneficial interests now differing and a severance of the joint tenancy having taken place only in equity. This interpretation, although a strained one given the wording, is consistent with the fact that, in making the recommendation corresponding to this provision, the Law Reform Commission LRC drew on the logic of 'the constructive trust' (see the LRC Report, p.33. If this is the intention, the wording of the provision is unnecessarily confusing; when discussing the severance of a joint tenancy, ie its conversion into a tenancy in common, it is unhelpful to use the word 'severance' to refer instead to something different, the creation of a separation between the legal and equitable interests.

A related practical point is that the rule against the killer benefitting from his crime is, logically, only applicable where there is a beneficial joint tenancy. In other words, the rule should not apply where (prior to the homicide) there is a trust and the parties hold the legal interests, but not the beneficial interests, as joint tenants. Consider a case where a family home is held in joint names at law but a resulting trust has arisen and so there is a tenancy in common in equity in the proportions of the parties' financial contributions to the purchase of the property. In this situation, the right of survivorship applies only to the bare legal interest but does not apply to beneficial interests. There is no possibility of the killer benefitting from his crime in this instance because the state of the beneficial interests is what matters and, in relation to the tenancy in common in equity, no right of survivorship will operate. The fact that the bare legal interest will vest in the killer following the homicide does not, in itself, confer any valuable property right on him.

Section 46C(1)(a) should be rephrased to take account of the points that have just been made.

(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.

Comment: The effect of this section appears to be that the court has a discretion, not only to reduce the killer's share below 50% but also to increase it above 50%. It is clear that the presumption referred to in s.(1)(c) is capable of being rebutted ('until the contrary is shown'). The approach elsewhere in the Bill is that a killer can only be spared from the effect of the rule against benefitting if his crime was manslaughter. In the context of a joint tenancy, however, a murderer could end up getting more than 50% after the court has exercised its discretion. This is very difficult to defend.

Another issue is raised by the first clause of (c), ie 'Unless otherwise provided (... or otherwise by operation of law)'. There does not appear to be any way whereby 'by operation of law' the parties to a joint tenancy could, after severance, become entitled otherwise than as tenants in common in equal shares. In any case, if it were thought to be necessary to provide in the Bill for the contingency that, upon severance, the starting point for the victim would be a share of less than a half share under a tenancy in common, it would seem to be necessary to go on to state in the Bill that the presumption would then be that the victim would hold at least the share represented by that starting point. In other words, if it is necessary to create a presumption that the victim holds at least half of the interest in the case of a conventional severance, it should also be provided that, in respect of unconventional severances, the victim is presumed to hold at least the share of the interest to which she would have been entitled if severance had occurred for a reason other than homicide.

(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.

Comment: Given that this section provides that the right of survivorship shall not operate (because a severance takes place), it does not make sense to refer to 'the fact that the right of survivorship was accelerated'; in the context of attempted murder, there is the further point that the victim is still alive.

(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,

(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.

Comment: Subsection 5(c) does not have any effect; it merely draws attention to a legal option for a co-owner under the existing law. Therefore it seems to belong in an explanatory memorandum rather than in the Bill. In any case, its wording does not make sense. It has already been provided in subsection 5(a) that the offender's interest shall be severed and so the offender is no longer a joint tenant with the innocent joint tenant/s.

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.

Comment: The inclusion of a discretion to modify the statutory rule in the context of manslaughter is welcome. However, the drafting creates a problem. It is stated that the court may modify or disapply 'section 46B(1)'. This fails to state that the jurisdiction to modify or disapply also applies in respect of s.46E. Crucially, the wording of s.46E does not provide that an application in the circumstances described in that section is, in fact, an application under s.46B(1). It must be recalled that s.46B(1) only applies where there has been a conviction, and s.46E(3)(b)(ii) states that the court must be satisfied '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'. This makes it clear that s.46B and s.46E provide different bases for an application. Therefore, it must be made clear in the Bill that the discretion to modify or disapply the rule applies both where there has been a conviction for manslaughter and to the manslaughter part of 'unlawful killing proven on the balance of probabilities' under s.46E. This, in turn, exposes another difficulty with the insistence in s.46E on avoiding reference to the actual offences of murder, attempted murder and manslaughter – the offences must be separated out in that context in order to allow the operation of the discretion to grant relief in cases of manslaughter, with or without a conviction.

- (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,
 - (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.

Comment: The current author would favour placing more emphasis on the central question of the 'culpability attending the beneficiary's criminal conduct' (Dunbar v Plant [1998] Ch 412, 438 (Phillips LJ)) and playing down the potentially distracting detail elsewhere, eg in terms of the parties' past contributions to an intimate relationship they might have shared. I do not believe that the current long list of discretionary factors is appropriate.

(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.

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).

Comment: Some concern was expressed during the Second Stage Debate about the application of the rules in the Bill to crimes committed outside the jurisdiction where there was no conviction. On the other hand, it is necessary to consider the possibility that eg a husband might murder his wife while they were abroad, and then take his own life. If the Bill did not apply in these circumstances, when there would be no conviction, then the husband would inherit from the wife and the property would pass to his chosen beneficiaries under his will.

(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.

Comment: The drafting in subsection (3) ties itself up in knots to avoid stating that the defendant has, on the balance of probabilities, been 'guilty' of murder, attempted murder, or manslaughter. It invents the novel concept of 'unlawful killing' and then tries, without referring directly to either offence, to define it in terms that will cover the two offences of murder and manslaughter. This convoluted drafting technique is unnecessary and risks introducing error. In fact, a problem arises due to the exclusion of attempted murder. Subsection (3)(b)(ii) states that no order can be made unless the offender has either been convicted of murder, attempted murder or manslaughter, or, on the balance of probabilities, has unlawfully killed the victim. The definition of unlawful killing in subsection (3)(b)(iii) requires the death of the victim and so, contrary to the intention of the drafters, excludes cases of attempted murder where there has been no conviction.

In drafting the Bill, it is difficult to avoid the use of some term that reflects the fact that the Bill is depriving the relevant person of a benefit on the basis that, on the balance of probabilities, he or she has been found to have committed the offence of homicide or attempted murder. It is important to note that the standard criminal law burden of proof beyond a reasonable doubt is not part of the definition of the offence of murder itself; in principle, a person still commits murder if he or she carries out the necessary acts with the necessary mental state even if, at a particular time, there does not happen to be sufficient evidence available to prove beyond a reasonable doubt that they did so.

New Zealand's Succession (Homicide) Act 2007 uses the term 'killer' and is willing to refer to a person as 'guilty' of homicide if they are found, on the balance of probabilities to have committed the offence. Similarly, the current s.120(1) of the Succession Act 1965 excludes from inheritance a person who is 'guilty' of homicide or attempted murder; properly understood, this subsection applies also to a person who has not been convicted of the relevant offence. Although it is important that the current Bill should make clear at some point that the relevant determination is being made only for civil law purposes, there is a danger of introducing confusion into the Bill through elaborate attempts to avoid the use of terms like 'guilty' or 'offender'.

(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.

Comment: The Bill's treatment of the issue of unfitness to be tried is dealt with in Section B of my detailed submission above.

(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).

Comment: Subsection (5) provides that the conviction of a person is conclusive evidence of the fact that the person has been convicted. This is circular and pointless. It addresses a problem that does not arise as the Bill is currently drafted. It would only be if the Bill had stated earlier that it applied to a person 'guilty' of one of the relevant offences that it would be necessary to state the fact of conviction should be treated as conclusive evidence of the fact that the person was 'guilty' of the relevant offence. (As stated earlier, this alternative drafting strategy would in fact be preferable).

(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.

(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.

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)).

Comment: A problem seems to arise due to the fact that the word 'offender' is used throughout the Bill, even in relation to a person who will not be prevented from benefitting. In s.46E(4)(a), the term is used in relation to a person who can show that he was insane at the time of the offence. It seems unlikely that the intention of the Bill is to create a strong presumption that the defendant shall bear the costs of the proceedings even where the defendant is held to be entitled to inherit or benefit from the right of survivorship because he is not responsible for a crime covered by the Bill. This should be addressed (and note the comments, of a different nature, I have made on s.46B(1) in relation to the use of the word '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."

Comment: Subsection 2 refers to a conviction for 'the murder or manslaughter of another'. The addition of the words 'of another', which would otherwise be unnecessary, seem to indicate an intention to prevent the killer from administering the estate of the victim only, rather than preventing him from administering anyone else's estate. This was stated to be the intention of the LRC. Nonetheless, the remainder of the wording fails to make the point clear and so the current effect of subsection (2) is that, for example, a conviction for the manslaughter of X would be an obstacle to acting as administrator for the estate of Y, even long after a criminal sentence had been served. The meaning of the section should be clarified.

Repeals

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

Comment: The repeal, without replacement of s.120(4) would have serious unforeseen consequences. See Section C of my detailed submissions above.

Short title and commencement

3. (1) This Act may be cited as the Civil Liability (Amendment) (Prevention of Benefit from Homicide) Act 2017.

Comment: As noted previously, this short title is not consistent with the short title stated at the start of the Bill and the version stated here is preferable to the one stated at the start of the Bill.

(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.

Text of John Mee 'Prevention of Benefit from Homicide: A Critical Analysis of the Law Reform Commission's Proposals' (2016) 39 Dublin University Law Journal 203

Abstract—This article offers a critique of the Law Reform Commission's recent proposals on the prevention of benefit from homicide. A person who has committed murder or manslaughter could potentially benefit in various ways, eg through inheriting from the estate of his or her victim or through the operation of the right of survivorship in the context of a joint tenancy. Cases in the succession law context are currently governed by s 120(1) of the Succession Act 1965, while in other instances an analogous common law principle is applied. In principle, the idea of providing for a more detailed and comprehensive statutory regime is uncontroversial. However, as the article argues, the LRC's proposal in this respect is defective in a number of ways. The article criticises the inclusion of attempted murder as one of the offences triggering the prevention of benefit principle, as well as the exclusion of those guilty of homicide as accessories and the treatment of persons who are unfit to be tried. In addition, the article criticises the LRC's proposals in relation to joint tenancies on the basis that they go beyond what is necessary to prevent the offender from benefitting from the homicide.

In its recent Report on Prevention of Benefit from Homicide,¹ the Law Reform Commission has addressed the difficult problems that arise where a person has committed homicide and, if the law failed to intervene, would stand to obtain some form of proprietary benefit as a result of that crime. The potential benefit could arise under the law of succession or due to the operation of the right of survivorship in the context of a joint tenancy or on some other basis, as where the killer is the beneficiary of an insurance policy taken out on the victim's life. The Law Reform Commission identified two related principles of public policy that apply to deny a benefit to the wrongdoer in these kinds of situations. The first is that 'no person should be able to benefit from his or her wrongful conduct' and the second is that 'no cause of action should arise from one's own unlawful or dishonourable act'.² Although it was once the case that a felon suffered 'civil death' and forfeited all his or her property to the Crown, this conception of forfeiture was abolished by the Forfeiture Act 1870. As a result, it *204 became possible that a person might profit from the commission of a homicide and this required the law to develop specific rules to prevent this from happening.³ Although there are differences in terms of detail (and the position has been clarified and/or modified by legislation in some jurisdictions), at a broad level of generality, the law is comparable across common law jurisdictions such as England and Wales, Australia, New Zealand and Canada.⁴

The area is already partially governed by legislation in Ireland. Section 120(1) of the Succession Act 1965 states that:

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 117.5

However, this provision is part of the codification of the law of succession represented by the Succession Act 1965 and it does not address situations which arise in other contexts. Thus, it had no application in *Cawley v Lillis*,⁶ where the dispute concerned the impact, on the ownership of property that had been held in joint tenancy by the husband and wife, of the husband's conviction for the manslaughter of his wife. At the conclusion of her judgment in the case, in which she applied a common law rule analogous to s 120(1), Laffoy J noted that 'ideally' there should be legislation in place to govern cases arising in the co-ownership context.⁷ Further impetus was given to law reform by the subsequent decision in *Nevin v Nevin*,⁸ a succession law case where Kearns P struggled *205 to understand an aspect of the wording of s 120(1) and suggested that it would be 'of considerable assistance if a suitable amendment... could be effected'.⁹

The LRC Report proposed the repeal of s 120(1) and its replacement with a modified, and more detailed, legislative framework which would cover the full range of situations where it is necessary to prevent a person obtaining a benefit from having committed homicide. This article offers a critical assessment of the LRC's proposals. The underlying premise of the LRC's reform proposals (and of the existing law in this area), that a person should not be permitted to benefit from the crime of homicide, is uncontroversial in itself. Complexity arises, however, in terms of the appropriate treatment of the range of circumstances that can arise in practice. Given the constraints of space, the emphasis in the article will be on those aspects of the LRC Report with which the current author does not agree, since it is where different thinking seems to be required that there is the greatest possibility of making a constructive contribution. Part 1 of the article discusses issues related to the scope of the forfeiture rule, ie questions concerning the type of offences and offenders that should be covered by that rule. Part 2 then addresses the specific issues that arise in cases involving joint tenancies. It criticises the LRC's proposal that the court would exercise a discretion to determine the parties' respective shares in this situation and suggests an alternative approach reflecting the idea that the law's response should not go beyond preventing the killer from obtaining a benefit.

Part 1 The Scope of the Forfeiture Rule

This part considers a range of issues relating, broadly speaking, to the range of offences and offenders that should be covered by the forfeiture rule. The LRC's approach was that the absence of a conviction, or even the fact of an acquittal, *206 should not prevent the application of the forfeiture rule.¹⁰ This reflects the existing terms of s 120(1)¹¹ and the case law of other jurisdictions.¹² If the conviction of the offender were a requirement of the application of the forfeiture rule, there would be no way to prevent a benefit passing to the estate of a murderer who died (perhaps having committed suicide) before being brought to trial or who was a long-term fugitive from justice.¹³

The LRC's proposals focused on the three offences of murder, attempted murder and manslaughter, which are also those listed in s 120(1). This involves the conclusion that all forms of manslaughter should continue to be covered by the forfeiture rule. This makes sense given the LRC's proposal to give the court

discretion to disapply the rule in cases involving manslaughter where the circumstances are such that there is little moral blameworthiness associated with the offender's actions.¹⁴

At one point in the Report, it is stated that 'most consultees' took the view that the forfeiture rule should be applied to inter alia 'cases of assisted suicide'.¹⁵ Surprisingly, there is no further discussion of the point in the Report and the offence is not mentioned in the Draft Bill. On balance, the current author takes the view that the inclusion of assisting suicide would, in fact, have been the appropriate choice. Some cases of assisting suicide seem clearly to involve a sufficient level of culpability to justify preventing the perpetrator from benefiting, eg where, with the intention of benefitting thereby, the perpetrator plays a crucial role in inducing the deceased to commit suicide; these cases should not be allowed to fall outside the net when it is possible to deal with cases involving lesser culpability by granting partial or total relief in pursuance of the proposed statutory discretion.¹⁶

The discussion which follows focuses on three specific aspects of the LRC proposals: (i) the inclusion of attempted murder within the forfeiture rule; (ii) the exclusion of accessories; and (iii) the exclusion of those who are unfit to be tried.

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1. Attempted Murder

Unfortunately, the LRC did not devote any discussion in its Report to the question of whether attempted murder should be included in a reformed codification of the forfeiture rule, simply assuming that its inclusion was appropriate. The LRC appears to have overlooked the basic point that what distinguishes attempted murder from murder is the survival of the victim. In the succession law context, if the offender has not caused the death of the testator, it cannot be said that allowing him or her to partake in the testator's estate, when the testator ultimately dies, will allow him or her to benefit from his or her crime. The position is similar in the context of joint tenancies. In that context, the Report states the existing law as follows:

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.¹⁷

This statement is, however, incorrect as it applies to attempted murder. The fact that one of the joint tenants attempts to murder another joint tenant does not trigger the right of survivorship; the victim of the relevant crime is not dead and continues to be a joint tenant in the eyes of the law.

It does not appear that any other common law jurisdiction regards attempted murder as falling within the scope of its forfeiture rule and its inclusion cannot be reconciled with the 'prevention of benefit' principle upon which the LRC focused in its Report. The inclusion of attempted murder in s 120(1) of the Succession Act is, in fact, explicable on the basis that it was 'framed after a study

of articles contained in the French, German and Swiss Civil Codes'.¹⁸ The civilian model is based on the different idea of 'unworthiness to inherit',¹⁹ a label which is echoed in the title of Part X of the Succession Act 1965.²⁰ As MacLeod and Zimmerman explain:

In none of the modern continental legal systems does the fundamental moral precept that no one should be allowed to benefit from his or her own crime play a central role in rationalizing the unworthiness regime.²¹

Under the civilian approach, a person's conduct may make him or her unworthy to succeed and this unworthiness can, in principle, result from crimes other than homicide.²² In some legal systems, the principle can 'encompass behaviour which is not even criminal'.²³

It is not easy to find a coherent rationale for the civilian 'unworthiness to succeed' approach. The most plausible rationalisation seems to lie in the need to protect the autonomy of the deceased person, whose ability to make an informed choice about the destination of his or her estate can be compromised by the actions of another person, as, for example, in the case of a homicide committed by a prospective beneficiary. It is true, however, as Zimmermann and MacLeod argue, that 'it should, as far as possible, be left to the deceased persons to determine who is to inherit their estate and thus to exclude those regarded by them as undeserving or "unworthy"'.²⁴ This suggests that the relevant rules should operate only as 'a kind of safety net for situations where deceased persons had typically been unable to do so'.²⁵

In light of the above, the inclusion of attempted murder in the LRC proposals (and in the current law as reflected by s 120(1)) seems questionable. While it is true that a person who has, in the past, attempted to murder another person is likely to be regarded by that other person as 'unworthy to succeed', it does not seem necessary for the law to intervene to automatically exclude the perpetrator from inheriting. Under the LRC's proposals (and under the current law), other extremely serious offences against an individual such as rape or assault causing serious harm, or the murder of the individual's spouse, do not serve to make the offender automatically unworthy to succeed. As with these other offences, the victim of attempted murder will normally have the opportunity to take steps, on his or her own initiative, to disinherit the perpetrator, and it is not easy to see the need to single out the offence of attempted murder for special treatment in terms of automatic exclusion of the perpetrator.

In the context of joint tenancies, it is even more difficult to justify the LRC's approach²⁶ of treating attempted murder on a par with murder or manslaughter. The LRC's proposal in respect of this situation will be discussed in detail in Part Two of this article but its essence is that the joint tenancy would be severed and the court would have a discretion, in accordance with a list of factors, to adjust the respective fractional shares of the parties under a tenancy in common.²⁷ The consequence of the LRC's proposal is that, as with the murder or manslaughter of a joint tenant, the attempted murder of a joint tenant would trigger an immediate severance of the joint tenancy. One initial problem with

this is that, unlike the disqualification of the perpetrator from inheriting in the succession law context, the severance of a continuing joint tenancy cannot be *209 seen as a simple restriction of the perpetrator's rights. Whether the automatic severance of a joint tenancy is favourable to the perpetrator or to the victim depends on which one ultimately lives longer and, therefore, stands to benefit from the operation of the right of survivorship. It does not seem that the law should react to the attempted murder of one joint tenant by another by imposing the double-edged consequence of automatic severance, which is (in principle) as likely to benefit the perpetrator as the victim.

In any case, it is difficult to see why the law should regard the attempted murder of one joint tenant by another as justifying legal intervention to alter the nature of the co-ownership between the parties. Under existing law, the relevant crime has no effect on the existing joint tenancy; each party's legal rights remain as before. If one thinks in terms of the prevention of benefit principle, there is therefore no benefit to the perpetrator of which he or she could be deprived. In order to develop an alternative justification for legal intervention, analogous to the civil law approach in the succession law context, it would be necessary to posit a new concept of 'unworthiness to remain as a joint tenant with another' which does not appear to be a convincing theoretical option. It must also be taken into account that, under the LRC's proposals, the court would have a discretion to reduce the perpetrator's share under the tenancy in common that would arise upon the severance of the joint tenancy. Unlike preventing the perpetrator of a crime from inheriting from his or her victim, a reduction in the perpetrator's share in co-owned property cannot be seen as depriving the perpetrator of a potential benefit. Neither could it be justified – by analogy with the rationalisation proposed above for the civil law approach in the succession law context – as an intervention by the law to protect the victim's autonomy. This is because, firstly, there is nothing to prevent the victim from taking steps on his or own initiative to sever the joint tenancy and, secondly, the steps available to the victim would not include reducing the perpetrator's fractional share under the tenancy in common that would result. Any reduction in the perpetrator's share would amount to the arbitrary imposition, outside of the criminal process, of an additional punishment for the perpetrator's crime.²⁸

On the whole, it is submitted that the appropriate approach would be to exclude attempted murder from the proposed statutory scheme and, instead, to focus simply on the prevention of benefit through homicide.

2. Accessories

A surprising aspect of the LRC's approach relates to the question of whether the forfeiture rule should apply 'to a person who aids, abets, counsels or procures *210 the commission of the homicide offences'.²⁹ Starting from the assumption that the current rule in s 120(1) does not apply to such a person,³⁰ the LRC concluded that this position should be maintained in its proposed new statutory regime. This approach involved rejecting the view of 'most consultees'.³¹ The LRC reasoned that 'what constitutes such a level of participation can vary enormously and, furthermore, the terms "aid" and "abet" are not subject to clear

definitions'.³² The LRC emphasised that its Report was 'concerned with civil liability... 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'.³³ Thus, '[g]iven 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... concluded that in the current context they should not be equated with the act of the person who carries out the offence'.³⁴ The current author's view is that the LRC was mistaken in its view that the current law (whether under s 120(1) or under the common law applicable outside the succession context) treats accessories as outside the forfeiture rule and was seriously misguided in concluding that it would be appropriate to provide for such an exclusion in reforming legislation.

To deal first with the current law, the key point is that a person who has 'aided, abetted, counseled or procured' the commission of an offence is simply guilty of the relevant offence. Under the s 7(1) of the Criminal Law Act 1997, '[a]ny 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'. This reflects the previous law,³⁵ under which there is no separate offence that is committed by a person who 'aid, abets, counsels or procures' the commission of an offence.³⁶ The point tends to be taken for granted in textbook discussions of accessory liability and so there are not many crisp statements of it. However, Herring makes the point explicitly when he states that '[t]he accessory is convicted of the same offence as the principal' and 'a person who assists in a murder is guilty of the offence of murder'.³⁷ Such an offender, therefore, *211 automatically comes within the common law rule applicable to the offences in question and also within the scope of s 120(1), which refers to those 'guilty' of murder, manslaughter or attempted murder. The argument in this paragraph is supported by the fact that it was assumed, without discussion, that the forfeiture principle was applicable in *Nevin v Nevin*,³⁸ notwithstanding the fact that the person against whom the forfeiture principle was applied, Catherine Nevin, was described at her murder trial as having 'had [her] husband assassinated'.³⁹ She had procured his killing by a contract killer or killers and so was convicted of the offence of murder and was, therefore, covered by s 120(1).⁴⁰

It has been argued, thus far, that the current law covers those who are guilty of homicide as accessories. In terms of whether the law should be changed to exclude such persons, the reasons given by LRC are plainly inadequate. In the first instance, it seems doubtful that the civil law should second-guess the criminal law in the manner advocated by the LRC. The definition of accessory liability is regarded as sufficiently clear (in a murder case) to justify stigmatising a criminal defendant who satisfies it as a murderer and subjecting him or her to a compulsory life sentence: Can our legal system, at the same time, sensibly regard that definition as too vague to justify imposing the civil law consequence of depriving the accessory of a proprietary benefit?

As well as referring to the lack of clarity around the definition of accessory liability, the LRC also emphasised that such liability could involve a wide range of moral culpability. In response to this, it can again be noted that the criminal law

regards the culpability involved as sufficient to justify conviction for the principal offence. There is, in any case, another point to consider. The fact that accessory liability involves a wide range of moral culpability means that, as well as cases where the culpability of the accessory is less than that of the principal, there *212 are also cases where the accessory's culpability is equal to, or greater than, that of the principal. In this context, it has been suggested that 'Lady Macbeth was worse than Macbeth'.⁴¹ McAuley and McCutcheon make the same point by reference to the examples of 'a person who commands the killing of another' and '[t]he leader of a criminal organisation, under whose direction crimes are committed, [but who] keeps his "hands clean"'.⁴² It seems clearly inappropriate that the law should be set up so that a murderer can be certain of escaping the consequences of the forfeiture rule, simply by avoiding personally carrying out the murder. The proper approach, it is submitted, is clearly that there should be no special exemption for those who are guilty because they were accessories.⁴³ Cases where the culpability of the person in question is comparatively low would fall to be dealt with under the general discretion which, under the LRC's proposals, would be available to the court to grant relief from the application of the forfeiture rule.⁴⁴

3. Fitness to be Tried

The LRC sensibly recommended⁴⁵ maintaining the current position whereby the forfeiture rule does not apply to a person to whom the defence of insanity is available.⁴⁶ Unfortunately, the LRC took the view that a similar exclusion should apply where a person has been found unfit to be tried.⁴⁷ The rationale for this approach was stated to be that:

[T]he 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.⁴⁸

However, this seems to overlook a point that is heavily stressed in the Report,⁴⁹ ie that the application of the forfeiture rule is a civil law matter which does *213 not depend on a conviction and does not involve dealing with the defendant within 'the criminal justice system'.

The issue of fitness to be tried, which involves an assessment of the defendant's mental state at the time of a possible trial, is logically distinct from the issue of whether the insanity defence would apply to the defendant's prior actions in killing the victim, which involves an assessment of the defendant's mental state at that earlier time. It is possible that, due to a subsequent deterioration in his or her mental state (possibly as a consequence of having committed the homicide),⁵⁰ a person could be found unfit to be tried even though he or she was fully sane at the time of the homicide. The general approach taken by the LRC involves a willingness to apply the forfeiture rule to situations where the defendant has not been the subject of a criminal trial, for example because he or she has died before having been tried for the alleged homicide. Cases where the

alleged perpetrator is unfit to be tried should be treated in the same way as any other case where there has been no conviction.⁵¹

Part Two Issues In Relation to Joint Tenancies

The case where one joint tenant kills another is not covered by s 120(1) of the Succession Act. In the context of a joint tenancy, the killer stands to benefit through the right of survivorship and, where there were initially only two joint tenants, would become the sole owner of the property by virtue of the operation of that right. In terms of preventing the killer from benefitting, the approach that has been adopted 'whether in case law or in legislation, in virtually every common law jurisdiction'⁵² is that the victim's death is regarded as triggering a severance of the joint tenancy, with the killer and the victim's estate (excluding the killer) holding the property from that time as tenants in common in equal shares in equity. This approach could equally be described as involving a severance in equity of the joint tenancy or as requiring the killer to hold on a constructive trust for himself/herself and the victim's successors in equal shares; there is no practical difference between these two formulations. It has been said that, under this approach, there is 'neither a gain nor a loss for any of the joint tenants' with the killer 'being prevented from enlarging their share while not being stripped of their existing legal interest'.⁵³ This is the approach that was applied by Laffoy J in *Cawley v Lillis*.⁵⁴

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Laffoy J stated in *Cawley* 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'.⁵⁵ She mentioned that such legislation would have to deal with the changes to the law of co-ownership brought about by the Land and Conveyancing Law Reform Act 2009 (the 'LCLRA'). The key provision in this respect is s 30, which makes the prior written consent of all the other joint tenants a prerequisite to any unilateral attempt by one joint tenant to sever the joint tenancy. This provision did not apply to the dispute in *Cawley* because the homicide in question took place prior to the coming into force of the relevant provisions of the LCLRA. Laffoy J also referred to the need to provide a solution to the more complex problems that arise in a situation where there were initially three or more joint tenants.

Although the majority of submissions favoured the 'half share' approach that had been taken in *Cawley*,⁵⁶ the LRC's Report advocated an approach that had not been mentioned in the preceding Issues Paper⁵⁷ and which, therefore, had not been the subject of consultation. This approach, moreover, does not appear to have been favoured in any other jurisdiction up to now. According to the LRC, it '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'.⁵⁸ Under the approach in question, the killer would not benefit from the right of survivorship but there would instead be a tenancy in common between the parties.⁵⁹ It would be for the court to determine, in accordance with a long list of factors, the extent of the parties' interests *215 under this tenancy in common on the basis of what is 'just and equitable', but there would be a presumption that the victim would hold at least half of the

interest in the property.⁶⁰ The LRC noted that ‘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%’.⁶¹ However, the LRC took the view that this would not be unconstitutional because it would arise from ‘a case-by-case approach’.⁶²

1. Background to the LRC Proposal

The killing of Celine Cawley by Eamonn Lillis set off a ‘media frenzy’ which lasted even past his release from prison after serving his sentence for manslaughter.⁶³ The dominant narrative in the coverage of the case is illustrated by headlines such as: ‘Wife-killer Eamonn Lillis now a millionaire thanks to tragic Celine Cawley’.⁶⁴ The implication of much of the news coverage was that an injustice had been done, with Lillis managing to profit from the crime of killing his wife, notwithstanding the fact that he emerged with only a one-half share in property that had been jointly owned prior to the homicide. The shrill tone of the media coverage is echoed in the Explanatory Memorandum to the Succession (Amendment) Bill 2015, a Private Members' Bill put forward by Senator Feargal Quinn. The Explanatory Memorandum suggested (notwithstanding the actual result in Cawley) that legislative inaction has given rise ‘to a grossly unjust and perverted incentive for a joint tenant with malicious intent to kill another joint tenant’ and goes on to state that the fact ‘[t]hat the law closes its eyes to this perversion of public policy is breathtaking’.⁶⁵

The proposal in the Bill was that the killer would not only be prevented from benefitting from the right of survivorship but would also lose his or her pre-existing share in the property. After discussing the Bill in detail,⁶⁶ the LRC Report noted that it constituted ‘a proposal to deprive the offender of property rights’.⁶⁷ Interestingly, the LRC then suggested that ‘[t]he key question that therefore arises is whether this is permissible in terms of the constitutional provisions on property rights’.⁶⁸ There was no discussion of whether the approach in the Bill, even if it were constitutionally permissible, would be desirable in principle. The discussion later moved on to another approach which has the *216 same practical effect as that of the Bill. Under this approach, the property would be dealt with as if the killer had predeceased the victim, with the result that (in a two-party situation) the victim's estate would take full ownership of the property that had been held in joint tenancy. This approach has been taken in ‘[a] small minority of states [in the USA] such as Massachusetts and North Dakota’.⁶⁹ This approach received some support amongst consultees but was rejected by the majority.⁷⁰ The LRC did not accept that ‘the “total deprivation” rule... should necessarily be regarded as being unsuitable merely because it represents a minority approach’.⁷¹ Again, this phrasing seems to indicate sympathy with the approach in question. However, the LRC ruled it out, reasoning that it ‘might well be unconstitutional’ because ‘it would involve an impermissible deprivation of existing property rights’.⁷² The LRC argued that ‘[i]t does not follow from this conclusion, however, that the only alternative to total deprivation... is the “half share” rule adopted in many jurisdictions’.⁷³ The LRC then proceeded to advance the proposal that has been outlined above.

2. Can the LRC Proposal be Justified?

The LRC proposal represents a novel departure in this area of the law. Unfortunately, its justification is not spelled out in the Report. Therefore, it is necessary in this section of the article to draw out, and evaluate in turn, the possible arguments in favour of the LRC's proposal. In part, these arguments are suggested by various aspects of the detailed list of factors which, under the LRC's proposal, would guide the court's exercise of discretion. This means that the discussion which follows will also involve a consideration of these factors. The ultimate conclusion of the current author will be that the LRC's approach is not a convincing one and should not be supported.

(i) Depriving the Offender

The argument which is implicit in the LRC's discussion – that its proposed approach comes as close as is constitutionally permissible to the 'total deprivation rule' – does not take us very far in the absence of an explanation as to why that rule should be regarded as attractive in principle. It comes up against the objection that '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'.⁷⁴ The principle underlying this objection is that the punishment for a crime should be *217 determined by the criminal law, in accordance with the established principles of sentencing, and should reflect the various rationales for criminal punishment: deterrence, rehabilitation and so forth. This means that it would not be appropriate that, in addition to the punishment dictated by the criminal law (which might, in principle, have an impact in property terms, as in the case of a fine), the offender should also suffer a diminution in his or her property entitlements. It would be arbitrary for an offender who happened to be the co-owner of property with the victim to suffer an additional penalty which would not be visited upon other offenders guilty of the same crime.

The objection to depriving the offender of his or her property rights is independent of the nature of the crime which the offender has committed. Thus, it does not represent a solution to suggest that the offender would be subject to a deprivation of property, on top of the appropriate criminal sanction, only on a 'case by case basis'. If the idea of stripping the offender of some of his or her assets is wrong in itself (unless it forms part of a sentence for the crime in question), then it is wrong even where the offender has committed a particularly callous crime. This suggests that the objection cannot be overcome simply by means of the introduction of a discretion which focuses, as do factors (h) to (j) in the LRC's proposal, on the gravity of the offence that has been committed.⁷⁵ Nor, of course, would it be sufficient in itself to assert that the loss of property rights is a 'civil' matter and is 'not punitive' in nature⁷⁶; this assertion would have to be justified through the identification of some specific civil law principle or principles that provided a justification for the loss of property rights that was independent of the fact that the offender has committed the crime in question. Possible justifications of this nature are considered in the sections which follow.

(ii) O'Brien v McCann and Other Benefits Flowing from the Homicide

The LRC suggested that the decision of Judge Dunne in the 1998 Circuit Court case of O'Brien v McCann⁷⁷ 'indicates that it is already possible under the current law to reduce the share left to an offender well below 50%'.⁷⁸ In O'Brien, a husband had murdered his wife. The husband and wife had owned the family home *218 as joint tenants. As a result of the wife's death, the outstanding mortgage of IR£50,000 was discharged by the couple's insurance company. Judge Dunne held that the effect of the murder was that the joint tenancy between the parties had been severed. She also held that the husband 'was not entitled to the benefit of the discharge of what would have been his liability under the terms of the mortgage, a discharge that had occurred by reason of his wrongful act'.⁷⁹ Therefore, she ordered that an amount representing half of the discharged mortgage should be deducted from his share of the proceeds of sale. In linked proceedings, Judge Dunne ordered that the husband should pay the victim's mother IR£9,300 under the Civil Liability Act 1961 'for mental stress and funeral expenses'.⁸⁰ The husband was also ordered to pay legal costs of IR£20,000. The LRC commented that the final result was that, after various deductions, the husband was left with a sum 'which represented ... 15.7% of the total value of the family home'.⁸¹ The LRC argued that the case showed that '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'.⁸²

It is submitted, however, that O'Brien does not actually support the LRC's proposed position that the court would have discretion 'to reduce the "starting point [of 50%]" for the offender by such amount as the court considers just and equitable'.⁸³ The central point overlooked by the LRC in its analysis of O'Brien is that the case involved two separate applications of the public policy principle against a killer profiting from his or her crime.⁸⁴ The first one ensured that the killer did not benefit from the operation of the right of survivorship. The second, and logically distinct, application of the principle ensured that the killer could not profit from an insurance policy that had been taken out on the life of the victim. This is a well-recognised occasion for the application of the principle.⁸⁵ As in the English case of Davitt v Titcomb,⁸⁶ the consequence of preventing the *219 killer from benefitting under the insurance policy was that the money that repaid the mortgage was regarded as emanating from the victim. Thus, the victim had paid more than her share of the joint indebtedness and was regarded as being entitled, on the basis of general equitable rules, to a contribution from her co-debtor. This indicates that the fact that Judge Dunne applied the public policy principle to prevent the husband from profiting from the insurance policy was not an indication that, in a case in which the parties were joint tenants, the court has an open-ended discretion to reduce the killer's fractional entitlement upon severance on the basis of what seems just and equitable. Similarly, the fact that the killer was liable to pay damages under the Civil Liability Act 1961 and to pay legal costs are logically unconnected to the parties' respective fractional entitlements under the tenancy in common resulting from the severance of the parties' joint tenancy.

Thus, it is not possible to accept the LRC's reading of O'Brien as indicating that, even in the absence of legislative reform, the law already allows the court a discretion to adjust the proportional entitlements of the parties under the tenancy in common that results when the homicide creates a severance of the parties' joint tenancy. For the same reasons, one cannot accept as appropriate the LRC's proposal to include, on the list of factors to guide the court in the exercise of a proposed discretion, a reference to whether the homicide triggered a payment under a life insurance policy and to 'any civil liability on the part of the offender arising from the act constituting the homicide'.⁸⁷ Where the offender stands to obtain a benefit from an insurance policy related to a mortgage, the public policy principle is applicable to that benefit but this would be the case even if there were no joint tenancy. This is neatly illustrated by the facts of *Davitt v Titcomb*,⁸⁸ where the parties were already tenants in common prior to the homicide. It only causes confusion to sweep logically distinct matters, such as the application of the public policy principle to the proceeds of an insurance policy, or the offender's liability under the Civil Liability Act or to pay legal costs, into a broad judicial discretion to adjust the parties' entitlements in real property that was held in joint tenancy prior to the homicide. *220 (broadly defined) to the welfare of the family. Then there are references to 'the age and financial needs, obligations and responsibilities' of the offender, and of any child or dependent of the victim.⁹⁰

(iii) Justificatory Arguments Suggested by the Inclusion of 'Family Law' Factors

The first four factors in the list put forward by the LRC are adapted versions of those that apply 'when property adjustment or pension adjustment orders are made under section 16 of the Family Law Act 1995'.⁸⁹ One of these factors refers to the direct and indirect contributions made by the offender and the victim to the jointly-held property and the second factor covers, in cases where the parties were spouses, civil partners or cohabitants or were parents, guardians or in loco parentis to a child or other dependent person, their contributions

In terms of why the issue of the parties' contributions to the jointly-held property was regarded as worthy of specific mention, it may be noted that one aspect of the perceived injustice of the outcome in *Cawley v Lillis* was that Lillis emerged with an equal share of the jointly-held assets, even though Cawley had made a greater contribution to the generation of the family's wealth.⁹¹ Leaving aside the situation where the parties are spouses, civil partners or cohabitants, which will be discussed below, it is not easy to see a principled reason why weight should be given to the fact that the victim made a greater contribution to the acquisition of the asset in question (unless a resulting trust arose, leading to a tenancy in common in equity in the proportions of the parties' contributions, in which case there would be no need for the law to intervene to prevent the killer from benefitting).⁹² Once one person has made a gift to another person, the recipient becomes the owner and obtains property rights over the subject matter of the gift; the giving of the gift becomes merely part of the history of the matter. Therefore, it is as much an interference in the property rights of the killer to divest him or her of a property right which, as a matter of history, resulted from a gift from the victim as it would be to divest him or her of another property

right. Moreover, it would surely be arbitrary to provide for the cancellation of a gift that has resulted in the joint ownership of property between the killer and the victim but to leave untouched in the hands of the killer any outright gift made by the victim.

Similarly, again considering cases where the parties are not spouses, civil partners or cohabitants, it is not easy to see the logic of taking into account the respective financial positions of the killer and of any dependents of the victim. Why should the homicide be regarded as the trigger for the operation of a new *221 jurisdiction allowing the court to redistribute the property entitlements of the killer and the victim's estate on the basis of an all-things-considered discretion? It should also be noted that, arbitrarily, such a discretion would operate only where the parties happened to hold property under a joint tenancy and would only allow the adjustment of the parties' entitlements in the jointly owned property and not in any other property.

Even where the parties were spouses, civil partners or cohabitants, it does not seem possible to justify allowing the court to adjust the parties' entitlements in the jointly owned property on the basis of the 'family law-style' factors that are included in the LRC's proposal. Although this is not articulated in the LRC Report, the underlying premise of this part of the proposal may be a feeling that the killer has deprived the victim of the possibility of making a claim against the killer's wealth. If the parties were married, or in a civil partnership, or were qualifying cohabitants,⁹³ and if the relationship had broken up during the lifetimes of the parties, or had ended with the death of the killer, the victim would have been able to claim under the applicable legislation. Under such legislation, the victim could have been recompensed for matters such as those identified in the LRC proposal, eg the fact that he or she made contributions to the welfare of the family which exceeded those of the other partner. The LRC's thinking may have been that, by killing the victim, the killer has robbed the victim of the potential opportunity to make a legislative claim and that this should be taken into account when one is considering how the ownership of the jointly owned property should be shared.

This is an interesting argument but there are difficulties. If it were thought necessary to create an avenue of recourse for the estate of a victim of homicide, perpetrated by a spouse or civil partner or qualifying cohabitant, where the victim has been deprived of the opportunity to make a claim for financial provision, it seems clear that this should be done as part of the relevant family law legislation. It would be arbitrary for this jurisdiction to be triggered only where the parties owned property as joint tenants and to stipulate that the jurisdiction can only operate to allow the adjustment of the parties' entitlements to that jointly owned property and, therefore, cannot be applied in relation to any other property of the parties. It should be noted that other jurisdictions have not found it necessary to create this refinement in the family law statutes governing financial provision. This may be because the event of homicide is relatively rare and carries severe criminal law penalties for the perpetrator. Also, it may be explicable on the basis it would not be easy to shape the contours of a property adjustment regime that would apply when a relationship was brought

to an end by the fact that the potential claimant was killed by the other partner. It would arguably be difficult to ensure that the exercise of a judicial discretion in such circumstances did not, in practice, result in the stripping of the assets of the killer.

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3. A Suggested Approach

It has just been argued that the LRC's proposed approach is not defensible. While it is not perfect, the most attractive solution seems, instead, to be the straightforward approach of treating each party as being equally entitled under a beneficial tenancy in common.⁹⁴ In seeking to identify an appropriate framework, an obvious starting point is the proposition that the perpetrator of a crime should not be permitted to profit from his or her crime but, nonetheless, should not be stripped of his or her pre-existing property entitlements (unless this constitutes a part of the criminal law penalty for the crime in question). The approach that has just been mentioned appears to be, insofar as is practically possible, consistent with this proposition. Prior to the homicide, the interest of the killer was capable of being converted into a one-half share under a tenancy in common.⁹⁵ Therefore, the value of the killer's interest under the joint tenancy can be seen as identical to the value of a one-half share under a tenancy in common.

It is true that, because of the nature of such ownership, where the parties were joint tenants they were linked together in a 'survivorship game', with the winner taking all the ownership in the property. Could it be said that the killer has cheated in this game and that, even if the killer is restricted to a one-half share, he or she has benefitted by avoiding the risk that he or she might have lost his or her interest in the property due to being the first to die? On this question, Laffoy J commented in *Cawley v Lillis*⁹⁶ that, just prior to the homicide, there were 'a number of possibilities as to the ultimate destination of the joint assets, which would have turned on a number of imponderables, for example, whether one or other of the joint tenants would sever the joint tenancy and which of the joint tenants would die first'.⁹⁷ She took the view that it was 'not possible to form a view, even as a matter of probability, as to where the ownership of those properties would have ultimately vested' if the homicide had not taken place.⁹⁸ Therefore, she concluded that adopting the solution of treating each party as equally entitled under a beneficial tenancy in common 'viewed objectively at that time, could not be regarded as conferring a benefit on the defendant as a result of the crime he committed'.⁹⁹ This seems a reasonable conclusion and the solution it suggests has the great advantage of simplicity. In the Irish context, however, a complication arises in the context of land.

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(i) The Effect of Section 30 of the LCLRA

As has been mentioned, s 30 of the LCLRA restricts a joint tenant's ability to sever the joint tenancy. To accomplish a severance, a joint tenant of land must either obtain the prior written consent of all the other joint tenants or else obtain a court order under s 31(2)(e) 'dispensing with consent to severance... where such consent is being unreasonably withheld'.¹⁰⁰ The resolution of *Cawley v*

Lillis was made far easier by the fact that it dealt with a homicide which took place prior to the advent of the LCLRA. Surprisingly, beyond noting the fact that Laffoy J had referred to s 30 in the case,¹⁰¹ the LRC did not discuss the relevance of the section at all. However, the effect of s 30 is that, in relation to a joint tenancy over land, it is possible to envisage a case where the solution discussed above would confer a benefit on the killer.

Consider a case where, the other party having refused to consent to a severance, a joint tenant made an unsuccessful application to have the court dispense with the need for that consent on the basis that it was being unreasonably withheld. If the unsuccessful applicant were then to kill the other joint tenant, the killer would clearly obtain a benefit if the effect of the homicide were to work a severance. This benefit might have significant financial value if one aspect of the hypothetical fact situation were that the killer was suffering from a terminal illness and the victim had been in good health. On the position taken in this article, the aim of the law should be to ensure that the killer obtains no benefit from his or her crime, while not divesting him or her of any other property which does not represent a benefit attributable to the crime. Thus, the existence of s 30 suggests that it is necessary to qualify the straightforward severance rule that is appropriate in jurisdictions which do not have this quirk in the law of joint tenancies. This qualification would only be applicable to joint tenancies over land since no rule equivalent to that set out in s 30 applies to joint tenancies over other forms of property.

The appropriate response in Ireland appears to be that reforming legislation should require the court to seek, in cases involving land, (i) to ascertain whether the killer would obtain any benefit through achieving the severance of the joint tenancy in circumstances where this would not otherwise have been possible and (ii) if it does appear that the killer would obtain such a benefit, to adjust the parties' entitlements so as to ensure that any benefit is erased. In practical terms, the first step would appear to be for the court to consider the *224 following question: would the court have made an order dispensing with the need for the victim's consent to severance if, on the date of the homicide, the killer had made such an application? The framing of this question assumes that the court's decision should not be influenced by the fact that a homicide, in fact, took place. Obviously, the court might be less well-disposed to the perpetrator of such a serious crime but the point at issue is whether a severance would benefit the killer and this requires a comparison between, on the one hand, the killer's position after the homicide and, on the other hand, the killer's position if there had been no homicide (which position, it is being argued, must be assessed without reference to the fact of the homicide).

If the court did determine that the killer would profit by being able to achieve a severance in circumstances where, if the homicide had not taken place, this would not have been possible, it would then be necessary for the court to assess the extent of this benefit and to take steps to reverse it. This could be achieved by giving the court a discretion to reduce the killer's share under a tenancy in common, which would be narrowly constrained by the requirement to do no more than to eliminate any benefit to the killer resulting from the homicide. To

determine the extent of the benefit to the killer, it seems that the court would have to assess the likelihood that, but for the homicide, the killer would have predeceased the victim (without having succeeded in a future application to sever and without having been able to obtain a sale of the property by means of an application under s 31 of the LRCLA). Assistance could be obtained from actuarial calculations of life expectancy but there would inevitably also be an element of judgment that could not easily be reduced to numerical terms.

(ii) Cases Involving Three or More Parties

Additional complications arise where there were three or more joint tenants and one joint tenant has killed another of the joint tenants. The innocent joint tenant/s have not been complicit in the homicide and there is no reason in principle why they should not benefit from the operation of the right of survivorship as against the victim. The LRC's proposal allows the innocent joint tenant/s to so benefit and this seems to be correct. Thus, the victim's share would disappear due to the operation of the right of survivorship. In order to prevent the wrongdoer from profiting in this circumstance, the LRC recommends that the wrongdoer's share be regarded as having been severed at the moment of the homicide,¹⁰² with a tenancy in common coming into existence between the offender and the surviving (innocent) joint tenant/s. If there were initially ^{*225} (say) four joint tenants, the killer would originally have had the potential, after a severance of the joint tenancy, to have a one-quarter share. With the death of the victim, however, the killer's severed share would be one-third. The LRC's proposal is that the court should have discretion to adjust this share of the killer on the basis of the same factors that have been discussed above as guiding the court's discretion in two-party situations. The LRC's proposal in relation to multi-party cases simply represents an adaptation of its proposal in relation to two-party cases, so that the critique that this article has offered in that respect is equally applicable in the multi-party context.

What is the appropriate approach if one is pursuing the aim, advocated in this article, of seeking to deprive the offender of any benefit flowing from his or her crime, without going further and stripping him or her of existing property rights? At first inspection, it is tempting to argue that the offender's share of the beneficial interest should be reduced so as to allow the victim's estate to retain the value of the victim's original share under the joint tenancy. This would mean that, if there were originally three joint tenants, the offender's one-half share under the tenancy in common with the surviving joint tenant would be reduced by a one-third share, which would go to the victim's estate, leaving the offender with a one-sixth share in equity. On reflection, the difficulty with this is that it goes beyond preventing the killer from profiting from his or her crime. The killer began with a (potential) one-third share and, in order to address the consequences of the operation of the right of survivorship in favour of the other joint tenants as well as in favour of the killer, the killer is being left with only a one-sixth share. The aim of preventing the killer from gaining a benefit does not, in principle, extend to the different objective of preventing the victim's estate from losing out to others as a result of the homicide. Preventing the killer from benefitting requires only that the killer's share is reduced to its pre-homicide

level; in the three-party situation, that would mean that the victim's estate would receive a one sixth share of the total ownership,¹⁰³ leaving the killer with one-third of the ownership. If there were four joint tenants initially, then the killer's share would be reduced from one-third down to his or her pre-homicide level of a one-quarter (potential) share; the victim's estate would take a one-twelfth of the total beneficial ownership away from the killer, and so on.

4. A Discretion to Reduce the Victim's Share

Under the LRC's proposal, it would be possible to rebut the presumption that the victim's estate would receive at least 50% under the tenancy in common triggered by the homicide, 'the burden being on the offender'¹⁰⁴ in this respect. At first impression, it seems odd that the LRC was willing to contemplate the reduction of the victim's share, potentially down to zero. In order to make sense *226 of this aspect of the proposal, it is necessary to understand it as allowing the court a discretion to waive the application of the forfeiture rule against an offender. The LRC later made a broadly similar proposal outside the joint tenancy context, albeit one which was presented differently (and the clarity of the report would have been greatly improved if the link had been expressly made between the two aspects of the LRC's proposals).

The proposal outside the joint tenancy context was that the court would have discretion to waive, in whole or in part, the application of the forfeiture rule in cases involving manslaughter. The LRC referred to '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'.¹⁰⁵ The approach of the LRC reflects the approach adopted in the United Kingdom¹⁰⁶ and in New South Wales.¹⁰⁷ However, the LRC proposal involves a much more detailed list of factors for the consideration of the court in exercising its discretion.¹⁰⁸ The current author would favour placing more emphasis on the central question of the 'culpability attending the beneficiary's criminal conduct'¹⁰⁹ and playing down the potentially distracting detail elsewhere, eg in terms of the parties' past contributions to an intimate relationship they might have shared.

Instead of including the joint tenancy situation within the general discretion to relieve against the forfeiture rule that has just been outlined, the LRC proposals rely on a unified discretion – applicable only in the joint tenancy context – to increase or diminish the fractional share of the killer under a post-homicide tenancy in common. This leads to two difficulties. First, it is unsatisfactory that a somewhat different (and even longer) list of statutory factors would apply in the joint tenancy context as compared to other contexts. A second, and more serious, problem is that the LRC's approach means that a person responsible for murder or attempted murder could be granted relief from the application of the forfeiture rule in the joint tenancy situation. There appears to be no justification for allowing this in the joint tenancy context but, in other contexts, restricting the availability of the discretion to cases of manslaughter.

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Conclusion

This article has highlighted a number of problematic features of the proposals made by the LRC in its Report relating to the inclusion of attempted murder within the scheme and the exclusion of accessories and those who are unfit to be tried, as well as to the discretionary scheme proposed in relation to cases involving joint tenancies. While the need for statutory reform is arguably not acute given that relevant cases arise relatively infrequently, it is true that legislation could provide necessary guidance in respect of the implications of s 30 of the LCLRA in joint tenancy cases involving land and on the tricky questions raised by the killing of a joint tenant by another where there were originally three or more joint tenants. Another benefit of legislation is that it would also give the courts discretion to disapply the forfeiture principle in manslaughter cases if, in all the circumstances, the culpability of the offender is comparatively low. However, if the LRC's proposals were to be enacted in their current form, the benefits of legislation could well be outweighed by the disadvantages. On the issues highlighted in this article, a rethink is necessary before reform can usefully proceed.

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1. LRC 114-2015 (July 2015) (henceforth 'Report').
2. *ibid* 9.
3. *ibid* 9-10. See generally, TG Youdan, 'Acquisition of Property by Killing' (1973) 89 LQR 235; TK Earnshaw and PJ Pace, 'Let the Hand Receiving it be Ever so Chaste' (1974) 37 MLR 481.
4. See N Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31 Common Law World Review 1; Forfeiture Act 1982; Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 (UK); Forfeiture Act 1995 (New South Wales); Victoria Law Reform Commission The Forfeiture Rule: Report (Melbourne 2014); Succession (Homicide) Act 2007 (New Zealand); *Lundy v Lundy* (1895) 24 SCR 650; *Nordstrom v Baumann* [1962] SCR 147; C Triggs, 'Against Policy: Homicide and Succession to Property' (2005) 68 Sask L Rev 117 (Canada).
5. On this provision, see Brian E Spieren, *The Succession Act 1965 and Related Legislation: A Commentary* (4th edn, Bloomsbury 2011) 408-11. Section 117, referred to in s 120(1), allows children of the testator to make an application for increased provision from the estate. Section 120(5) clarifies that 'Any share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased.'
6. [2011] IEHC 515, [2012] 1 IR 281.
7. *ibid* 303.
8. [2013] IEHC 80.
9. Kearns P's difficulty related to a difference between the wording of s 120(1) and that of s 120(4), which precludes a person 'found guilty' of certain offences against the deceased or his family from insisting upon his or her legal right share (as spouse or civil partner) or from making an application for increased provision under s 117 (as a child of the deceased). This contrasts with the

reference in s 120(1) to those who are 'guilty'. In fact, the wording of s 120(1) reflects the orthodox view (see text to (n 10-13)) that a conviction should not be necessary to trigger the prevention of benefit principle, an approach that would make less sense in the different context of s 120(4). Note that the LRC recommended that s 120(4) be repealed without replacement: (n 1) 52-55, seeming to overlook the non-discretionary nature of a spouse's entitlement to the legal right share. The LRC recommendation would mean, for example, that a spouse who had been convicted of serious sexual offences against the children of the deceased would be entitled to insist upon a legal right share if disinherited (unless, which would not always be the case, this entitlement had been lost in the context of a formal divorce or judicial separation).

10. Report (n 1) 66-67.

11. See (n 9).

12. *Gray v Barr* [1971] 2 QB 554; *Helton v Allen* (1940) 63 CLR 691.

13. Mirroring the approach at common law, the position taken by the LRC was that the applicable standard of proof of guilt should be the balance of probabilities: Report (n 1) 67.

14. Report (n 1) 47-51. See discussion in the text to (n 105-109). The LRC's view was also that the forfeiture rule should not be extended to cover 'other forms of offences that lead to death, such as dangerous driving causing death': (n 1) 47.

15. Report (n 1) 45. See s 2(2) of the Criminal Law (Suicide) Act 1993.

16. Infanticide also does not appear to be covered by the LRC's proposals. This exclusion may not be logical because, although infanticide is a distinct offence, Irish criminal law effectively equates it with an offence which is covered by the LRC proposals, ie manslaughter on the grounds of diminished responsibility (see Infanticide Act 1949, s 1 as amended by s 22 of the Criminal Law (Insanity) Act 2006).

17. Report (n 1) 19.

18. Dáil Deb 25 May 1965, vol 215, col 2029 (Minister Brian Lenihan).

19. See Ian Williams, 'How Does the Common Law Forfeiture Rule Work?' in Birke Häcker and Charles Mitchell (eds), *Current Issues in Succession Law* (Hart Publishing 2016) 52-53.

20. 'Unworthiness to Succeed and Disinheritance'.

21. John MacLeod and Reinhard Zimmermann, 'Unworthiness to Inherit, Public Policy, Forfeiture: The Scottish Story' (2012-13) 87 *Tulane Law Review* 741, 745.

22. See, eg, Bürgerliches Gesetzbuch [BGB] [German Civil Code] § 2339-2345, referred to by MacLeod and Zimmermann (n 21) 746.

23. Williams (n 19) 52.

24. (n 21) 785.

25. *ibid.*

26. *ibid* 36.

27. *ibid* 36-37.

28. See further, text following (n 73) below. Although space does not allow this to be worked through in this article, it seems that the LRC's inclusion of attempted murder in its general formulation of the forfeiture principle could have illogical consequences in other contexts, eg in relation to pensions or the proceeds of a life insurance policy (see Report (n 1) 42-43).

29. *ibid* 46.

30. *ibid* 45.

31. *ibid.*
32. *ibid* 46.
33. *ibid* 47.
34. *ibid.*
35. See s 7 of the Accessories and Abettors Act 1861, repealed by sch 3 of the Criminal Law Act 1997. This provision governed felonies, extending the common law rule to the same effect that was already applicable to misdemeanours.
36. Contrast s 7(2) of the 1997 Act, which creates a distinct offence which is committed where a person 'does without reasonable excuse any act with intent to impede [the] apprehension or prosecution' of another person who is guilty of an arrestable offence.
37. Jonathan Herring *Criminal Law: Text, Cases and Materials* (6th edn, OUP 2014) 891.
38. [2013] IEHC 80.
39. Irish Times Reporters, 'Nevin gets life sentence as jury finds she murdered her husband' *The Irish Times* (Dublin, 12 April 2000) 1.
40. The LRC seems to have regarded as significant (Report (n 1) 45) the fact that the legislation applicable in the United Kingdom, the Forfeiture Act 1982 and the Forfeiture (Northern Ireland) Order 1982 (note also Succession (Scotland) Act 2016, ss 12-17), provides that references to unlawful killing include aiding, abetting, counselling or procuring such a killing: s 1(1) of the 1982 Act; Art 1 of the 1982 Order. The LRC appears to have assumed that this legislation changed the law in the United Kingdom so that, for the first time, the forfeiture rule there would cover the liability of accessories. However, the relevant legislation does not create or restate the forfeiture rule; its function is to give the court discretion to grant relief from the operation of the pre-existing common law rule. That the Forfeiture Act and Order are phrased so as to cover accessory liability, in fact, indicates an understanding by the drafters that the common law principle also covers such liability. This legislation – unlike s 120 of the Succession Act 1965 – does not define its scope of application by referring to persons who are 'guilty' of certain listed offences. Instead, reference is made to a person who has 'unlawfully killed' another. This wording is not apt to cover an accessory to homicide. This explains the inclusion of a proviso to the effect that 'unlawful killing' includes aiding, abetting etc.
41. Glanville Williams, *Textbook of Criminal Law* (Stevens and Sons 1978) 287, quoted in TJ McIntyre, Sinead McMullan and Sean O'Todhga, *Criminal Law* (Round Hall 2012) 355.
42. Finbarr McAuley and J Paul McCutcheon, *Criminal Liability: A Grammar* (Round Hall 2000) 453.
43. Note that this view has recently been taken by the Victoria Law Reform Commission, *The Forfeiture Rule: Report* (Melbourne 2014) 22.
44. See text to (n 105-109).
45. Report (n 1) 58-59; 64-65.
46. Section 120(1) applies to 'a sane person who has been guilty' of one of the relevant crimes. The word 'sane' here has become otiose because, under the Criminal Law (Insanity) Act, s 5, the old verdict of 'guilty but insane' has become 'not guilty by reason of insanity'.
47. Report (n 1) 64-65.
48. *ibid* 64.

49. See *ibid* 57-67.
50. See *Re Pechar* [1969] NZLR 574, 583, where Hardie Boys J referred to ‘the possibility of ultimate mental disorder deriving from, rather than being a cause of, the acts themselves’.
51. See text to (n 10-13) above.
52. Report (n 1) 31.
53. Victoria LRC (n 16) 76.
54. [2012] 1 IR 281.
55. *ibid* 303.
56. Report (n 1) 24.
57. Issues Paper on Review of section 120 of the Succession Act 1965 and Admissibility of criminal convictions in civil proceedings (LRC IP 7-2014).
58. Report (n 1) 36.
59. The Report states ((n 1) 36 and (in the Draft Bill) 88) that ‘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... was committed’. This phrasing is difficult to interpret because of the principle that a person who holds property beneficially (ie with no trust yet in existence) does not hold separate legal and beneficial interests: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 706E-F (Lord Browne-Wilkinson). One interpretation of the LRC's recommendation is that a severance will occur, at law, at the time that the offence is committed, with the result that no trust comes into existence (so that the LRC proposal is a modified version of Option 2 discussed in the Report (n 1) 21-22). The other reading is that the statement that the legal and beneficial interests ‘shall stand severed’ is intended to convey the fact that a trust has come into existence, with the legal and beneficial interests now differing and a severance of the joint tenancy having taken place only in equity (so that the LRC proposal is a modified version of Option 3, discussed *ibid* 22). This may be a somewhat more artificial reading of the words in the Report but is consistent with the fact that the LRC draws on the logic of ‘the constructive trust’ in support of its recommendation: *ibid* 33.
60. Report (n 1) 39. For discussion of the LRC's recommendation in cases where there are three or more joint tenants, see text to (n 102).
61. *ibid* 36.
62. *ibid*.
63. Conor Lally, ‘Eamonn Lillis case: A Media Frenzy from the Outset’ *The Irish Times* (Dublin, 11 April 2015).
64. Anon, *The Irish Independent* (Dublin, 10 April 2015).
65. Explanatory Memorandum to the Succession (Amendment) Bill 2015, 1.
66. Report (n 1) 24-27.
67. *ibid* 26.
68. *ibid* 26-27.
69. *ibid* 32.
70. *ibid* 24.
71. *ibid* 32.
72. *ibid*.
73. *ibid* 33.
74. *ibid* 32. The LRC used these words in describing the objection to the ‘total deprivation rule’, rather than in relation to its own proposal.

75. The relevant factors (see Report (n 1) 37) refer to 'the nature of the offender's conduct in relation to the offence' and, in particular, whether it was murder or attempted murder or, if it was manslaughter, whether it was voluntary or involuntary; whether it involved diminished responsibility; and whether there was a motive or intention to cause death.

76. The civil nature of the relevant proceedings is frequently emphasised in Chapter 4 of the Report, in the different context of whether a conviction should be required. In that chapter also it is stated that the relevant public policy principles are not punitive in their operation: see Report (n 1) 59 and 64.

77. The Irish Times (Dublin, 9 October 1998) 4. The case was mentioned in *Cawley v Lillis* [2012] 1 IR 281, 291. However, Laffoy J merely noted (*ibid*) that Judge Dunne had decided that 'the effect of the murder was to sever the joint tenancy'.

78. Report (n 1) 33.

79. The Irish Times (n 77) 4.

80. *ibid*. See ss 48 and 49 of the 1961 Act.

81. Report (n 1) 34.

82. *ibid*.

83. *ibid* 35.

84. Note the comment of Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 158 that 'the principle of public policy must be applied as often as any claim is made by the murderess'. Another simple example of the application of the rule more than once comes in relation to the joint tenancy situation; the homicide causes a severance and the victim's share is held by her successors. If the killer is one of those successors, the public policy rule (this time as codified in s 120(1) of the Succession Act) applies for a second time to prevent the killer from taking this benefit, with the result that the victim's successor will be determined on the basis that the killer predeceased the victim (s 120(5)).

85. See *Cleaver* (n 84). Indeed, the Report goes on to discuss O'Brien as an example of such an application: (n 1) 41.

86. [1990] 1 Ch 110.

87. See factors (g) and (h) respectively and note also factor (e): Report (n 1) 37.

88. [1990] 1 Ch 110.

90. *ibid*, factors (c) and (d). Note also the reference to 'any income or benefits to which the offender of the victim is entitled, included by or under contract, trust or statute': *ibid* 35, factor (e). This factor is not one of those which were described as having been adapted from s 16 of the Family Law Act 1995.

89. Report (n 1) 35.

91. Anon, 'Wife-killer Eamonn Lillis now a millionaire thanks to tragic Celine Cawley' *The Irish Independent* (Dublin, 10 April 2015).

92. On the purchase money resulting trust, see Hilary Biehler, *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) 173. As indicated in the text, it would be inappropriate for the legislative regime governing prevention of benefit from homicide to extend to joint tenancies at law where, due to the operation of independent equitable doctrines, there is already a tenancy in common in equity; the right of survivorship to the beneficial ownership of the property is never in play in such a situation. Unfortunately, it does not appear that this point was taken on board by the LRC in formulating its

recommendations: see s 46C of the Draft Bill, Report (n 1) 87 (provision applicable where the offender and victim held property under 'a joint tenancy').

93. Under Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

94. See I Williams (n 19) 70. More complex approaches have been mooted. See, eg, John Tarrant 'Unlawful killing of a joint tenant' (2008) 15 Australian Property Law Journal 224 (surveying various judicial and legislative approaches, as well as advancing his own proposal).

95. As will be discussed, where the property held in joint tenancy is land, the Irish position is complicated by the existence of s 30 of the LCLRA.

96. [2012] 1 IR 281.

97. *ibid* 300-01.

98. *ibid* 301.

99. *ibid*.

100. Although constraints of space prevent the exploration of this point, s 30 is an idiosyncratic provision which is difficult to defend. See Heather Conway, 'Leaving Nothing to Chance?': Joint Tenancies, the "Right" of Survivorship, and Unilateral Severance' (2008) 8 Oxford University Commonwealth Law Journal 45, esp 65-69. See also John Mee, 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions: Part 2' (2006) 11 CPLJ 91; Una Woods, 'Unilateral Severance of Joint Tenancies: The Case for Abolition' (2007) 12 CPLJ 47.

101. Report (n 1) 23. The LRC also mentioned the relevance of s 30, alongside s 31, to cases where there were multiple joint tenants and the surviving innocent joint tenants no longer wished to remain as joint tenants with the offender: *ibid* 39.

102. One consequence of this would be that if X, Y and Z were joint tenants and if X killed Y, and then shortly afterwards killed himself, Z would not become the sole owner, even though he or she was the last survivor. Because the need to protect the interests of the victim triggered a severance of the share of X, the killer, no right of survivorship would operate upon X's subsequent death. This is not an ideal outcome but seems to be a necessary consequence of the approach under discussion.

103. This is all that was lost to the killer; the other innocent joint tenant absorbed the other half of the victim's original (potential) one-third share.

104. Report (n 1) 34.

105. *ibid* 51.

106. Forfeiture Act 1982; Forfeiture (Northern Ireland) Order 1982. Note also Succession (Scotland) Act 2016, ss 15-16.

107. Forfeiture Act 1995.

108. Report (n 1) 51. The LRC was, it appears, influenced by the comment of Cretney that it could be helpful if legislation of this nature included comparatively extensive guidance along the lines of the factors listed in family law legislation. See *ibid* 48, citing Stephen Cretney, 'The Forfeiture Act 1982: The Private Member's Bill as an Instrument of Law Reform' (1990) 10 OJLS 289, 303.

109. *Dunbar v Plant* [1998] Ch. 412, 438 (Phillips LJ).