

In the Goods of G. M. Deceased
In the Matter of the Succession Act, 1965
F.M. v T.A.M., O.A., J.A.K., M.K. and G.A.C.
High Court
3 March 1970
[1968 No. 249 Sp.]; [1969 No. 235 Sp.]
[1972] 106 I.L.T.R 82
Kenny J.

July 22, 21, 1969, March 3, 1970

Succession—Will—No provision for adopted son in will—Testator's moral duty—Whether child of testator—Whether testator had moral duty to provide for son—Conditions necessary for moral duty to arise—Succession Act, 1965 (No. 27 of 1965) ss. 109 and 117.

Will—Construction—Succession—Estate in Ireland and England—Succession Act, 1965,—Meaning of “estate of the testator for purposes of Succession Act, 1965.

By his will dated 3rd March, 1961, the testator left all his property in the Republic of Ireland and all his shares and securities to executors upon trust for his wife for her life and after her death for two nephews. The testator had married in 1924. There were no children of the marriage and in 1941 the wife informally adopted the plaintiff. The boy grew up in the testator's home and at the time of the testator's death was aged thirty-two and was married with two children.

On the 19th of March, 1954, the Adoption Board made an adoption order under the Adoption Act, 1952, (No. 25 of 1952) and the plaintiff became the adopted child of the testator and his wife.

Held:—

1. There was a binding duty on the testator to make proper provision by his will for the plaintiff.
2. The testator made no provision whatever and so failed in this duty.
3. The court must, therefore, order that proper provision is to be made out of the estate and must decide the question from the point of view of a prudent and just parent.
4. The Succession Act, 1965, however, is based on the principle that a testator owes a duty to leave part of his estate to his widow (the legal share) and to make proper provision for his children in accordance with his means. It is not based on a duty to provide maintenance for his widow nor is it limited in its application to children who were dependant on him.
5. The existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon (a) the amount left to the surviving spouse or the value of the legal right if the survivor elects to take this, (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death, (c) the means of the testator, (d) the age of the child whose case is being considered and his or her financial position and prospects in life, (e) whether the testator has already in his lifetime made proper provision for the child.
6. In calculating the value of the estate of the testator for the purposes of the Succession Act, 1965, Part IX, the value of the immoveable property of which the testator was seized of or entitled to outside the Republic of Ireland is to be excluded.

Special Summons

G.E.M., the testator, was the owner of a large farm in Meath and also lands in England. On the 19th January, 1968, the testator died leaving a widow and one adopted son. The son at the time of the testator's death was 30 years of age and had been adopted when he was sixteen years old. The adoption was effected under the provisions of the Adoption Act, 1952, but the evidence suggested that the testator signed the relevant documents to please his wife who paid for the boy's education, clothes and other incidental expenses. The boy was treated kindly but told by the testator that he would never succeed to the testator's farm in Meath.

By his will dated the 3rd March, 1961, the testator appointed his brother, T.A.M. and O.A. to be his executors and trustees. The will provided for all his real and personal estate in the Republic of Ireland to be held in trust for his wife for life with the remainder to one of his nephews. The testator's property in England was limited so that a *82 brother-in-law of the testator obtained an equitable life estate and one of the nephews was given the equitable fee-simple in remainder. The adopted son was not mentioned in the will.

The gross value of the testator's estate was £135,000 (the detailed breakdown of this figure appears in the judgment).

The executors, T.A.M. and O.A. were unable to decide whether the property of the testator, situate in England, was to be included in the testator's estate for the purposes of Part IX of the Succession Act of 1965, and in particular sub-section 2 of section 109 of that Act, which provides:— “In this Part reference to the estate of the testator and to all estate to which he was beneficially entitled for an estate or interest not ceasing on his death and remaining after payment of all expenses, debts and liabilities (other than estate duty) properly payable thereout.”

Accordingly, a special summons (1969 No. 235 Sp.) was issued to have this matter determined. The plaintiffs were T.A.M. and O.A., the executors and the defendants were J.A.K., M.K., G.A.C., B.F.E.M., and F.B.M.

The questions in the special summons for the construction of the will of G.E.M. deceased, relevant to this report were as follows:—

- (i) In calculating the value of the estate of the deceased within the meaning of subsection (2) of section 109 of the said Act, is the real estate in England to which the said deceased was at the time of his death absolutely entitled to be included in the estate?
- (ii) If the answer to question (i) is in the affirmative.
 - (a) Is the legal right (one third of the estate) of the defendant B.E.F.M. to be satisfied wholly out of the estate of the said deceased which vests in his Irish legal personal representative or
 - (b) Does such legal right abate by a sum equivalent to one third of the value of the said English real estate or
 - (c) How otherwise is the said legal right to be dealt with?
- (iii) If the answer to question 1 is in the negative is the said defendant B.E.F.M. entitled to have her legal right satisfied wholly out of the estate of the said deed so far as the same vests in his Irish legal personal representatives?

The adopted son of the testator had decided to make an application under section 117 of the Succession Act, 1965, and issued a special summons (1968 No. 249 Sp.) for this purpose. The plaintiff was F.M. (otherwise F.B.M.), and the defendants were T.A.M. and O.A., (the executors), J.A.K., M.K. and G.A.C.

Section 117 provides (inter alia) as follows:

- “(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
- “(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the said child to whom the application relates and to the other children.
- “(3) An order under this section shall not affect the legal right of a surviving spouse, or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.”

Counsel in the Construction Summons (1969 No. 235 Sp.) were as follows:—

C. F. Matheson, S.C., and M. P. Smith for the plaintiffs T.A.M. and O.A., the executors of G.E.M. deceased.

R. J. O'Neill, S.C. and R. L. K. Mills for the first and second defendants, J.A.K. and M.K.

H. R. McWilliam for the third defendant, G.A.C.

C. B. McKenna, S.C., F. Griffin, S.C. and Murray McGrath for the fourth and fifth defendants, B.F.E.M. and F.M. (otherwise F.B.M.).

The arguments in relation to the provision *83 under the Succession Act, 1965, (1968 No 249 Sp.) were as follows:—

C. B. McKenna, S.C. (with him F. Griffin, S.C. and Murray McGrath) for the plaintiff F.M., (otherwise F.B.M.):—

Section 117 of the Succession Act, 1965, empowers the court to make provision for a child of the testator for whom the testator has failed to make proper provision in proportion to his means. Under the section the court has power to make a will for the testator. The first three sub-sections of the section are the only ones which are relevant to this case. Their operation is limited by section 120 of the Act. The court should consider all the sections in Part IX of the Act. The court should look at the intentions of the legislature. Prior to 1965 the widow was given a half share of the testator's estate if there were no children and a one-third share if there were children. This was known as the widow's legal right share. But section 117 did not establish a legal right share for the children and this was sensible because the position and needs of children were quite different. Where a testator had children grown up and able to earn a living and also young children, then it was right and just to give the young more. But the purpose of the section was to see that testators did not disinherit their children. Sub-section (1) of section 117 was not mandatory but only comes into operation where the testator has failed in his moral duty to make proper provision for the child in accordance with his means. Sub-section (3) of the section does not affect the legal right of the surviving spouse.

He referred to the British Inheritance (Family Provisions) Act, 1938, (c.45); The Family Protection Act, Part II (No. 60 of 1908), 1908, of New Zealand; the Testator's (Family Maintenance and Guardianship of Infants) Act, 1916, of New South Wales; *Allardice v. Allardice* [1911] A.C. 730; *Bosch v. The Perpetual Trustee Company Limited* [1938] 2 All E.R. 14; [1938] A.C. 463; *Re La Fleur* [1948] D.L.R. 682; [1948] 1 W.W.R. 801/56; *Re Barthwick*, *Barthwick v. Beauvais* [1949] Ch. 395; [1949] 1 All E.R. 472; *Re Singer* [1967] 3 All E.R. 129; *Re Clark* [1968] 1 All E.R. 4511.

Raymond O'Neill, S.C. (with him R.L.K Mills) for the third and fourth defendants:—

The questions for the court in an application of this kind are: (i) whether in relation to the jurisdiction of the court, to make an order at all, Article 42(2) of the Constitution, and (ii) if the court has jurisdiction, what order the court should make ... “proper provision for the child ...” The latter question does not arise until it is established that the testator is under a moral duty to make provision for the applicant and that he has failed to do. It is not sufficient for the applicant to say: “I am a child of the testator therefore there is a moral duty on the testator to provide for me”. A moral duty may arise in one of two ways: (a) by the natural obligation of a parent to provide maintenance, support and education for a child who is not able to support himself, or, (b) it might arise from the fact that it naturally falls on a parent to establish a child in life and enable him to earn his living.

The plaintiff in the present case is established in his profession. He is married and living in his own house. He never demanded nor received financial or other assistance from the testator. It is plain from the evidence that the plaintiff did not expect it either during the testator's life or after his death. So in this case there are no circumstances to establish the existence of a moral duty. Further, the circumstances in which the applicant entered the testator's family were relevant to the question of moral responsibility. Until formal adoption the testator did not adopt him as his son and did not accept financial responsibility for him. So during that period there was no duty to the plaintiff.

After that period the applicant was eighteen and training for his profession. So there was no new moral duty.

It is submitted that sub-section (2) of section 117 does not apply to this case because there are no other children in the testator's family. Subsection (2) seems to be concerned with what the court should consider once it is established that a moral duty exists. It has no relevance to the initial question in relation to moral duty. It is suggested that the expression “moral duty to make proper provision for the child ...” is equivalent to the phrases:—“without adequate provision for their proper maintenance,

education or advancement in life as the case may be” and “without adequate provision for their proper maintenance and support “in the New Zealand and English statutes already referred to.

[He referred to:—*Bosch v. The Perpetual *84 Trustee Company Limited* [1938] A.C. 463 [1938] All E.R. 14; *Allardice v. Allardice* [1911] A.C. 730; *In re Little* [1953] 4 D.L.R. 846, [1953] O.W.N. 865; *Re Maitland* [1953/4] 10 W.W.R. (N.Z.) 673; *Re Cavanagh* [1930] N.Z.L.R. 376; *Re Fegil Estate* [1939] 4 A.L.R., [1939] 3 W.W.R. 573; *Re Hawke* [1935] N.Z.L.R. 157; *Re Osborne* [1928] S.R.Q. 129; *Mataka v. Midland Bank Executor and Trustee Company* [1941] Ch. 142; *In re Andrews, deceased* [1955] 1 W.L.R. 1105; and *In re Howell* [1953] 1 W.L.R. 1034.]

On the question of what provisions should be ordered by the court out of the estate, it is submitted (i) that the Act does not provide that a child has an absolute right to a provision out of the testator's estate and (ii) that, whereas under section 111 the testator's widow has an absolute legal right to a onethird share of the estate where the testator leaves a spouse and children, nevertheless where, as here, you have one child, he should not get as much as the spouse.

H. R. McWilliam for the last defendant G.A.C.:—

My client will receive the English land under the will because the decision in this case does not affect land in England. The law of succession to immovable property is the *lex situs*. *In re Rae deceased* [1902] I.R. 451.

C. F. Matheson, S.C. (with him M. P. Smith) for the executors T.A.M. and O.A. asked the court to deal with the question of whether the English lands in the testator's estate are to be included in calculating the value of the testator's estate under section 109(2) of the Succession Act, 1965.

Cur. Adv. Vult.

Kenny J.:

G.E.M. (“the testator”) was the owner of a large farm in County Meath which he worked and of lands in England. On the 10th December, 1924, he married B.C. one of the defendants. They had no children and in 1941 she decided to adopt a boy called F.B., the plaintiff, who came to live with them. The informal adoption followed a conversation which she had with her sister and she did not consult the testator who knew nothing of it until she brought the boy to the farm. There was no system of legal adoption in the Republic of Ireland at that time.

The plaintiff attended the national school at A. until he was eight and then went to boarding schools until he was 17 years of age when he became a student at the School of Navigation attached to the University of Southampton for one year. He then joined the Merchant Navy in which he reached the position of first mate. He holds a Master's certificate and since May, 1969, has been working for the British and Irish Steamship Company. He is now 32, lives in Dublin, married and has two children. His basic salary is £1,200 but his total earnings will be about £1,700 this year.

On the 19th March, 1954, An Bord Uchtala made an adoption order under the Adoption Act, 1952, by which the plaintiff became the adopted child of the testator and his wife. The application for this must have been signed by the testator and validity of the Order has not been challenged. From the time it was made the plaintiff was called F.M. or F.B.M.

Mrs. M. who is a medical doctor, paid all the expenses of the plaintiff's education and provided him with clothes and pocket money. The testator and the plaintiff were on friendly terms, but the bond of affection which the relationship of father and son usually creates never existed between them. The testator told the plaintiff that he would never become the owner of the farm at F. and all the evidence suggests that the testator never wanted the adoption and signed the documents in connection with it to please his wife. The testator has two nephews, J.A.K. and M.K., the sons of his sister who was a medical doctor who now lives in Northern Ireland. Mrs. K. and one of her sons called on a few occasions to see the testator. Mrs. M. did not welcome their visits and there was not any personal affection or attachment between the testator and his nephews.

On the 3rd March, 1961, the testator made his will by which he appointed his brother, T.A.M. and A., the well known solicitor, to be his executors and trustees. He left all his property in the Republic of Ireland and his shares and securities to them upon trust for his wife for life and after her death for the two

nephews I have mentioned, absolutely. He left his farm at P. in England to them upon trust for his brother-in-law G.A.C. who had been managing it for many years, for his life and after his death to his nephew, M.K. absolutely. The remarkable feature about this will is that the plaintiff is not mentioned in it. The effect of section 24 of *85 the Adoption Act, 1952, was that the plaintiff was to be regarded as the child of the testator and of his wife born to them in what the Act calls "lawful wedlock" and who for the purpose of property rights was to be treated as a child of the testator if the testator had died intestate.

The testator died on the 19th January, 1968, when he was 93 years of age. He was domiciled in the Republic of Ireland. His property consisted of (a) the farm in Co. Meath subsequently acquired by the Land Commission for £50,000 payable in 8% Land Bonds and which, for the purposes of this application, I intend to value at £45,000; (b) shares and securities in the Republic of Ireland, in England and Scotland, which had a market value of about £65,000; (c) livestock and furniture worth about £8,500 and (d) the farm in England which had a value of about £18,500. His debts and funeral expenses were £2,257 so that the gross value of his estate after deduction of debts, but before deduction of testamentary expenses was about £135,250. The testamentary expenses (excluding the costs of these proceedings which I estimate will be about £5,000) will be about £5,000 so that the testator had disposing power over assets worth about £130,000. The estate duty payable in the Republic of Ireland was £38,067 against which there is a credit of £12,061, the duty paid in England. His widow has elected to take the legal share of one-third of his estate instead of the benefits given to her by the will (see section 111 of the Succession Act, 1965.)

There was some discussion as to whether the estate for the purposes of Part IX of the Act of 1965 includes the farm in England, but it has now been conceded that it does not. Section 109(2) of the Act has not changed the judge-made rule that the succession to immoveables is governed by the law of the place where they are situate, while that to moveables is regulated by the law of the domicile of the deceased. Section 109(2) bears a striking similarity to section 66 which appears in Part VI which deals with distribution on intestacy. Both define the type of interest in property with which the two parts are dealing, an estate to which the deceased was beneficially entitled for an interest not ceasing on death.

Part IX of the Act made radical changes in the law relating to the privilege to dispose of all property by will in any manner. The widow is now given a right to choose between what is given her by the will and one-third of the estate when children of the marriage have survived the testator. Section 117 provides that when the court is of opinion that a testator has failed in his moral duty to make proper provision for a child of his in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just and the effect of section 110 is that a child who has been adopted under an order made by An Bord Uchtala is in the same position as a child born of the marriage. Section 120 specifies a number of cases in which a person may be excluded from inheriting. It has not been suggested that the plaintiff has done anything which would justify his omission from benefit under the will of the testator.

Counsel have referred to the legislation in England, New Zealand and in New South Wales which limits the unrestricted power of disposition by will. The Family Protection Act, 1908, of New Zealand was the first legislation of this type in a common law country while a similar law was made in New South Wales by the Testators (Family Maintenance and Guardianship of Infants) Act, 1916. The legislation in England began with the Inheritance (Family Provision) Act, 1938, which has been amended by the Intestates Estates Act, 1952, and the Family Provision Act, 1966. I have considered many of the decisions on these Acts. *Allardice v. Allardice* [1911] A.C. 730; *Re Allen* [1922] N.Z.L.R. 218; *Bosch v. Perpetual Trustee Co. Ltd.* [1938] 2 All E.R. 14; *In re Pugh decd.* [1943] Ch. 387 and *In re Goodwin* [1968] 3 All E.R. 12.

The concept underlying the legislation in New Zealand, New South Wales and England is that a testator owes a duty to make reasonable provision for the maintenance of his widow and of his dependants. Our Succession Act, however, is based on the idea that a testator owes a duty to leave part of his estate to his widow (the legal right share) and to make proper provision for his children in accordance with his means. It is not based on a duty to provide maintenance for his widow nor is it limited in its application to children who were dependant on him. The cases decided on the New Zealand, New South Wales and English Act of Parliament are, therefore, of little assistance.

An analysis of section 117 shows that the duty which it creates is not absolute because it does not apply if the testator leaves all his property to his spouse (section 117(3)) nor is it an obligation to each child to leave him something. The obligation to make proper provision may be fulfilled by will or otherwise and so gifts or settlements made during the lifetime of the testator in favour of a child or the provision of an expensive education for one child when the others have not received this may discharge the moral duty. It follows, I think, that the relationship of parent and child does not of itself and without regard to other circumstances create a moral duty to leave anything by will to the child. The duty is not one to make adequate provision but to make proper provision in accordance with the testator's means and in deciding whether this has been done, the court may have regard to immoveable property outside the Republic of Ireland owned by the testator. The court, therefore, when deciding whether the moral duty has been fulfilled, must take all the testator's property (including immoveable property outside the Republic of Ireland) into account, but if it decides that the duty has not been discharged, the provision for the child is to be made out of the estate excluding that immoveable property.

It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon (a) the amount left to the surviving spouse or the value of the legal right if the survivor selects to take this, (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death, (c) the means of the testator, (d) the age of the child whose case is being considered and his or her financial position and prospects in life, (e) whether the testator has already in his lifetime made proper provision for the child. The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive.

The testator in this case never made any provision for the plaintiff except that he allowed him to live at F. The plaintiff was the testator's only child and his mother and he were the only persons to whom the testator owed a duty for there was no one else with any moral claim on him. The estate of the testator was worth about £135,250 before payment of testamentary expenses and estate duty. If I take £10,000 as an estimate of the amount of testamentary expenses and costs, the value of the mother's legal right will be about £36,200 (one-third of £108,500) so that the amount available to make proper provision for the plaintiff is about £89,000. The amount of estate duty payable is £38,000 but as Mrs. M's legal right and any provision made for the plaintiff under section 117 will have to bear their proportions of this duty section (118) I exclude it from the calculation. This is another striking change made in the law because except in relation to real estate, estate duty was, before 1967, payable out of the residue.

In my opinion the circumstances which I have described created a moral duty binding on the testator to make proper provision by will for the plaintiff. He made no provision whatever and so he failed in this duty. The court must, therefore, order that proper provision is to be made out of the estate and must decide this difficult question from the point of view of a prudent and just parent.

I think that the provision which such a parent would have made in this case would have been to have given one half of the estate (excluding the immoveable property in England) to the plaintiff. The amounts of the testamentary expenses and the costs of the two sets of proceedings will be deducted from the gross amount of the estate to arrive at the figure on which the one half is calculated.

Representation

Solicitors for F.M.: Noonan, Keaveney & Co.

Solicitors for T.A.M. and O.A., Executors: W. O. Armstrong & Co.

Solicitors for J.A.K. and M.K.: A. and L. Goodbody

Solicitors for G.A.C.: Fetherstonhaugh and Carter

Solicitors for B.F.E.M.: Noonan, Keaveney & Co.

1991 No 425Sp, (Transcript)

**PC a Ward of Court
suing by her Committee McGreevy
and McGreevy
and
A.C.**

The High Court

Judgment delivered by Miss Justice Carroll the 10th day of October 1995

This is a claim under Section 117 of the Succession Act, 1965 that the Plaintiff's mother failed in her moral duty to make proper provisions for her daughter P now a Ward of Court.

The Plaintiff's mother died a widow and testate on 6 December, 1989 aged ninety-nine years. She left her surviving four children, O born 5 July, 1924, E born 6 March, 1926, A (the Defendant) born 28 December, 1928 and P (the Plaintiff) born 22 January, 1932. Probate of her Will dated 25 May, 1979 and Codicil thereto dated 3 September, 1986 was granted to the Defendant as executor on 15 June, 1990, the other executor having renounced.

Under the terms of her Will dated 25 May, 1979, after two small pecuniary bequests, she left a parcel of land at Bogtown (described as approximately 2 acres) to her daughter E, the furniture and contents of the house to her daughter P and the residue to her son A charged with payment of £10 per week for life to P to be paid into the bank and to be reviewed every three years according to the Cost of Living Index. She gave exclusive use of the dwelling to P and provided that P and A might exchange houses if they so wished.

By Codicil dated 3 September, 1986 the Testatrix left the field known as the Angle Field to her daughter P and a £100 to her son O in token of his kindness.

Prior to that she had made two previous Wills. One was made on 22 March, 1963 where, after a small bequest for Masses, she left a right of residence in the dwelling house to her daughter P while unmarried with a right to be supported and maintained but not clothed. She left the residue to her son A.

By a second Will dated 2 May, 1973, after two small pecuniary bequests, she left the lands on Folio 9036 (plots 4A and 4B) to her daughter P with an exclusive right of residence in the dwelling for

life or until she elected to live elsewhere and she left the residue including the lands in Folio 8991 (plots 5A and 5B) to her son A subject to the right of residence. She left the furniture and contents of the house to her daughter P.

The estate consists of a farm of land in County Louth comprising approximately 30 acres. There are two Folios. Folio 9036 County Louth contains approximately 14 1/4 acres (described at plots 4A and 4B on the map); these plots are about 3 miles apart. The area described at 4B is the field left to E which she has renounced. Folio 8991 County Louth comprises the dwelling and approximately 15 3/4 acres described at plots 5A and 5B on the map. These lands are also about 3 miles apart. The Angle Field contains about 4 acres and is part of the land described at 5A. The two fields in plots 4B and 5B adjoin each other.

In the Inland Revenue Affidavit the farm and dwelling were valued at £58,000 and the contents of the dwelling at £750. There was no cash and no money in the bank.

The Plaintiff's valuer described the lands at 5A and 4A as level grazing fields. She described the lands at 4B and 5B as level grass land in reasonable condition. She saw the lands in 1994 and valued the lands as of 1989 at £1,750 per acre for all the land making no distinction between different parcels. This amounts to a total of £52,500 for 30 acres excluding the dwelling.

The dwelling, which was built by their grandfather consisting of two rooms downstairs and three upstairs and no piped water but with an outside toilet, she valued at £35,000. She agreed the house was in poor condition and needed a fair amount of work and that the decoration was nil.

The Defendant disputes these valuations. He says the land was set for fifty years and was poor and overgrown. He put fertilizer on it after 1989 and brought it back and improved it. He put the value at £1,000 per acre not at £1,750. He said the two fields up the road are very wet and points out that the area at 4B is described as bogland. He did not get around to improving those lands. He would have to drain them. They are in grass and one field is very rushy.

I accept the Defendant's evidence that he improved plots 4A and 5A since his mother's death. I also accept that the lands at Bogtown are wet and rushy. This would make the Plaintiff's valuation too high. The total value of the estate lies between £60,000 according to the Defendant and £87,500 according to the Plaintiff. But in my opinion this case does not depend on whether the farm is worth £60,000, £70,000 or £80,000. The reality is that it is a small farm and the question is whether it should be split up.

O is a quantity surveyor. He got a secondary education, obtained the Leaving Certificate and went to England where he studied. He has for many years lived in Bristol with his wife and is apparently comfortably off. Their only son is dead. Under the Codicil his mother left him £100. He makes no claim.

E qualified as a nurse. She is married to an auctioneer and has seven children aged thirty-three to twenty-two. She lives in Ardee and she too is apparently comfortably off. Under the Will she was left a 2 acre field. She has renounced the bequest in favour of her brother A and supports his entitlement to the farm.

A, the Defendant, was taken out of school at age thirteen when his father became ill, to help him run the family farm. His father died when he was fifteen. His mother set the land but he continued to work around, cutting hedges and maintaining the house and sheds. He lived at home with his mother and sister P until he married at the age of forty in 1968. His mother gave him a site for a house. It was the orchard adjacent to the family home and he built his own house with assistance from a friend.

He said he was promised the farm. This was always understood and this is confirmed by his sister E. At one stage in 1970 he and his mother went in to the solicitor to have the farm transferred into his name. Money was not plentiful and they were advised it would cost money for stamp duty and charges. The solicitor said it was cheaper to leave it by Will and this advice was taken. A said he never thought his mother would split the land up.

He got a job at seventeen with a builder, then with a contract farmer but still did jobs around the farm. There was very little money coming in, mainly through pigs, hens and conacre lettings. He used his agricultural labourer's money to keep the house and affairs going. He was there all the time to look after things. He had no holidays for fifteen years. O and E left and he spent all his spare time at the place. At age thirty-three he got a full-time job driving long distance with CIE. He started in 1961 and he retired in September 1993. His income as a CIE lorry driver increased over the years from £9,755 per annum in 1982/83 to £20,924.32 in 1992/93. These are gross figures and the net figures were not available. He has three boys now aged twenty-one, nineteen and seventeen. The eldest is studying and working, the second is at agricultural college but has no grant and the third is doing his Leaving Certificate. His CIE pension amounts to £21 per week and his State pension to £86.20. His wife gets £60 disability per week.

The valuer valued the Defendant's home at £55,000 as of 1989 though she had no internal inspection. The site of the bungalow she valued at £10,000. A disputes that his site was worth £10,000 as it is on top of the farmyard.

P, the Plaintiff, who was made a Ward of Court on 29 April, 1991 received a secondary education followed by secretarial training. She worked until she was aged thirty, variously as a dentist's receptionist and shop assistant in Dublin and Drogheda. She was diagnosed as schizophrenic when she was thirty (in 1962) and she did not work after that. She lived at home with her mother who looked after her. At the date of her mother's death she had a bank account containing £9,383.

As to the source of this money, A says it came from savings made by his mother over the years. He recalled her talking about it. Dr Murphy, who is the psychiatrist at St Brigid's Hospital, Ardee, said he

asked her the source of the money in the bank account and she said she was in receipt of gifts from various relatives in the States, \$50 to \$100 a few times a year. She said they were now deceased. Later he changed the sums to \$100 to \$200. A said their uncle in America was dead over thirty years and Fr Tom C, another relative, was dead thirty to forty years.

In view of the pattern of lodgments as follows, February 1986 -- £600, January 1987 -- £560, March 1988 -- £200 and April 1988 -- £300, I assume the money came from the Testatrix's management of both her and her daughter's pensions and any other source of income she had. I think it is unlikely to have come from America. The bank accounts for the Plaintiff were not produced prior to 1985 though there were clearly prior records. The first entry refers to a balance forward of £8,361.25 so I do not know the earlier history of the Ward's bank account. This is a matter which could have been clarified on behalf of the Ward.

P's medical history over the years shows that she was hospitalised for three months in 1964, two months in 1965 and two and a half months plus three and a half months in 1967.

In 1981 she was three and a half months in hospital and two and a half weeks in 1987. There was an exacerbation of her illness in 1988 She was in hospital for three weeks in November 1988 and practically the whole of 1989 with the exception of one week in September and a few weeks in October. She has been hospitalised since November 1989.

The Solicitor for the Wards of Court invested the £9,383 from the bank account in 9% Capital Loan which yields £817 per annum or £15 per week. From this costs of £570 and management fees of £300 per annum must be deducted. This leaves £7,000 to be reinvested. If invested at 5% it would produce £350 per year or £6.80 per week. The Angle Field if valued at £1,725 per acre would realise £7,000 if sold, less costs, which would produce £6,000 to £6,300. That represents another £5 to £6 per week.

According to the solicitor for Wards of Court under the Health (Charges for In-Patient Services) Regulations, 1976 (SI 180 of 1976) for a person with no dependants, hospital charges are made at a rate not exceeding the income less £2.50 per week. Where Wards of Court are concerned the Health Boards do allow the payment of more than £2.50 per week provided the income does not exceed £50 per week but she said this is only a guideline and is open to challenge by the hospitals. P will be entitled to a reduced Old Age Pension which the hospital could apply towards maintenance. They have a discretion. She had a Disabled Person's Maintenance Allowance when living outside. She also earns £3 per week for working in the kitchen. The Plaintiff's valuer estimated the capitalised value of the right of residence at £13,000 taking a rental of £35 per week and interest at 10%. This was based on the Plaintiff's life expectancy which is 20.73 years.

Dr Michael Murphy, the consultant psychiatrist in St Brigid's, said they attempted to admit her to hostel accommodation but it did not work. He said she is not capable of managing her own affairs or of giving evidence. She is maintained in a public ward and free to come and go as she pleases, including going to town. But she says she is afraid she will fall or be struck by traffic. She is highly dependant and needs care and protection. She sends other patients out for food and spends her money on sweets, confectionery and treats. She says she would like to get her hair done once a fortnight, which Dr Murphy says would be good for her. Her sister gives her clothes. Dr Murphy said she told him she would prefer to buy her own. He said she would require £50 per week disposable income for clothes, treats, cigarettes and confectionery. He said he did not know if she was brought out by relatives.

In fact both A and E visit her every week. A takes her for a drive every Sunday. They have a cup of tea and they shop at the supermarket. He used to give her £21 per week, then he put the money into an account for her and he now has put by £800. He now gives her between £10 and £15 per week. He said she spends it on other people and has no regard for money. She never said to him about getting her hair done and what she wanted was to be taken for a drive and to get sweets and apple tart. She gave up cigarettes a couple of years ago and while she had started again, she only smoked a few. If she wanted anything she got it from E and himself. He said his brother in England sends something. His intention is to go on looking after her. He said his children will also continue to look after her. They had intended to set up a Trust Fund for her of about £10,000 plus her own money, that is almost £20,000 but the Trust Fund was not pursued because the Wards of Court Office stepped in.

E said she visits P every week. She used to take her out in the car but once she hit her over the head with an umbrella so now she does not take her out as she is afraid. P is subject to unpredictable bouts of violence. If P asks for something she gets it. Recently she bought her an outfit consisting of slacks, cardigan and a blouse. She did not express a desire to buy her own clothes. She was off cigarettes for quite a while but back on them very recently. She gets her hair done in the hospital. She said her family or A's family will always look after her.

The principles applicable are set out in *CC and Ch F v WC and TC* [1992] IR 143 where Finlay CJ said at page 148:-

"I am satisfied that the phrase contained in s 117, sub-s 1, 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established.

In a case such as is the instant case where evidence has been given of the testatrix's financial support of her children during her lifetime indicative of a concerned assistance to all the members of her family and where, as was established to the satisfaction of the learned trial judge in this case, the relationship between the testatrix and her children and in particular between the testatrix and her daughters was one of caring and kindness, the court should, it seems to me, entertain some significant reluctance to vary the testatrix's dispositions by will. Quite different considerations may apply, as have been established in some of the decided cases under this section, where marked hostility between a testator and one particular child is established to the satisfaction of the court".

In this case it appears that the Testatrix was always concerned that P would have a place to live. She was in St Brigid's effectively from November 1988 except for a period at Christmas and a week in September 1989 and some weeks in October 1989. I can assume that the Testatrix was aware of the level of care which she received in St Brigid's at different times over the years and that the cost was paid by the Health Board. She must have known that her daughter was being well looked after and was assured of a place to live. Her wants were creature comforts. She would have known her daughter's wants and capabilities. She knew her daughter had the bank account with over £9,000. In the Codicil she had given her a field representing approximately another £7,000. I do not know whether she had any intimation that her daughter would never come out. But if she did her mother had provided that her daughter had her own home. She would have had her Disability Allowance and a brother next door who all his life looked after his sister.

By contrast A is the son who alone in the family was deprived of an education. He has a young family none of whom are fully launched and one of whom is studying agriculture. I cannot see that moral duty there is on a mother to break up the farm and take it away from the son who was promised it and who had given her and P a lifetime of care, so that her daughter could send out for sweets and confectionery. I am satisfied that both A and E are genuinely fond of their sister and intend to continue to visit her every week. The evidence was that the relationship between the Testatrix and all her children was a good one. She acknowledged the kindness of her eldest son in her Codicil. She left a 2 acre field to her daughter E and it is significant that E renounced that in favour of her brother. So the only question concerns the competing interests of A and P.

In my opinion the Testatrix made her Will doing the best for her family. I think she was conscious of her moral duty to both A and P and the Court should not upset her arrangement. The Testatrix could not have known that her daughter's "nest egg" would be whittled away by administrative charges. What is important is that P should continue to get support and visits from her family.

In his evidence the Defendant disputed his mother's right to leave the Angle Field to P. But it is not permissible for him to make this argument. He is the executor of the Will and as such must uphold the terms of the Will. If he wanted seriously to challenge the bequest of the Angle Field, he should not have taken out probate.

In my opinion a positive failure in moral duty has not been established in this case.

[1990] IR 143

C.C. and Ch.F., Plaintiffs, v. W.C. and T.C., Defendants

[S.C. No. 86 of 1988]

Supreme Court

[1990] IR 143

Succession - Testator - Moral duty to make proper provision for child - Breach - Onus of proof - Estate - Unjust disposition - Testatrix making inter vivos gifts to four adult children - Testatrix's knowledge of threatened break-up of daughter's marriage - Plaintiff receiving least of four children in inter vivos gifts - Second plaintiff relatively secure financially - Second plaintiff receiving financial support from testatrix when her marriage broke up - Plaintiffs receiving less than defendants under will - Criteria for judging existence of moral duty to make proper provision for child - Onus of proof in establishing failure in duty - Whether court should be reluctant to vary will where testator had caring relationship with all her children - Whether provision for plaintiffs proper at time of testatrix's death - Succession Act, 1965 (No. 27), s. 117, sub-ss. 1 and 2.

Statute - Interpretation - Phrase "failed in his moral duty to make proper provision for the child in accordance with his means" - Criteria for judging existence of moral duty - Onus of proof in establishing failure in duty - Succession Act, 1965 (No. 27), s. 117, sub-ss. 1 and 2.

Section 117, sub-s. 1 of the Succession Act, 1965, provides that where "on application by or on behalf of a child of a testator, the court is of the opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just".

Section 117, sub-s. 2 of the Act of 1965 provides that the "court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children".

The deceased testatrix made her last will on the 5 November, 1981, and died on the 17 May, 1985. The parties to the action were her four surviving children.

T., (the second defendant) a permanent invalid, was married with one child and his sole income was a disability pension. The value of the disposition to him under the will was £30,800.

W., (the first defendant) was married with three dependant children one of whom was severely disabled. W. was the owner of the family business which had been transferred to him by the testatrix during her lifetime, but the business was, to the knowledge of the testatrix, in financial difficulties before her death. The value of the disposition to W. under the will, which included a premises at D. valued at £50,000, was £62,900.

C., (a plaintiff) was separated from her husband and had four dependant children. She had been in steady employment at the time of the testatrix's death, was receiving maintenance from her husband and was the owner of her home which was subject to a relatively small mortgage. The value of the disposition to her under the will was £12,900.

Ch., (a plaintiff) was living with her husband and their two young children at the time of the testatrix's death. Ch's marriage was in difficulties to the knowledge of the testatrix. The High Court (Costello J.) had held that a just and prudent parent would have made provision for the fact that it was

probable that this marriage would break up, which it did after the testatrix's death. Ch. received a disposition to the value of £13,100 under the will.

In the period of ten years before the death of the testatrix T. had received £7,000; W. had received £10,000 to £20,000 in addition to the family business and although much of this was for investment in the family business, he derived some benefit from it and the business was sold for £38,000; C. received benefits valued at £18,500; Ch. received £3,000 and had received £2,400 per annum in respect of the upkeep of the testatrix when she was living with her between 1983 and 1985.

The High Court (Costello J.) found that the testatrix had failed in her moral duty to make proper provision, according to her means, for both C. and Ch. and made provision for them by varying the devise of the D. premises by declaring C. entitled to a one ninth share and Ch. to a two ninths share in them. The first defendant appealed against the order of the High Court.

Held by the Supreme Court (Finlay C.J., Griffin and Hederman JJ.) in allowing the appeal to the extent of varying the order of the High Court in relation to C. and in affirming it in relation to Ch., 1, that the existence of a moral duty to make proper provision by will for a child pursuant to s. 117 of the Act of 1965 would have to be judged by the facts existing at the date of death and would have to be decided by objective considerations; the court's view and not the testator's view being decisive.

M. (F.) v. M. (T.) & Ors. In re M. (1970) 106 ILTR 82 approved.

2. That the phrase "failed in his moral duty to make proper provision for the child in accordance with his means" in s. 117, sub-s. 1 of the Act of 1965 placed a relatively high onus of proof on an applicant and the court should not make an order under the section merely because it would on the facts proved have formed different testamentary dispositions. A positive failure in moral duty would have to be established.

3. That the court should be reluctant to vary a testator's disposition where there was evidence of his financial support of all his children during his lifetime indicative of a concerned assistance to all of them and where there was a caring relationship between the testator and his children, in particular with those children seeking relief pursuant to s. 117 of the Act of 1965.

4. That, although the provision made for Ch. had probably been proper at the time of the making of the will, it had ceased to be so before 1985 because the testatrix had been aware of the likelihood of the break-up of Ch's marriage and of the consequent problems facing her to the extent that as a just and prudent parent she should have made provision for this probability and bearing in mind that Ch. had received the least financial benefit of the four children from the testatrix before her death, a proper provision for Ch. involved either a further testamentary disposition or an inter vivos gift.

5. That C's relatively secure financial position was such that the combined operation of the gifts made to her by the testatrix during her lifetime and the provision in the will did not constitute a failure by the testatrix to make proper provision for her.

Cases mentioned in this report:-

M. (F.) v. M. (T.) & Ors. In re M. (1970) 106 ILTR 82.

Appeal from the High Court.

The plaintiffs sued the first defendant in his capacity as executor and beneficiary and the second defendant as beneficiary by a special summons issued in the High Court and dated the 15 October, 1986. The plaintiffs sought relief pursuant to s. 117 of the Succession Act, 1965. The High Court (Costello J.) made an order on the 9 October, 1987, that the testatrix had failed in her moral duty to make proper provision for the plaintiffs and declared that the plaintiff Ch. was entitled to a two ninths share, the

plaintiff C. to a one ninth share and the first defendant, W., to a six ninths share as tenants in common in certain premises which the testatrix had devised to the first defendant.

The first defendant appealed against the order of the High Court by notice of motion dated the 22 March, 1988.

The facts of the case and the provisions of s. 117 of the Succession Act, 1965, have been summarised in the headnote and are set out fully in the judgment of Finlay C.J., *infra*.

The appeal was heard by the Supreme Court on the 20 January, 1989.

John M. Fitzgerald S.C. (with him *Noel MacMahon*) for the first defendant.

John Rogers S.C. (with him *Gerard Durcan*) for the plaintiffs.

Cur. adv. vult. 24 July, 1989.

Finlay C.J.

This is an appeal brought by the first defendant against an order made in the High Court on the 9 October, 1987, by Costello J. pursuant to s. 117 of the Succession Act, 1965.

The deceased testatrix made her last will on the 5 November, 1981, and died on the 17 May, 1985.

She was at the date of her death a widow and left her surviving four children who were:

T., a son aged 44;

W., a son aged 42;

C., and Ch., twin daughters, aged 41.

The position and circumstances of these four children at the date of the death of the testatrix was found as a fact by the learned trial judge on evidence adduced before him which supported such findings, and must accordingly be accepted by this Court for the purpose of determining the issues on this appeal.

The position so found of each one of the children was as follows.

T. was a permanent invalid, having sustained brain damage. He was married with one child and his sole income was apparently a disability pension payable by the United Kingdom government where he had been residing at the onset of his disability.

W. was married with three sons aged approximately 10, 7 and 6 and one of them was severely disabled by deafness. He was the owner of the family business of grocery and newsagents which had been transferred to him by his mother during her lifetime, but that business was, to the knowledge of the testatrix, in financial difficulties before the time of her death.

C. had married in 1969 but was separated from her husband since 1974. She had four children: two girls who were twins aged approximately 15 and two girls who were twins aged approximately eleven. She received maintenance from her husband for the support of herself and the children at the time of her mother's death of approximately £240 per month. She was in steady employment, earning approximately £10,000 gross per year at the time of the hearing in the High Court and had been so employed, earning approximately £6,000 at the time of the death of her mother. She was the owner of a house in which she resided with her children and which was subject to a relatively small mortgage.

Ch. was living with her husband and her two children who were twin girls aged about seven. Her husband was apparently the sole owner of the house in which the family lived, but she and her husband were joint owners of a residential property in Spain where the family had lived for some time. The

learned trial judge found that prior to the death of the testatrix Ch.'s marriage was in difficulties to the knowledge of the testatrix and he concluded that a just and prudent parent would have made provision for the fact that it was probable that this marriage would break up. On the evidence the marriage did break up after the death of the testatrix and Ch. is now separated from her husband.

Benefits received by children in the lifetime of the testatrix

It was proved that in a period of approximately ten years before the death of the testatrix each of the four children had received the following benefits from his or her mother.

T. received £7,000 in cash in 1983.

W. received a total of £10,000 to £20,000 in cash over this period, much of which consisted of injections of cash by his mother into the business from which the learned trial judge was satisfied he (W.) must have derived some benefit. He had been transferred the family business by his mother in 1979 and it was after the death of the testatrix sold for £38,000.

C. received sums in cash between 1976 and 1985, together with a motor car which was registered in her mother's name, the total value of which was approximately £18,500.

Ch. received £3,000 in 1981, and between 1983 and 1985 while her mother was living with her, received approximately £2,400 per annum in respect of the upkeep of her mother.

Value of the estate

The learned trial judge assumed the net value of the testatrix's estate, on the evidence adduced before him, to be in the figure approximately of £122,000.

The provisions of the will

The testatrix left her estate as follows:

To T.:

Cash £10,000

E.S.B. shares £7,900

Quarter share of residue, approximately £12,900

Total: £30,800

To W.:

Premises at D. Street, valued at £50,000

(viewed by the learned trial judge as probably an under-estimate)

Quarter share of residue £12,900

Total: £62,900

To C.:

A bequest of a motor car that was registered in the testatrix's name, which by the time of her death was of no value.

One quarter share of the residue, say, £12,900

To Ch.:

Silver valued at £200

Plus one-quarter share of the residue, say, £12,900

Total: £13,100

Order of the High Court

The learned trial judge found that the testatrix had failed in her moral duty to make proper provision, according to her means, for both C. and Ch. and made provision for them by varying the devise of the D. Street premises to W. so as to make C. and Ch. tenants in common with him in those premises in the respective shares of one ninth to C. and two ninths to Ch.

Section 117 of the Succession Act, 1965

The provisions of s. 117 relevant to the issues arising in this case are those contained in sub-ss. 1 and 2 of that section and are as follows:-

"(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

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

The law

In the course of his judgment as a judge of the High Court in *M.(F.) v. M.(T.) & Ors. In re M. (1970) 106 ILTR 82, Kenny J., at p. 87, stated as follows:-*

"It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon

(a) the amount left to the surviving spouse or the value of the legal right if the survivor elects to take this,

(b) the number of the testator's children, their ages and their positions in life at the date of the testator's death,

(c) the means of the testator,

(d) the age of the child whose case is being considered and his or her financial position and prospects in life,

(e) whether the testator has already in his lifetime made proper provision for the child.

The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive."

I would adopt and approve of this general statement of the principles applicable to an application under s. 117 as being a correct statement of the law. I would, however, add to it further principles which may to an extent be considered a qualification of it.

I am satisfied that the phrase contained in s. 117, sub-s. 1, "failed in his moral duty to make proper provision for the child in accordance with his means" places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established.

In a case such as is the instant case where evidence has been given of the testatrix's financial support of her children during her lifetime indicative of a concerned assistance to all the members of her family and where, as was established to the satisfaction of the learned trial judge in this case, the relationship between the testatrix and her children and in particular between the testatrix and her daughters was one of caring and kindness, the court should, it seems to me, entertain some significant reluctance to vary the testatrix's dispositions by will. Quite different considerations may apply, as have been established in some of the decided cases under this section, where a marked hostility between a testator and one particular child is established to the satisfaction of the court.

Applying these principles to the facts as found by the learned trial judge in this case, I have come to the following conclusions.

Whilst the provision made for Ch. in this will probably was at the time of the making of the will in 1981 a proper provision it had, in my view, ceased to be so before the death of the testatrix in 1985. Accepting as I do the finding of the learned trial judge that by that time the testatrix was aware of the difficulties in Ch.'s marriage to the extent that as a just and prudent parent she should have made provision for the probability of the break-up of that marriage, it seems to me, bearing in mind that of all her four children Ch. had up to that time received the least financial benefit from her by a very considerable margin, that a proper provision for this particular child necessarily involved either a further testamentary disposition by codicil or otherwise, or the making of a gift inter vivos.

The testatrix by her provision for C. during her lifetime indicated in a very definite fashion her appreciation of the particular problems facing a daughter whose marriage had broken up. The logical consequence of that view would, it seems to me, have been that she should have made some improved provision for her daughter Ch., having regard to the learned trial judge's finding on the evidence that she was aware of the likelihood of a break-up of that marriage also.

I cannot agree, however, on the evidence with the learned trial judge's conclusion that in the case of C. the provision made by the combined operation of gifts given by the testatrix during her lifetime and the provision contained in the will fell short of the testatrix's moral obligation to make proper provision for her daughter. The evidence would appear to indicate that at the time of the death of the testatrix C. was established, living with her four children in a house subject to a relatively small mortgage and in a steady, well-paid job, though not at an extravagant salary and was receiving a reasonable contribution from her husband towards the maintenance of her children. Her difficulties from the time of her separation in 1974 to 1985 had been substantially aided by sums totalling just under £20,000.

In these circumstances, I cannot accept the conclusion that the provision made for her in the will of a one-quarter share in the residue was less than proper.

I would, accordingly, allow this appeal to the extent of varying the order made in the High Court by setting aside the finding of a failure properly to provide for the plaintiff, C., by affirming the finding of a failure properly to provide for the plaintiff, Ch. and by affirming the appropriate variation in the

administration of the estate of the deceased to make just provision pursuant to that finding as being to declare Ch. entitled to a two-ninth share in the premises in D. Street which were devised to W.

Griffin J.

I agree.

Hederman J.

I agree.

E.B. v. S.S. and G. McC.

In the matter of the estate of L. (otherwise B.M.) B., widow, deceased and in the matter of section 117 of the Succession Act, 1965 and in the matter of an application by E.B.;E.B., Plaintiff v.

S.S. and G.McC., Defendants

[1994 No. 139 Sp.; S.C. No. 261 of 1996]

High Court

5th July 1996

Supreme Court

10th February 1998

Succession - Will - Proper provision - Children - Grandchildren - Alleged 'failure in moral duty' - Prudent and just parent - Principles applicable - Provision by court - Succession Act, 1965 (No. 27), s. 117(1) and (2).

Section 117 of the Succession Act, 1965, provides, inter alia, as follows:-

- "(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
- (2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

The testatrix divided the bulk of her substantial estate, inter vivos, equally between her four children who included the plaintiff. The plaintiff had also received many other benefits (including educational opportunities) from his parents. The testatrix knew that the plaintiff had a drink and drug problem, that he had dissipated her gifts and was living in reduced circumstances with his wife and three children. The testatrix made no substantial provision in her will for the plaintiff, leaving her remaining estate to charity, together with small bequests to her grandchildren.

The plaintiff sought a declaration, stated to be for the benefit of his children and not for his own benefit, pursuant to s. 117(1) of the Succession Act, 1965, that the testatrix had failed in her moral duty to make proper provision for him, in accordance with her means, by her will or otherwise, having regard to the circumstances of the case. The plaintiff also sought an order, on foot of the declarations, making such provision from the testatrix's estate as to the court seemed just.

Held by the High Court (Lavan J.) in refusing the application, 1, that the time for considering a failure in a moral duty was the date of death of the testator and not the date of making of the will.

1. C.C. and Ch.F. v. W.C. and T.C. [1990] 2 I.R. 143 applied.
2. That the test for judging a failure in a moral duty was an objective one; it was irrelevant that the testatrix believed that she had made adequate provision for the plaintiff.
M. (F.) v. M. (T.) and Others (1970) 106 I.L.T.R. 82 approved.
3. That the testatrix was expected to have knowledge of all the circumstances pertaining to the fulfilment of the moral duty as of the date of her death, and that on the evidence she did have such knowledge in this case.
De B. (J.) v. de B. (H.) [1991] 2 I.R. 105 applied.
4. That a good test would be if a just and prudent solicitor would have reasonably queried whether the testatrix was fulfilling her moral duty by leaving the bulk of her estate to charity.
5. That the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend on:-

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- (i) the amount left to the surviving spouse or to the value of the legal right if the survivor elects to take this;
 - (ii) the number of the testator's children, their ages, and their positions in life at the date of the testator's death;
 - (iii) the means of the testator;
 - (iv) the age of the child whose case is being considered and his or her financial position and prospects in life;
 - (v) whether the testator has already in his lifetime made proper provision for the child.
- and further that the existence of the duty must be decided by objective considerations and that a positive failure in moral duty must be established.

M. (F.) v. M. (T.) and Others (1970) 106 I.L.T.R. 82 approved.

7. That on the objective test and taking into account the five factors above quoted, proper provision was made for the plaintiff throughout his life and that the testatrix had fulfilled her moral duty.
8. That the testatrix, having made proper provision it was not necessary for the court to consider what provision, including provision for a discretionary trust, that the court would have made.
9. That a moral duty to make such provision as would enhance the educational prospects and positions of the plaintiff's children was not a moral duty susceptible of enforcement under s. 117 of the Succession Act, 1965.

In the matter of N.S.M. deceased (1971) 107 I.L.T.R. 1 applied.

The plaintiff appealed the judgment and order of the High Court to the Supreme Court.

Held by the Supreme Court (Keane and Lynch JJ.: Barron J. dissenting) in dismissing the appeal, 1, that factors which occurred subsequent to the death of the testatrix were not relevant to the discharge or otherwise of the testatrix's moral duty to the plaintiff but they would become relevant if the court were of the view that the testatrix had failed in her moral duty and was going on to consider under s. 117(2) the extent of the provision that should be made.

2. That the testatrix had not failed in her moral duty, in the circumstances of the case, in making no further provision for the plaintiff, according to her means, in her will.

M.(F.) and M.(T.) and Others (1970) 106 I.L.T.R. 82 ; C.C.; Ch.F. v. W.C. and T.C. [1990] 2 I.R. 143 approved.

3. That the apparent needs of the plaintiff's children were not a factor which would justify the court, in the present case, in setting aside the findings of the High Court.

Per Barron J. (dissenting): That a claim stated to be made on behalf of the children of the plaintiff was capable of enforcement under s. 117(1) of the Succession Act, 1965, in so far as it permitted the plaintiff to fulfil his obligations to his dependants.

Cases mentioned in this report:-

In re B.E. & R.E. v. A.J. (Unreported, High Court, Barrington J., 14th January, 1980).

C.C. and Ch.F. v. W.C. and T.C. [1990] 2 I.R. 143; [1989] I.L.R.M. 815.

J. de B. v. H. de B. [1991] 2 I.R. 105.

H.L. v. Bank of Ireland [1978] I.L.R.M. 160.

In the goods of J.H. Deceased [1984] I.R. 599.

M.(F.) v. M.(T.) and Others (1970) 106 I.L.T.R. 82.

In the matter of N.S.M., deceased (1971) 107 I.L.T.R. 1.

S.B. (or se S.M.) v. Bank of Ireland (Unreported, High Court, Blayney J., 27th July, 1988).

Special summons.

The facts in this case are summarised in the headnote and are fully set out in the judgment of Lavan J., *infra*.

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This matter came on for hearing before the High Court (Lavan J.) on the 25th October, 1995, by way of special summons dated the 22nd February, 1994.

John M. Fitzgerald S.C. (with him Brian Spierin) for the plaintiff.

Paul O'Higgins S.C. (with him John Nolan) for the defendants.

Cur. adv. vult.

Lavan J.

5th July, 1996

1. The plaintiff is unemployed and resides in the City of Dublin.
2. The first defendant is a company director and resides in the County of Dublin.
3. The second defendant is a married woman and resides in the County of Wicklow.
4. The plaintiff is a son of the testatrix named in the title hereof late of the County of Dublin, widow, who died on the 9th December, 1992.
5. The testatrix made and duly executed her last will and testament on the 24th March, 1992 and later died without revoking or altering the said will and probate of which issued on the 26th May, 1993, out of the probate office principal probate registry to the defendants as the executrices named in the said will and they are sued in that capacity.
6. By her said will, the testatrix made a number of specific legacies and some pecuniary legacies to her grandchildren and then left all the rest, residue and remainder of her property of every nature and kind and description wheresoever situate to five charities, namely:-
 - (a) Simon Community, 21, Marlborough Place, in the City of Dublin,
 - (b) Cancer Research Fund of St. Luke's Rathgar, in the City of Dublin,
 - (c) Society of St. Vincent de Paul, Cabra Road, in the City of Dublin,
 - (d) Concern, Upper Camden Street, in the City of Dublin,
 - (e) G.O.A.L., Third World Agency, 7, Northumberland Avenue, Dun Laoghaire, in the County of Dublin.
7. The testatrix by her will did not make any provision for the plaintiff, her son.
8. The plaintiff is unemployed with dependent wife and three dependent children, all of whom are minors, and is living on unemployment assistance.
9. In all the circumstances of the case the testatrix has failed in her moral duty to make proper provision for the plaintiff, her son, in accordance with her means.

And the plaintiff claims:

1. A declaration that the said testatrix failed in her moral duty to make proper provision for the plaintiff herein, her son, in accordance with her means by her will or otherwise having regard to all the circumstances of the case.
2. An order of the court making such provision for the plaintiff as to this Honourable Court seems just pursuant to the provisions of s. 117 of the Succession Act, 1965.

As to the evidence

The plaintiff gave evidence that he was 40 years old, married and now separated. His late father was a very successful businessman who, upon his death in 1985, left an estate worth over £1,000,000. Both the plaintiff's father and mother fully provided for their three children. The plaintiff attended excellent schools at both primary and secondary level as did all his sisters. He later attended university for one year. Thereafter, he worked for his father's company for some three years. Following that, he moved to a number of European countries where he obtained casual employment over a period of four years. In 1980, he returned to Ireland and established a small haulage business obtaining business from his father's firm. By 1983, the plaintiff with his father's support decided to attend university. He was supported financially

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in this endeavour during the course of each academic year and worked his vacations in the family firm. He completed three of that four year course.

In 1988, he married. He now has three children aged 12, 10 and 8 years. On his own evidence he says he is maintaining this action on their behalf. He made it clear he is not maintaining an action on his own behalf. In 1983, his father put him into occupation of his residence which is in the joint names of the plaintiff and his sister M.

His mother was left a large estate in excess of £1.3 million. Her character, on the evidence, was impeccable at all times. Suffice it to say after a short period of widowhood, she decided that her fortune ought to be divided amongst her children.

I found the evidence of Mr. Halpenny, solicitor compelling in the context of this case. With the profound and compelling evidence of a professional will-drawer, he described the deceased as "a lady not for turning". He has left me in no doubt that the deceased was a sensible, caring, understanding mother. The deceased's decision to give each of her children part of the estate when, on the evidence, she took the view that they needed it then rather than upon her death impressed me greatly.

In relation to her commitments, her beliefs and her obligations to each of her children, I accept as fact Mr. Halpenny's evidence. This was a sensible lady who fully understood her duty to each of her children. I therefore accept Mr. Halpenny's testimony in full as accurately describing the testamentary capacity of this deceased lady immediately upon her demise.

When this case is reduced to its essentials, I am faced with a claim, by the plaintiff on behalf of his children and no other claim.

The plaintiff makes no challenge against his mother's moral duty. Essentially, he wants another bite of the cherry on behalf of his children.

As will be clear from the foregoing I accept the evidence adduced by the executors.

The section

Section 117 of the Succession Act, 1965 provides, inter alia, as follows:-

"(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or by otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

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

The remaining sub-sections of s. 117 are not relevant.

The plaintiff's claim

The plaintiff in these proceedings is the son of L. (otherwise B.M.) B. ("the testatrix") and he claims that the testatrix, his mother, failed in her moral duty to make proper provision for him in accordance with her means. The plaintiff is one of four children of the testatrix and none of the other children makes any similar claim. The testatrix by her will conferred no substantial benefit upon her children, giving to them

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certain items of personal effects. The testatrix by her will left pecuniary legacies of the sum of £5,000 each to her grandchildren and left the residue of her property among five charities:-

- (a) The Simon Community.
- (b) Cancer Research Fund.
- (c) The Society of St. Vincent de Paul.
- (d) Concern.
- (e) G.O.A.L.

The plaintiff is unemployed, and was unemployed at the date of death of the testatrix, he has a wife who is dependant upon him and who is also unemployed and has three dependent children, all of whom are of school-going age at primary or secondary level.

The testatrix in 1987, made substantial provision for each of her children. At the date of death of the testatrix, the plaintiff had dissipated the benefit conferred on him by the testatrix, was in very poor financial circumstances, was suffering from drink and drug addiction and was experiencing marital difficulties.

The plaintiff claims that, notwithstanding the substantial provision made for him in 1987, that in view of his circumstances at the date of the death of the testatrix, further provision should have been made for him and in failing to make that provision the testatrix failed in her moral duty to make proper provision for the plaintiff, her son, in accordance with her means.

At the commencement of the case, in line with previous authority, I asked if the parties were agreed that the case should proceed in two stages. The first question to be addressed was:-

(a) Whether the testatrix had failed in her moral duty to make proper provision for the plaintiff, her son? If this question was answered in the affirmative, then the court would proceed to address the second stage of the application.

(b) What provision should be made for the plaintiff?

The parties indicated they were in agreement with this approach. The evidence heard by the court related to the first question only and these submissions also relate only to that aspect of the case.

Facts not in contention

It is submitted the following facts were established by the evidence in the case as heard by the court on the 25th October, 1995:-

1. The plaintiff's father died in 1985, having established a successful business. This business was a company involved in laboratory supplies. At the date of his death, the plaintiff's father held 56% of the shares in the company. On the death of the plaintiff's father, his widow, the testatrix in this case, became entitled to the 56% of the shares in the company. The plaintiff's parents had four children. The plaintiff is the youngest and only son and is now aged forty years. He has a sister S., the first defendant aged about 45 or 46 years of age (as of the date of trial); a sister G., the second defendant, aged about 46 years of age (as of the date of trial); a sister M. aged about 44 years of age (as of the date of trial).
2. Each of the four children was given a secondary school education.
3. The plaintiff left school at the age of eighteen years having attained two honours in his Leaving Certificate. He then went to university to study commerce but did not finish his first year. He then worked at various jobs between 1974 and 1983, initially working in his father's business.
4. During this period he also lived in London for a time and also lived in Holland for a period.
5. In 1983, he went to Trinity College to take a degree in history and German. He qualified with a B.A. (Mod.) - a pass degree - in 1986. In 1987, he attempted to improve upon his degree in order to do a Higher Diploma in Education (he required an honours degree to do this) but he did not finish the year when it became apparent he would not be eligible to do the Higher Diploma in Education.

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6. The plaintiff started drinking at the age of sixteen or seventeen and he also took some cannabis in or about the age of eighteen years. He also abused other substances such as cocaine and heroin. He developed a craving for cocaine and became an alcoholic and his drinking went out of control in or about the year 1987. In 1991, he received treatment in St. John of Gods for alcoholism and received further treatment in the Rutland Centre for alcoholism in 1992. The treatment periods in St. John of Gods and the Rutland Centre were short. In 1993, he received treatment in Cluain Mhuire for alcoholism. This treatment was over a five month period and while the plaintiff was free to leave Cluain Mhuire he persevered with the programme and he has not taken any drink or drugs since August, 1993.

7. The plaintiff married in 1988. His wife is not working.

8. He has three children, Sarah aged 12 (at the date of trial), Emma aged 10 (at the date of trial) and Rory aged 8 (at the date of trial). They are all attending non-fee paying schools.

9. In 1987, he received an allocation of shares from his mother in the company known as B.M. Browne Ltd. which realised a net amount (after the payment of gift tax) of about £275,000.00. Each of his siblings received a similar gift at that time. By 1992, the plaintiff had dissipated the money given to him through irresponsible living. Some of the money was spent on his house, which was a house given to him and his sister by his father in 1983. The house remains in the name of the plaintiff and his sister. He currently lives in the house with his wife and three children. In 1993, the plaintiff was sentenced to six months imprisonment for driving without insurance and he served eleven weeks in jail for this motor offence.

10. The testatrix knew at the date of her death that the plaintiff was an alcoholic and had dissipated the monies given to him and was in very poor financial circumstances. The testatrix was aware of his treatment in St. John of Gods and the Rutland Centre and was also aware of some marital difficulties which the plaintiff experienced during his periods of drinking and drug abuse.

11. In or about 1987, the testatrix engaged Mr. Halpenny of the firm P.C.L. Halpenny and Co., solicitors to make a will for her. It was the first will drawn up by Mr. Halpenny. When Mr. Halpenny was taking instructions for the making of the will, the testatrix described the plaintiff as being "happy go lucky" and a "ne'er do well" and "still a student at 32 years of age".

12. At the time of making her will, her assets were a house, an apartment, an account with the Bank of Ireland, shares in her husband's company, 14,287 Allied Irish Bank plc. shares, shares in Save and Prosper, a First National Bond.

13. The testatrix told Mr. Halpenny that she wanted to treat all her children equally. On the 3rd September, 1987, the testatrix spoke to Mr. Halpenny on the telephone and told him she wished to transfer her shares in her husband's company to her children, inter vivos. In October, 1987, Mr. Halpenny prepared four stock transfer forms and as a result of the share transfer, 166 shares were given to the plaintiff.

14. On the 5th October, 1988, the testatrix visited Mr. Halpenny and told him she wished to make a new will. The changed aspect of this was that she did not want to leave the residue of her property to her children. The reason she gave for this was her children were already provided for by the gift of the shares in 1987.

15. Mr. Halpenny suggested to the testatrix that "charity begins at home" and that some of the residue should be left "at home" and given to her children. The testatrix refused to consider this and was in Mr. Halpenny's words "dogmatic" about it. On that occasion, she told Mr. Halpenny that the plaintiff, and his sister M., did nothing but enjoy themselves and the plaintiff was an eternal student at the age of 35 years. The testatrix gave her instructions and named five charities as her residuary legatees and devisees. Mr. Halpenny prepared the will which she executed on the 10th October, 1988.

16. On the 20th March, 1992, the testatrix attended again on Mr. Halpenny and said she wished to make a new will. This involved a change in the person who was to benefit from a bequest of her motor car. The paintings which had been executed by M. were to be left to her and a nebuliser was to be left to the plaintiff. She told Mr. Halpenny "E. is an alcoholic and is barred from his house by his wife". She told Mr. Halpenny she did not wish to change the main terms of her will and the charities were still to be the beneficiary. Mr. Halpenny decried the testatrix as "a lady not for turning".

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17. The second defendant gave evidence and stated that it was the approach of herself and her sister, her co-executrix and first defendant, that they wished to see their mother's wishes upheld but they personally had no difficulty with provision being made for the plaintiff. The second defendant confirmed that the testatrix was aware that the plaintiff was an alcoholic and had dissipated the money he had been given in 1987, by that the date of death of the testatrix in 1992.

The law

The provisions of s. 117 have been considered in a large number of cases and it is clear many of the cases turn on their own particular facts. A number of principles emerge from the cases:-

(a) That the time for considering whether there has been a failure by the parent in his/her moral duty towards the claiming child is not the date of making the will but the date of death. *M.(F.) v. M.(T.) and Others* (1970) 106 I.L.T.R. 82 (decision of the High Court) and *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143 - (decision of the Supreme Court). There is some academic argument as to whether the court should take into account any change in circumstances which may arise after the death of the deceased [see *Succession and Judicial discretion in Ireland: the s. 117 cases* by Mark Cooney 15 (Irish Jurist) (N.S.) 62 and *Succession Act: s.117 and Life After Death* by John Mee, March 1995 Incorporated Law Society of Ireland Gazette]. The circumstances of the plaintiff in this case does not appear to have worsened since the date of death and he has made efforts to maintain sobriety and be free of drugs. His financial circumstances however, are much the same as of the date of death.

(b) The test applicable in deciding if there has been a failure in the moral duty is an objective one and it is irrelevant whether or not the testatrix regarded herself as having made adequate provision for her son. (*M.(F.) v. M.(T.) and Others* (1970) 106 I.L.T.R. 82 - cited above). An application may therefore succeed even if the behaviour of the testatrix was not in a moral sense blameworthy. The testatrix may have done her best as she saw it to discharge her duty but may still, as a practical matter, have failed to make proper provision for the child.

(c) The testatrix is expected to have knowledge of all the circumstances pertaining to the fulfillment of the duty as of the date of death (*In re N.S.M.* (1971) 107 I.L.T.R. 1). In that case Kenny J. attributed to a testator the capacity to anticipate what might occur after his death. In the case of *In Re N.S.M.*, litigation had been commenced by two women claiming to be the surviving spouse of the testator under Irish law. The testator had divorced his first wife and remarried in England. The court held that the testator would have been expected to anticipate that type of litigation and the effect it would have on a residuary gift to a child, which as a result of the litigation had shrunk to virtually nothing. Kenny J. stated (at p. 6 of the report):-

"The court must attribute to the testator on the day before his death knowledge of the amount of estate duty which will be payable on his estate and a remarkable capacity to anticipate the costs of the litigation which will follow his death. I realise that this is unreal, that the amount of estate duty payable is usually mercifully hidden from most testators and that it is impossible to anticipate what litigation will follow on death. I am convinced, however, that s. 117 must be interpreted in this way."

(d) It is submitted that it is clear therefore that the court must attribute to the testatrix full knowledge of the plaintiff's circumstances in this case, although it has been established on evidence that she did know of her son's very difficult circumstances.

(e) Section 117(2) requires the court to consider the alleged failure on the part of the testatrix in her moral duty to make proper provision for the plaintiff as a "prudent and just parent". In the case of *J. de B. v. H. de B.* [1991] 2 I.R. 105 Blayney J. quoted from Barron J. in the case of *In the Goods of J.H. deceased* [1984] I.R. 599 at p. 607 as follows:-

"[It] is the decision of the court on the hearing of the application which has to be fair. Such a decision, would not, in my view be fair, if it disregarded a relevant factor merely because it occurred after the date of death of a testator."

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(f) Therefore, while it might be argued that at the date of death of the testatrix the plaintiff was still an alcoholic it was imprudent of the testatrix to make provision for her son, leaving aside for the present consideration of devices that could have been used to make provision without actually giving money into his hands. The fact he has made strenuous efforts to rehabilitate himself vis a vis his alcohol and drug addiction is a circumstance, while occurring after the death of the testatrix, it is submitted the court can take into account when considering the circumstances as a "prudent and just parent".

(g) Section 117(2) further enjoins the court to consider "any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

It is submitted that as the other children of the testatrix are well provided for and have no special need, unlike the plaintiff, that the court should consider the matter in a way that is as fair as possible to the plaintiff.

In a case of *J. de B. v. H. de B.* [1991] 2 I.R. 105, Blayney J. quoted with approval the statement of the law as cited above, by Barron J., describing it as "a very clear analysis of how subsection (2) of section 117 should be construed".

(h) The case of *M.(F.) v. M.(T.) and Others* (1970) 106 I.L.T.R. 82 (cited above) contains the guidelines which have been consistently adopted in subsequent cases in relation to s. 117 and which were approved by the Supreme Court in the case of *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143. In the particular case the testator had left all his property to his widow and two nephews. He left nothing to the plaintiff who was an adopted son. The plaintiff was 32 at the date of death and had married and had two children. Kenny J. stated at p. 6 of the report as follows:-

"An analysis of section 117 shows that the duty it creates is not absolute because it does not apply if the testator leaves all his property to his spouse, (section 117, sub-s. 3), nor is it an obligation to each child to leave him something. The obligation to make proper provision may be fulfilled by will or otherwise and so gifts or settlements made during the lifetime of the testator in favour of a child or the provision of an expensive education for one child when the others have not received this may discharge the moral duty. It follows, I think, that the relationship of parent and child does not of itself and without regard to other circumstances create a moral duty to leave anything by will to the child.

The duty is not one to make adequate provision, but to make proper provision in accordance with the testator's means and in deciding whether this has been done, the court may have regard to immovable property outside the Republic of Ireland owned by the testator. The court, therefore, when deciding whether the moral duty has been fulfilled, must take all the testator's property (including the immovable property outside the Republic of Ireland) into account but if it decides that the duty has not been discharged, the provision for the child is to be made out of the estate excluding that immoveable property.

It seems to me the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon -

(a) the amount left to the surviving spouse or the value of the legal right if the survivor selects [sic] to take this, [This consideration does not arise in this instance as the testatrix was a widow]

(b) the number of the testator's children, their ages and their positions in life at the date of the testator's date, [this is a relevant consideration in this case]

(c) the means of the testator, [this is a relevant consideration in this case]

(d) the age of the child whose case is being considered and his financial position and prospects in life, [this again is a consideration in this case]

(e) Whether the testator had already in his lifetime, made provision for the child. [This again is a consideration in this case but it is submitted that on the facts of this particular case when this is

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considered at the date of death of the testatrix given the plaintiff's changed circumstances that the provision made was not proper].

The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive".

(i) This dictum was approved by the Supreme Court in the case of C.C. and Ch.F. v. W.C. and T.C. [1990] 2 I.R. 143. Finlay C.J. who delivered the judgment of the Court (which was unanimous), quoted the above passage from the decision of Kenny J. and went on to say at p. 148:-

"I would adopt and approve of this general statement of the principles applicable to an application under s. 117 as being a correct statement of the law.

I would however add to it further principles which may to an extent be considered a qualification of it. I am satisfied that the phrase contained in s. 117, sub-s. 1 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on the applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under this section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established".

(j) It is submitted that upon the evidence positive failure has been established in this instance. The testatrix was aware of the plaintiff's circumstances but set her face against making any further provision for him on the basis she did not wish to prefer one child over the other. This was despite her solicitor pointing out to her that "charity began at home". The testatrix considered her residuary bequest twice. In 1988 and in 1992, and she was aware and told her solicitor of the plaintiff's difficulties in 1992, that he was an alcoholic and was barred from his house by his wife. But she still did not alter the terms of her will and left the bulk of her estate to charity. It is submitted she could have, by means of a number of devices, provided for her son in a manner which would not have allowed him have direct access to funds and this would have fulfilled her moral duty towards him.

(k) In the case of S.B. (or S.M.) v. Bank of Ireland Unreported, High Court, Blayney J., 27th July, 1988) the trial judge stated the law as follows:-

"Basically there are two issues which may require to be determined in all proceedings under section 117. First, the court must determine whether there has been a failure on the part of the testator of the moral duty mentioned in the section and which he owes to the applicants.

The second question, (which would only arise if the first question were answered affirmatively) concerns the provisions which the court should make out of the testator's estate.

The matters to be taken into account by the court in forming its opinion were enumerated by Kenny J. in the much cited passage from his judgement in M.(F.) v. M.(T.) and Others (1970) 106 I.L.T.R. 82."

(l) The judge then went on to deal with the facts of the case before him:-

"At the date of the testator's death the plaintiff was aged 29. She was separated from her husband and was not receiving any alimony from him. She had no home of her own and had no job. She was living with her mother in the family home and while the testator might have envisaged that she could continue to live there during her mother's lifetime, it was uncertain how long this would be and in any event it was normal that a married woman with a child would want to live on her own. Her sole income was what she was receiving from the trust fund of £50,000.00 which had been set up for her. Having regard to the testator's very substantial means and having regard to the provisions she made for P.M. and A.M. during his lifetime, the former being given shares valued at £287,000.00 and the latter having had £300,000.00 set aside for him to buy a farm, and having regard to the plaintiff's special position, a broken marriage, no job, no home of her own, a daughter to bring up and educate, I am of opinion the testator failed in his

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lifetime to make proper provision for the plaintiff and equally failed to do so by his will since out of an estate of £1,500,000.00 all the plaintiff was given was a share of residue worth £90,000.00 and a remainder interest in 20% of the contents of Knockrobin. This did not, in my opinion, amount to proper provision for the plaintiff in accordance with the testator's means. I am of opinion accordingly that the testator failed in his moral duty to make proper provision for the plaintiff in accordance with his means and so the court's application is to make such provision for the plaintiff as is just."

(m) In the case before Blayney J. the testator had made a substantial bequest to charity of the order of £400,000.00 and it was from this amount extra provision was made for the claiming daughter.

(n) It is submitted the matter before Blayney J. was somewhat similar to the case now before the court in that the circumstances of the daughter had altered between the time of an inter vivos disposition in her favour on the date of death of the testator.

Application of the law to the facts of this particular case

The court, is required by the section to consider the matter as a "prudent and just parent". The court is required to consider the matter objectively and in the light of all the circumstances pertaining at the date of death of the testatrix and other relevant factors which should fairly have a bearing on the court's consideration of the matter.

The ethos behind the provisions of Part IX of the Succession Act, 1965, is to prevent spouses and children of testators becoming a charge on the State, where this need not happen. This part of the Succession Act, 1965, restricts the testamentary freedom of married persons and persons with children, whether marital or non-marital.

It is submitted that the testatrix did not pay proper attention to the position in life of each of her children. She did not, having regard to her means, pay proper attention to the financial position and prospects in life as of the date of death of the testatrix. She did not have regard to the fact that the gift inter vivos made to the plaintiff had been dissipated by him.

The court must consider the matter objectively and not be influenced by the view of what the testatrix regarded was correct or moral. It is submitted that a good test would be to consider whether a prudent and just solicitor when being asked to draft a will for a testator on being informed of all the facts established before the court, which are largely not disputed would have reasonably queried if the testatrix was fulfilling her moral duty as imposed by s. 117, by leaving the bulk of her estate to charity. It is submitted that a prudent, reasonable and just solicitor would have suggested provision be made and Mr. Halpenny was in fact of view that all the residue of the estate should not be left to charity. No doubt Mr. Halpenny's view would have been all the stronger if he had been fully aware of all the plaintiff's circumstances as of the date of drafting of the last will of the deceased.

It is submitted that a prudent and just parent would have regard to the possibility of a "ne'er do well" child rehabilitating him/herself and would have by the employment, if necessary, of discretionary trust provisions, have ensured there was a fund available to that child upon rehabilitation.

It is further submitted that the testatrix's "dogmatic" approach and her unwillingness to "turn" were themselves failure to make proper provision for the plaintiff in accordance with her means.

There is no doubt the plaintiff was a prodigal son and he has fairly admitted this. He has also made strenuous efforts to rehabilitate his life and has succeeded in doing so. These are circumstances to which a prudent and just parent would have regard and would act accordingly.

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Without wishing to impinge on question 2 (as to how provision should be made) there were a variety of ways open to the testatrix to make provision for the plaintiff (her son) which would not involve him having direct access to funds. These do not appear to have been considered by her.

Costello J. (as he then was) in the case of *H.L. v. Bank of Ireland* [1978] I.L.R.M. 160, decided that he could set up a discretionary trust in favour of a child where he found there was a failure in a moral duty and it is submitted that if it was open to the court to do this it was also therefore open to the testatrix to make provision for the plaintiff in this way.

The plaintiff therefore submits that there was a failure on the part of the testatrix to make proper provision for the plaintiff, her son, in accordance with her means and the court should therefore consider what provision should be made for him.

The defendants agree that s. 117(1) and (2) of the Succession Act, 1965, are the sections which pertain to the plaintiff's application and that the remainder of the section is irrelevant to the proceedings. The defendants agree that the section of the plaintiff's submission under the above heading sets out the plaintiff's allegations alleged to give rise to an entitlement to a provision under s. 117 of the Succession Act.

The law

So far as it has application to the instant case, the three features of the legal position on which the defendants would wish to place emphasis are as follows:

(a) As set out in the plaintiff's submission, the relevant date upon which to view the issue of failure in moral duty, subject to exceptions which have little bearing in the instant proceedings, is the date of death of the testator.

(b) That the factors to be taken into account in deciding whether or not a failure has occurred are the five considerations set out in the decision of Kenny J. in *M.(F.) v. M.(T.) and Others* (1970) 106 I.L.T.R 82 at p. 87 and affirmed by the Supreme Court in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143.

(c) That as a general principle testamentary freedom is not to be trammelled by the law unless an actual dereliction has occurred as viewed by any objective standard. This emerges clearly from the decision of the Supreme Court in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143, already cited in the plaintiff's submission and which is cited again for the purposes of emphasis. As it was put by Finlay C.J. at p. 148:

"I am satisfied the phrase contained in s. 117, sub-s. 1 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for the child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The Court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions."

In the defendants' submission, it might well be that some prudent and just parent would have made provision in some form for the plaintiff. However, in the defendants' submission it is not necessary for the defendants to establish that the will was "perfect" in the view of the court. In the defendants' submission it is necessary for the plaintiff to satisfy the court that the particular approach taken by the testator could not be justified on objective moral grounds prior to the intervention of the court.

(d) While the defendants accept that the test of whether or not a moral dereliction has occurred is an objective one, it is plain also that the court in each case is looking at the facts of that case in particular.

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In the defendants' submission a court is entitled to take into account the attitude of a particular testator in assessing in the position for the purpose of a decision under section 117. In this regard the plaintiff's submission is perhaps slightly misleading where it states "the court must consider the matter objectively and not be influenced by the view of what the testatrix regarded as correct or moral". In discussing the matter in *M. (F.) v. M. (T.) and Others* (1970) 106 I.L.T.R. 82, Kenny J. observed that the view of the testator that he did not owe any moral duty was not "decisive". The judgment certainly did not indicate that no regard could be paid to that view.

Application of the law to the facts of the case

In the defendants' submission the question as to whether the testatrix's moral duty has been discharged is to be viewed from the date of death. It is to be viewed in the content of the five criteria found by Kenny J. in *M. (F.) v. M. (T.) and Others* (1970) 106 I.L.T.R. 82. In the instant proceedings there is no surviving spouse. No other children of the testatrix are relevant to the court's consideration. It is plain that the testatrix had sufficient means to leave a substantial legacy, if she wished to do so, to the plaintiff. In the defendants' submission, it is the last two factors contemplated by Kenny J. which require balancing against one another in order to arrive at a true perception as to whether the testatrix failed in her moral duty to the plaintiff in permitting to survive to the date of her death, her will made on the 20th March, 1992.

The plaintiff was 38 years of age at the time of his mother's death. He had family commitments, having a wife and two children. In the defendants' submission he had reached an age where, unless he had suffered from neglect by his parents and the testator in particular, he would have been expected to be independent. His parents over the years had given him many chances. After his secondary education in a good boarding school he was sent to University College Dublin. When he did not persevere with that opportunity he was given an opening in his father's firm. He did not show long term enthusiasm for that job and left for England and Holland for a number of years. On his return his father again spent appreciable money although his son was by now approaching 27 years of age, on setting him up in his own business. This further opportunity was not availed of and the insurance payment made following the plaintiff's crashing of his second van was not applied to the business. The business thereby ceased to exist.

At the age of nearly 29 the plaintiff took the view that he would like to attend Trinity College to do history and German. Although he was well past the age where parental financial support for such an enterprise would normally be expected, and although he had been given many earlier opportunities by his parents, his father paid for him in Trinity College and assisted in the support of his family during his time there. While he got a degree, his time appears not otherwise to have been put to good use, as no work of any significant kind appears to have been done by him on the basis of his qualification in the eight years since 1987.

Finally, in October, 1987, the plaintiff was left, as were his three sisters, approximately £360,000 gross which after tax amounted to just over £275,000. On the plaintiff's evidence this money was almost entirely wasted between 1987 or early 1988 and 1992.

It is in this context that the plaintiff makes the case that, looked at from the perspective of December, 1992, having regard to the provision which had been made for him and the opportunities which had been given to him in the course of his lifetime, his mother was in breach of her moral duty to make proper provision for the plaintiff. It is the defendants' case that vast provision had been made for the plaintiff on many occasions over an extended period such as to give rise to a position where it would be quite impossible to claim that on any objective basis the testator had not made proper provision during her lifetime for the plaintiff. Undoubtedly, the plaintiff claims that his financial position by the time of his mother's death was not a happy one. However, in the defendants' submission it would require a straining

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of language of a wholly artificial kind to say that the plaintiff's parents had not amply discharged their moral duty to him by the time of death.

In the context of the passage in the Supreme Court in the case of *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143, even if the Court itself would have formed different testamentary positions, it could not at all be said that a positive failure in moral duty has been established by the plaintiff. The defendants argue that the ultimate disposition by the plaintiff of the remaining £400,000 in her will to the five named charities is amply in accordance with concepts of justice and prudence having regard to the manner in which the provision made over the years for the plaintiff had been wasted. From the date of the plaintiff's leaving Trinity College to the date of the testator's death, the plaintiff, on his own admission had done no work of any description. This he attributes to his becoming a patent, as opposed to latent, alcoholic and to other substance abuse. Whether this is so or not, it appears that the failure of the plaintiff to do any work for that period of five years was attributable either directly to his receipt of the money in question or indirectly by reason of his having had the means to satisfy his alcoholic tendencies.

In either event the defendants argue that having regard to the law as set out above it was neither unjust or imprudent of the testatrix to have left her money where it was certain to do good and not to give further funding of a kind which by any standard had done a lot of harm and no good of any kind. In the defendants' submission the plaintiff cannot discharge the necessary burden having regard to the evidence. Finally, the defendants would observe that the thrust of the plaintiff's case appears to be that the testatrix did not fail in her moral duty to the plaintiff. Rather, the plaintiff complains that the testatrix did not make such provision as would enhance the educational prospects and position of his own children. In effect the defendants would argue that the real matter in issue is as to whether a moral duty to a daughter-in-law and grandchildren might have been breached. If this is so, then it is not a moral duty susceptible of enforcement under the provisions of s. 117 of the Succession Act, 1965.

Application pursuant to s. 117 Succession Act, 1965

The question before the court, is whether or not the testatrix in the instant case has failed in her moral duty to make proper provision for the plaintiff in accordance with her means pursuant to s. 117 of the Succession Act, 1965. This duty to make proper provision may be fulfilled by "will or otherwise" and if the court finds that there has been a failure in moral duty, according to s. 117(1) of the Act of 1965, the "court may order that such provision shall be made for the child out of the estate as the court thinks just". When considering such a claim, the court must do so from the point of view of "a prudent and just parent", taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible . . . (s. 117(2) of the Act).

In the instant case, the testatrix did not make provision for any of her four children in her will, save for a few personal items, leaving instead her estate (worth in the region of £300,000) to five named charities. During her lifetime in 1987, she gave each of her children a substantial inter vivos gift in the form of shares. The plaintiff who is the testatrix's only son, sold his shares for a sum of £270,000 after tax. By the time of his mother's death in 1992, the plaintiff had dissipated this money and was and still is unemployed, married with three dependant children and has a severe drink problem (although now he is trying to rehabilitate himself). He now asserts that his mother failed to make proper provision for him in her will.

In deciding whether there has been a failure in moral duty, the courts must look to the particular facts of each case and consider the matter objectively and in the light of all circumstances pertaining at the date of death of the testator, (per *Kenny J., M. (F.) v. M. (T.) and Others* (1970) 106 I.L.T.R. 82.

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In the celebrated and much stated *M. (F.) v. M. (T.) and Others* (1970) 106 I.L.T.R. 82, Kenny J. laid down 5 guidelines which were approved by the Supreme Court in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143, to establish whether there has been a failure to make proper provision on the part of a testator. These guidelines or factors to be taken into account at the date of death are as follows:-

- (i) The amount left to the surviving spouse or to the value of the legal right if the survivor elects to take this,
- (ii) the number of the testator's children, their ages and their positions in life at the date of the testator's death,
- (iii) the means of the testator,
- (iv) the age of the child whose case is being considered and his or her financial position and prospects in life,
- (v) whether the testator has already in his lifetime made proper provision for the child.

In the present case, the first factor is irrelevant. The testatrix had four children, all of whom were in their forties at the time of her death, all appeared to be financially secured save for one daughter who was unemployed and the plaintiff himself. The testatrix had quite substantial means (the residue of her estate was worth in the region of £300,000) and the applicant is now 40 years of age and is in poor financial circumstances. Applying the last of Kenny J.'s guidelines, the testatrix had given a substantial inter vivos gift in the form of shares to each of her four children but nothing was provided by will for them. Kenny J. in the *M. (F.) v. M. (T.) and Others* at p. 87 states that "the relationship of parent and child does not of itself and without regard to other circumstances, create a moral duty to leave anything by will to the child". He also added that there is a moral duty on the part of a testator to make proper provision for a child but that this duty may be discharged inter vivos by gifts or by providing the child with a high standard of education, or in some other way.

Notwithstanding the inter vivos gift of £270,000 to the plaintiff, there are other relevant factors to be taken into consideration in determining whether the testatrix had discharged her moral duty and these are as follows:-

- (i) The plaintiff was well provided for in his life by both his parents. On leaving school, he was given the opportunity to attend University College Dublin, but left this after one year.
- (ii) His father then gave him a job in his own company which he later abandoned and went to work abroad.
- (iii) On his return home from working abroad, his father set him up in his own business.
- (iv) At the age of 29, the plaintiff then decided to pursue a degree course in Trinity College Dublin, which his father financed and he also maintained the plaintiff and his family throughout his studies from 1983 to 1986.
- (v) In addition, the plaintiff and his family have been living in rent free accommodation in a house in Churchtown, which the father had purchased for the plaintiff, with one of his sisters enjoying a half share interest.

Judging objectively, from the point of view of a prudent and just parent, it would appear from the aforementioned facts that proper provision had been made for the plaintiff throughout his life.

In *re B.E. & R.E. v. A.J.* (Unreported, High Court, Barrington J., 11th January, 1980) a case which is similar to the instant case, a testatrix during her lifetime had made provision for her children but had not done so by will. She had given gifts to each of her children in the form of property transfers, save for one son (the claimant) who apparently had a drink problem and who had expressed a desire not to be involved in the management of property. With regard to this son she transferred property to another son who was to pay the claimant an annual tax free income. Barrington J. was of the opinion that the testatrix had wanted to provide for this son as she had provided for the other children and the form of the gift reached was by virtue of the fact that the son did not wish to manage the property. The judge held that he "was not

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prepared to hold that she [the testatrix] failed in her moral duty towards him [her son] by neglecting to make further provision for him in her will".

However, in the instant case, it is contended that despite provision made for the plaintiff, the testatrix failed in her moral duty to make provision in her will for the plaintiff, for at the time of her death his circumstances had changed and she was aware of this.

Counsel for the plaintiff cited *S.B. (or S.M.) v. Bank of Ireland* (Unreported, High Court, Blainey J., 27th July, 1988), as being similar to the present case in that, the daughter was given an inter vivos gift in the form of a £50,000 trust and under the terms of the will she was given a share in the residue of the testator's estate worth £90,000. It was held that no proper provision had been made for the daughter, for at the time of the testator's death her circumstances had changed from the date when the gift had been made, in that she was separated from her husband, had a child to bring up, no job and very little qualifications, no maintenance support and no home.

However, that case can be distinguished from the one at hand, due to the fact that Blainey J. reached his decision on the basis that the applicant's brothers had been greatly provided for in the testator's lifetime in comparison to the applicant. One of the brothers had received £287,000 and the other brother had £300,000 set aside for him to buy a farm. It was this factor which weighed heavily in the daughter's favour. In the present case, the plaintiff had been given the same inter vivos gift as his sisters and was in some respects better provided for than his siblings. Unlike the applicant in *S.B. v. Bank of Ireland*, the plaintiff in this case has his own home, courtesy of his father and has a university qualification which could improve his job prospects, but from the time of receiving his shares in 1987, he has not taken up any form of employment. His change in circumstances while they are regrettable were brought about by his own actions, which the plaintiff admits in his affidavit.

If it is to be argued, as counsel in the instant case have, that a testator, despite making a substantial gift to a child during his lifetime, has failed in his moral duty by not making further provision in his will for the child as a result of a change in circumstances in the child's life brought about by his/her own actions, then the question which must be raised is when exactly is a parent's moral duty to a child discharged? Is a parent expected to continue supporting a child financially throughout their lives and even after their death? Surely not, save in the case where the child is mentally or physically disabled. There must come a time when a parent having made provision for a child during his lifetime, that such a child is then established in life and so relieving the parent of his moral duty. Also, if the courts were to support the argument raised by counsel, this could bring about a situation whereby, parents might be reluctant to make gifts to their children during their lifetime (which would be of most benefit then to a child to give them a start in life) as they could still be required to make further provision in their wills.

It is also contended by counsel for the plaintiff, that the testatrix could have provided for her son, in a manner which would not have given him direct access to funds and that she should have had regard to the possibility of him rehabilitating himself and thereby have created a discretionary trust for him. In support of this the case of *H.L. v. Bank of Ireland* [1978] I.L.R.M. 160 has been cited. In that case Costello J., set up a discretionary trust in favour of a child where there had been a failure in moral duty and counsel in the present case argue that if it was open to the courts to do this, then it was also open to the plaintiff to set up a trust for the plaintiff.

However the *H.L. v. Bank of Ireland* turns on its own facts. The child concerned was a paranoid schizophrenic who was in urgent need of psychiatric care and Costello J. (as he then was) felt that the best means of providing for him was by way of a trust. The court had the discretion to make this order as there was no doubt that there had been a failure to make proper provision for the children by the testator both during his lifetime and by will. In fact none of the children had received a proper education and the

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testator had physically ill-treated them throughout their lives. In comparison, the plaintiff herein did not suffer from any mental illness and had been well provided for throughout his life by both his parents. He had been set up in his own business, was given a university education and also a substantial inter vivos gift worth £270,000.

Also, the courts are reluctant to interfere too much in the testamentary dispositions of the deceased. Finlay C.J. in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143 stated the "court should not, . . . make an order under the section [117] merely because it would on the facts proved have formed different testamentary dispositions. A positive failure in moral duty must be established".

Each case must be looked at on its own merits. The fact that in the present case, the testatrix did not set up a trust for her son, it does not necessarily follow that she had failed to make proper provision for him. In *re B.E. & R.E. v. A.J.* (Unreported, High Court, Barrington J., 14th January, 1980) the testatrix made provision for her son by way of a trust, as a result of the son explicitly stating that he did not wish to be involved in property management. The plaintiff in the instant case did not make any direct remarks about the gift of shares he received. If the court were to find that there was a failure on the part of the testatrix to carry out her moral duty towards the plaintiff, it would be at the discretion of the court to decide if the plaintiff would be best provided for by trust. But, in order to do so, a positive failure in moral duty must be established and judging by the facts and circumstances pertaining to this case, the testatrix's moral duty has been discharged.

On the evidence and the applicable law, I find that the plaintiff has not established his claim and same is hereby dismissed. As a result of this finding it is not necessary to consider the second question. The plaintiff appealed to the Supreme Court from the judgment and order of the High Court by notice of appeal dated the 30th August, 1996.

The appeal was heard by the Supreme Court (Keane, Lynch and Barron JJ.) on the 9th December, 1997.

John M. Fitzgerald S.C. (with him Brian Spierin) for the plaintiff.

Paul O'Higgins S.C. (with him John Nolan) for the defendants.

Cur. adv. vult.

Keane J.

10th February, 1998

The facts in this case are not significantly in dispute and may be shortly stated.

The plaintiff's father built up a successful business from what appears to have been a relatively modest foundation. At the date of his death in 1985, he owned 56% of the shares in the company, to which his widow, the plaintiff's mother and the testatrix in this case, then became entitled. There were four children of the marriage, the plaintiff, who at the date of the trial in the High Court [1995] was aged 40, and his three sisters, S.S., G. McC. and M. who are older than him and who, at the date of the trial, were in their mid forties.

All four children went to secondary school. The plaintiff left at the age of eighteen having achieved two honours in his leaving certificate. He went on to university to study commerce, but dropped out in his first year. He worked at various jobs between 1974 and 1983, initially in his father's business, and during that time also lived in London for a while and in the Netherlands. In 1983, with his father's financial assistance, he returned to university and achieved a B.A. (Mod), a pass degree, in German and history from Trinity College.

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The plaintiff developed a major problem with drink and drugs in the mid 1980s. His alcoholism became extremely serious in 1987 and in the years 1991 to 1993, he received treatment in St. John of God's Hospital, The Rutland Centre and Cluain Mhuire. His evidence at the trial was that, since his discharge from Cluain Mhuire in 1993, he had not taken alcohol or drugs.

The plaintiff married in 1988. His wife does not work. They have three children, two girls and a boy, who, at the date of the trial, were aged twelve, ten and eight respectively. They were all attending non-fee paying schools. They live in a house which was given to him and his sister M. by their father and which is worth approximately £120,000.

The plaintiff's sisters S.S. and G. McC, who are the defendants in these proceedings, are both married, have families and are comfortably off. So too is his sister M., who is unmarried.

In 1987, the plaintiff's mother (hereafter "the testatrix") instructed a solicitor, Mr. Michael Halpenny, to draft a will for her. She described the plaintiff to Mr. Halpenny as "happy go lucky", a "ne'er do well" and "still a student at thirty-two years of age". At that time, her assets consisted of a house, an apartment, money in the bank and stocks and shares, including, of course, the shares in her husband's company. Her total assets appear to have been in excess of £1 million. She made it clear to Mr. Halpenny that she wished to treat all her children equally and to make substantial provision for them in her lifetime. She decided to do this by transferring all her shares in her husband's company to them. Since the husband of S.S. already owned 100 shares in the company, this was achieved by transferring 66 shares to S.S. and 166 shares each to the remaining three children, including the plaintiff. The plaintiff's shares, after payment of gift tax, realised a sum of approximately £275,000.

On the 5th October, 1988, the testatrix again saw Mr. Halpenny and told him that she wished to make a new will. She had decided to leave the residue of her property, after some relatively small legacies to her children and grandchildren, to a number of charities. She told her solicitor that she was taking this course, because of the ample provision she had already made for each of the children in her life time. Mr. Halpenny suggested to her that "charity begins at home", but she remained adamant and reiterated her view that the plaintiff was "an eternal student".

The plaintiff unhappily dissipated the sum of £275,000 within a relatively short time. It had all gone by the year 1992.

On 20th March, 1992, the testatrix called to Mr. Halpenny again and said that she wished to make a new will. The changes were, however, minor. She was insistent that the charities were still to be the beneficiaries. She also told Mr. Halpenny on that occasion that the plaintiff was an alcoholic and was having marital problems. It is accepted that she was aware of the fact that he had squandered the money he had been given and was in relatively straitened circumstances.

The testatrix died on the 9th December, 1992. The terms of her will have already been summarised: she gave legacies of £5,000 to each of her grandchildren (of whom there were ten at the date of her death) and a nebuliser to the plaintiff. She left the residue of her estate to the following named charities:-

- (a) The Simon Community;
- (b) The Cancer Research Fund of St. Luke's Hospital, Rathgar;
- (c) The Society of St. Vincent de Paul;
- (d) Concern;
- (e) Goal.

The gross value of the estate as shown in the Inland Revenue affidavit was £335,027.30 while the nett value was £302,499.78.

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The plaintiff at the time of the trial was unemployed and in receipt of social welfare assistance of approximately £135 per week. He has no savings and no assets, other than the half share in the house to which I have already referred.

The present proceedings have been instituted by the plaintiff under s.117 of the Succession Act, 1965, claiming a declaration that the testatrix had failed in her moral duty to make proper provision for the plaintiff in accordance with her means by her will or otherwise, having regard to all the circumstances of the case. He further claimed an order making such provision for the plaintiff as seemed to the High Court to be just. S.S. and G. McC., who had been named as the executrices in the will, were joined as the defendants.

At the trial before Lavan J., the plaintiff, Mr. Halpenny and G. McC. gave evidence. While counsel on behalf of the executrices resisted the claim under s. 117, it was made clear that they would have no personal objection to provision being made for their brother out of the estate. It would appear that the named charities were also consulted and indicated that they would abide by whatever order the court made.

It was agreed in the High Court that the first issue which had to be determined was whether the testatrix had failed in her moral duty to make proper provision for the plaintiff in accordance with her means, whether by her will or otherwise. If that issue was resolved against the plaintiff, it would follow, of course, that the court would not be concerned with the extent of any provision that should be made for him. In a reserved judgment, Lavan J. concluded that the plaintiff had not established that the testatrix had failed in her moral duty to make proper provision for him and dismissed the claim under section 117(1). From that decision, the plaintiff now appeals to this Court.

Submissions of the parties

On behalf of the plaintiff, counsel submitted that, in determining whether the testatrix had failed in her moral duty to make proper provision for the plaintiff, the court had to sit "in the testatrix's chair" on the eve of her death, to use the language of Kenny J. in *M. (F.) v. M. (T.) and Others* (1970) 106 I.L.T.R. 82. While he accepted that sub-s. (2) was primarily directed towards the extent of the provision that should be made once it had been established that the testatrix had failed in her moral duty, he submitted that its language was also relevant in determining whether the testatrix had so failed. The court was, accordingly, required to consider the first issue from the point of view of "a prudent and just parent", taking into account the position of the child whose provision was in issue and all the circumstances of the case. This was an objective test, he said, and the fact that the testatrix might genuinely have thought that she had made appropriate provision for the plaintiff was not a relevant consideration.

Counsel submitted that, while it was not disputed that the testatrix had made generous provision for the plaintiff by the transfer of shares in 1987, it was also clear that she was aware, at the time she made her will in 1992, that all that money had been squandered and that the plaintiff was in relatively straitened circumstances. She was also aware that his problems were due in significant measure to his alcoholism and drug addiction. Since that situation remained unchanged at the date of her death, counsel urged, a just and prudent parent would have made at least some provision, even of a relatively small nature, for him in her will. The understandable fear that might have been felt by the testatrix that this money would also be dissipated could have been met by vesting the funds in trustees who could advance sums to the plaintiff at their discretion. He submitted that the testatrix having failed so to provide, the High Court could authorise the establishment of such a discretionary trust, citing in support the decision of Costello J., as he then was, in *H.L. v. Bank of Ireland* [1978] I.L.R.M. 160.

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Counsel submitted that the critical factor in applications under s. 117 was the need of the applicant child. Where, as here, a need was established beyond any doubt, the only remaining question was as to whether the testatrix had discharged her moral duty to meet that need, having regard to her own means. In this case, he submitted, it was clear that she had not.

On behalf of the defendants, counsel submitted that s.117(1) did not create a moral duty which rested on parents to make proper provision for their children in accordance with the parent's means: it recognised that such a duty existed. He urged, however, that the burden of establishing that a parent in any given case had failed in his or her moral duty was a heavy one, citing in support the dicta of Finlay C.J. in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143. He also relied on the observation by the learned Chief Justice that to meet the comparatively high threshold set by the section, it was not sufficient that the High Court Judge should take the view that he or she would have made a particular provision for the applicant child. It had to be shown that the testatrix, in this case, could not reasonably have adopted the course she did. Counsel for the defendants submitted that, applying that test, which was not a subjective test, it could not plausibly be suggested that the testatrix in this case had no reasonable grounds for deciding not to make any further provision for the plaintiff. Having made what was conceded to be generous provision for him during her life time, the testatrix was perfectly entitled to take the view that she should use the rest of her money in support of the particular charities concerned and thus benefit people whose needs were beyond doubt. It would be a serious incursion on the freedom of testamentary disposition guaranteed under Article 40.3.2 and Article 43 of the Constitution if the right of the testatrix to make that choice were to be frustrated.

Counsel for the defendants further submitted that the testatrix may well have thought that, having regard to what had happened in the past, providing the plaintiff with further benefits under her will might not have been in his interest. That was a view which a parent who had unarguably made proper provision for a child in the past might well take and it was not the function of the court under s. 117 to set it aside.

The applicable law

Section 117 of the Act of 1965 provides, inter alia , as follows:-

"(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

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

The policy underlying these provisions is clear. Until its enactment, it was possible for a testator to dispose entirely of his or her property without any regard to the needs of his or her spouse or children.

The Oireachtas in dealing with this possible social evil chose, in the case of the children, to adopt a scheme similar to those in other common law countries which allowed a degree of flexibility to the court in determining whether provision should be made for them.

In a frequently cited passage in *M. (F.) v. M. (T.) and Others* (1970) 106 I.L.T.R. 82, Kenny J., sitting as a High Court Judge said at p. 87:-

"It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon

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- (a) the amount left to the surviving spouse or the value of the legal right if the survivor elects to take this,
- (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death,
- (c) the means of the testator,
- (d) the age of the child whose case is being considered and his or her financial position and prospects in life,
- (e) whether the testator has already in his lifetime made proper provision for the child.

The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive."

That statement of the law was approved by Finlay C.J. speaking for this court in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143, subject to one qualification which he expressed as follows:-

"I am satisfied that the phrase contained in s. 117(1), failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established."

The circumstances of the present case are somewhat unusual. Typically in applications under s. 117, the applicant child contends that there has been a failure of moral duty in relation to him or her, having regard to the provision made either by will or during the lifetime of the testator for other members of the family. Here the plaintiff has no complaint as to the division of the shares between him and his three sisters in the inter vivos transaction in 1987. His claim is that, having regard to his circumstances at the date of the death of the testatrix, she should have made provision for him at the expense of the other beneficiaries, i.e. the charities.

It is also clear that the court in the present case was not entitled to take into account, in considering whether the testator had failed in her moral duty within the terms of s. 117(1), the fact that the plaintiff, since his discharge from Cluain Mhuire in 1993, had not taken alcohol or drugs. Since his recovery from his addiction for that period was subsequent to the death of the testatrix, it was not relevant to the discharge or otherwise of her moral duty to him. It could only become relevant if the court were of the view that she had failed in her moral duty and was going on to consider, under sub-s. (2), the extent of the provision that should be made for him.

It is also obvious that it is not necessarily an answer to an application under s. 117 that the testator has simply treated all his or her children equally. The maxim "equality is equity" can have no application where the testator has, by dividing his estate in that manner, disregarded the special needs (arising, for example, from physical or mental disability) of one of the children to such an extent that he could be said to have failed in his moral duty to that child. At the same time, the proper and understandable anxiety of parents to avoid any friction among their children by effecting, so far as possible, an equal distribution of their property among them must also be recognised. Thus, the clearly expressed wish of the testatrix in this case to treat all her children equally, although not a decisive factor, is not entirely irrelevant.

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Conclusions

Ultimately, the issue which the High Court had to resolve was reasonably straight forward. It is beyond argument that the testatrix had made adequate, and indeed generous provision, for the plaintiff during her lifetime. His father had done everything in his power to give him the best start in life possible, including financing his returning to university when he was in his thirties and providing him with a house. In addition to that, he was given by the testatrix £275,000 which, properly managed, should have afforded him a degree of financial security for the rest of his life. Towards the end of her own life, she might have concluded that, rather than give the entire of her remaining wealth to the five charities of her choice, she should make at least some provision for him in the hope that this time he would use it to good effect. The alternative was to do what she did and make no further provision for him.

As has already been pointed out, the test to be applied is not which of these alternative courses the court itself would have adopted if confronted with the situation. It is whether the decision by the testatrix to opt for the second course of leaving unaltered the bequest to the charities, of itself and without more constituted a breach of her moral duty to the plaintiff. I am satisfied that it did not.

The court, in applications of this nature, cannot disregard the fact that parents must be presumed to know their children better than anyone else. In many cases that obvious fact would be of little weight where it is established that a child has been treated in a manner which points clearly to a failure of moral duty on the part of the testator. It is of considerable significance, however, in a case such as the present, where, even on the most favourable view of the plaintiff's case, it cannot be suggested that he was treated with anything other than generosity and support by both his parents up to the time that the shares were transferred to him. Against that background, the decision of the testatrix not to make further provision for him in her will may well have been prompted, not merely by a concern that her money should go where she could be sure that it could do most good, but also by a belief that, since the provision of significant financial assistance to the plaintiff had not in the past produced the best results, it might not have been in his own interest to provide him with further funds, even through the mechanism of a trust. It is, however, sufficient to say that this was clearly a view which a responsible and concerned parent could take and that it follows inevitably that the learned High Court Judge was correct in concluding that the plaintiff had failed to establish that the testatrix had failed in her moral duty to him.

In the judgment which he is about to deliver, Barron J. considers the obligation, if any, on the deceased, in a case such as the present, to have regard to the plaintiff's responsibilities to his children. A person in her position might be regarded as being under a moral duty to make some provision for the children of the plaintiff. That, however, is not the issue with which the High Court or this Court is concerned: we are solely concerned with the legal obligations of the deceased. In the case of her children, the Oireachtas has transposed the moral obligation which she, in common with all parents, owed to her children into a legal duty enforceable in the terms laid down in section 117. The social policy underlying that provision, and which was, of course, exclusively a matter for the Oireachtas, was, it is reasonable to assume, primarily directed to protecting those children, who were still of an age and situation in life where they might reasonably expect support from their parents, against the failure of parents who were unmindful of their duties in that area. However, since the legislature, no doubt for good reasons, declined to impose any age ceilings which would preclude middle aged or even elderly offspring from obtaining relief, the courts must give effect to the provision, irrespective of the age which the child has attained. But to extend in effect the extremely ample protection which the Oireachtas has thus afforded to children, even in the middle aged and elderly category, to grandchildren seems to me to bring within the scheme of the Act a category of claimants the protection of whom was not envisaged by the legislature. I am accordingly satisfied that the apparent needs of the plaintiff's children are not a factor which would justify the court in the present case in setting aside the findings of the learned High Court Judge.

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There is one other matter, to which I drew attention at the hearing, and to which I would like to return. In the present case, the interests of the five charities benefited by the will could have been materially affected by the outcome of the present proceedings. It is surprising that at no stage was the Attorney General given notice, as the protector of charities, of the existence of the proceedings. Charities enjoy a special position in our law because they are established for the public benefit and the Attorney General has also a special role as their guardian. If he had been given notice of these proceedings, he might well have decided that, having regard to the attitude of the executrices, it would have been adding unnecessarily to the costs for him to be joined as a party. It is, however, in my view desirable (and it may be essential) in every case, whether it arises by way of a construction summons or an application under s. 117, where the interest of charities may be materially affected, that the Attorney General be given notice of the proceedings.

I would dismiss the appeal.

Lynch J.

I agree with the judgment of Keane J.

Barron J.

This is an appeal by the plaintiff against the decision of the High Court dismissing his application for relief under the provisions of s. 117 of the Succession Act, 1965.

At the date of the hearing of his application the plaintiff was aged forty, and married with three children aged twelve, ten and eight years respectively. Although he did not marry until 1988, he had cohabited with his wife since before the birth of their first child. He was the youngest of four children having three older sisters. His father was a successful businessman who when he died in 1985, left his widow an estate of some £1.3 million.

The plaintiff dropped out of university in his first year. He had various jobs thereafter including running a small haulage business financed by his father. When that failed, he returned to university from which he obtained a pass arts degree, his subjects being history and German. Up to the birth of her first child, his wife had worked, but following the birth she became a semi-invalid and is now unable to work.

Following his graduation, the plaintiff appears not to have worked. He became an alcoholic and drug addict and at the date of his mother's death on the 9th December, 1992, he was unreformed, though by August, 1993, he had reformed and has remained free from both alcohol and drugs since. During the period of his addiction he lost his driving licence.

He was a feckless character and known to be such by his mother. In 1987, she had distributed the major part of what she inherited from her husband equally between her four children. After taxes the plaintiff received £275,000. The plaintiff lives in a house owned in equal shares by himself and one of his sister's. This house was provided as a gift from his father. Apart from spending about £25,000 on the house, the entire of the sum he received from his mother was wasted in one way or another.

At the date of the hearing in the High Court the plaintiff was separated from his wife and the sole income available to the family was unemployment assistance.

By her will his mother left the entire of her remaining estate amounting to approximately £300,000 to five named charities. Each is aware of these proceedings and is content to abide by whatever order the court makes. However, it is to be regretted that the Attorney General as protector of charities does not appear to have been notified of the existence of the proceedings.

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This application was unusual in that the plaintiff made no claim on his own behalf but sought under the mechanism of s. 117 to obtain provision for his children. This would be in addition to the sum of £5,000 left to each of them by his mother's will. None of his sisters who are reasonably well off has made any claim.

Before the passing of the Act, there was no restriction upon a person making a will as to who might be made a beneficiary thereunder. A person might cut out his or her entire family and none would have any recourse to the estate. This was rightly regarded as wrong. The Succession Act, 1965, changed the law in favour of spouses and children. Exceptions, though not applicable in the instant case, were made in relation to those deemed by the Act to be unworthy to succeed.

The spouse of the deceased was given a particular share in the estate, called the legal right, in every case. No such mandatory provision was made for children. They were dealt with upon a different basis. The section recognised that the relationship of parent and child came within the moral basis upon which the relevant part of the Act was based. It recognised that the parent should not be obliged to make provision for his or her children in all cases. So children were not given rights similar to the legal right given to the spouse. Instead, they could apply to the court whenever they were of the view that the parent had not observed the moral obligation arising from their relationship and their respective circumstances.

The Act expressed this moral obligation as a duty to make proper provision for the child in accordance with the means of the parent. The duty is entirely a moral one though enforceable in law. Before the court can act there must however be clear circumstances which establish that it is proper to grant relief. A positive failure in moral duty must be established: see the judgment of Finlay C.J. in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143. The court has no power to redraft a will and even where it is satisfied that the statutory moral duty has been breached it has no such power. Its sole power in such circumstances is to make such provision for the applicant child so that the will which will then be deemed to have included such provision is no longer in breach of the duty. The date at which the relevant factors must be considered is the date of death of the testatrix.

In considering whether to accede to an application, the court is not concerned with the parent child relationship alone. It is concerned with what is proper provision in accordance with the parents' means. Even though the child may not come within the statutory category of those unworthy to succeed, yet the right being based upon moral considerations whether the child deserves to have provision or further provision made cannot be overlooked.

Dealing with the circumstances in which the Court should interfere, I said in *In the Goods of J.H. deceased* [1984] I.R. 599 at p. 608:-

"The power of the court arises only to remedy a failure on the part of the testator to fulfil the moral duty owed towards his child. In general, this will arise where the child has a particular need which the means of the testator can satisfy in whole or in part. If no such need exists, even where no provision has been made by the testator whether by his will or otherwise, the court has no power to intervene."

In the instant case, the plaintiff was very much in need at the date of his mother's death. He was an unreformed addict, he had a wife who was a semi-invalid and unable to work, and he had three young children aged respectively, nine, seven and five years of age. However, he had been well provided for by both his parents. His father had provided him with a good education and helped towards establishing him in life well after the normal period. His mother had transferred to him a large sum of money in 1987. He did not deserve more. This he has acknowledged by seeking funds only to better the position of his children.

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Part of a person's needs must involve his or her responsibilities whether legal or moral. In *In the Goods of J.H. deceased* [1984] I.R. 599, I also said at p. 608:-

"In the ultimate analysis, each case must stand upon its own facts. To take two examples: proper provision for a child in one walk of life may not be proper provision for a child in a different walk of life; or proper provision for a child without a handicap or with normal responsibilities may not be proper provision for a child with a handicap or with exceptional responsibilities."

Although the present issue did not arise in that case, I clearly assumed then and take the view now that proper provision involves assistance to enable the child to meet his responsibilities. These include those towards his wife and his children.

The testatrix never took these into account though she was fully aware of the circumstances of her son. In 1988, when she made her will leaving her estate to charity, her expressed view of her son was that he did nothing but enjoy himself. There is no evidence as to how much of her gift he had then spent. However, when she affirmed her will in March, 1992, he had nothing left which she knew. She even revoked her legacy to him of her car, presumably on the basis that he had lost his licence. There were no material changes in the plaintiff's circumstances between that date and the date of her death.

In my view, the testatrix was wrong not to consider the plaintiff's then responsibilities. Her desire to treat each of her children equally can be appreciated. But while equality is equity, perpetuating inequality may not be. To treat children with widely divergent financial circumstances equally may be as morally wrong as to treat equally those whose circumstances are roughly equal would be morally right. That however is not the issue. A parent does not have to treat his or her children equally nor produce equality.

Going to the root of this application is the meaning to be given to the words "proper provision". The plaintiff obtained advancements from his father within the meaning of s. 63 of the Act as well as a generous provision from his mother in 1988. But the level of provision cannot of itself determine what is proper. "Proper" connotes in the context in which it is used doing what is right. If so, then the fact that generous provision has already been made must only be one of the matters to be taken into account in determining what is proper.

The situation must be looked at as of the date of death. At that date, the testatrix had four children and a number of grandchildren not only the children of the plaintiff. The only member of her family who purported to have any claim on her bounty was the plaintiff. What was the right thing for her to have done? She should have considered the individual circumstances of each of her children. Insofar as she did consider the circumstances of the plaintiff, she dismissed them as imposing any further obligation upon her. If she had considered them more deeply, she would have realised that by reason of his addiction and his inability to handle money, he was unable to provide for his wife and children in accordance with the standards to which he himself had been used or indeed to any reasonable standard. This was a situation brought about entirely by himself but for which his dependants were in no way responsible.

In those circumstances, would it be proper to make further provision for the plaintiff so that he could fulfil his obligations to his dependants? In answering this question, it is the moral duty to the plaintiff and not any moral duty to the dependants which must be considered. Having regard to his obligations and the very considerable difference in his economic circumstances from those of his mother and the competing moral claims of the charities, it would have been right and proper for some further provision to have been made for the plaintiff. There are three factors involved and in my view each is satisfied. First, the plaintiff has a considerable need to meet his obligations. Secondly, the deceased had the means to alleviate that need, certainly in part. Thirdly, having regard to all the moral claims upon her bounty, it would have been right and proper for the deceased to have used some of those means to alleviate at least part of that need.

In the present case, I would grant relief to the plaintiff upon the basis that the ultimate beneficiaries should be his children, since it was for them that the application was in reality brought. This should be by way of a supervised trust whereby the funds may only be used for the advancement of his children or

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exceptionally for their maintenance provided that the entire sum so applied will be used solely for their benefit.

In so doing, there is a danger that this is giving a strained construction to the words of the section. The right is given to the child, whereas the benefit is to be taken by the grandchildren. Having regard to the overall purpose of this part of the Act to prevent a testator from wrongfully disinheriting his nearest family, such a construction is meeting that purpose. It is the responsibility and therefore the need of the child and not that of the grandchildren which the relief is intended to meet. In other parts of the Act children of a deceased parent step into the shoes of that parent, whereas s. 117 is silent on this. This case highlights that difference and suggests that perhaps further consideration should be given to the section by the legislature.

I would allow this appeal upon the basis which I have indicated.

Solicitor for the plaintiff: Joe Clancy.

Solicitors for the defendants: P.C.L. Halpenny & Son.

Fergus Courtney, Barrister

P.McD. v. M.N.

**In the matter of J. McD., deceased and in the matter of s. 117 of the Succession Act, 1965. P. McD.,
Plaintiff v. M.N. (Senior), Defendant [No. 1994/785 Sp.; S.C. No. 7 of 1999]**

**High Court
18th December 1998
Supreme Court
25th November 1999**

Succession - Will - Proper provision - Child - Moral duty to make proper provision for child - Plaintiff claiming that testator had failed in moral duty - Onus of proof - Whether court entitled to have regard to behaviour of plaintiff - Succession Act, 1965 (No. 27), ss. 117(1), 117(2) and 120(4).

Section 117(1) of the Succession Act, 1965, provides that where "... the court is of the opinion that the testator has failed in his moral duty to make proper provision for the child the court may order that such provision shall be made for the child out of the estate as the court thinks just".

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

Section 120(4) provides "A person who has been found guilty of an offence against the deceased ... punishable by imprisonment for a maximum period of at least two years ... shall be precluded ... from making an application under section 117".

The widowed testator, by will dated the 25th May, 1993, left all his property to a member of a family (not his own) with whom he had been residing since 1979, subject only to a payment of £5,000 to the plaintiff, his son. The defendant was the executrix of the will.

The estate included a farm of 156 acres, a further 114 acres, plus two smaller holdings amounting to 64 acres, and what had been the home farm with the family dwellinghouse. The plaintiff's only other sibling, his younger brother, was given lands by the testator *inter vivos*.

In 1963, the testator had been badly injured and shortly after the injury the plaintiff left school and helped to run the farm, aged 14 years. When the plaintiff's mother died in 1968, the running of the farm was substantially undertaken by the plaintiff. Up to 1980, he had the benefit of 45 or 50 acres of tillage land, and his father ran an account for him in the local shop. By 1982 until 1984, the plaintiff effectively had the use of the testator's farm of 400 acres including a quarry, for which he paid nothing.

Then due to a change in the relationship between the plaintiff and the testator, which deteriorated to such an extent as to involve the intervention of the gardaí, a court order was obtained by the testator directing the plaintiff to vacate his lands by September, 1984. Mediation obtained an extension of time for the plaintiff, upon payment by him of £2,000, but he never had any intention of leaving, and breached the compromise. In August, 1986, the plaintiff was imprisoned for refusal to vacate the lands, and served 11 months rather than purge his contempt of court. He was finally released after an undertaking was given to the court.

While the plaintiff was in prison, the plaintiff's wife continued to run the farm, but the testator transferred some lands to the plaintiff's brother and also some lands to a non-relative.

This led to the total disintegration of the relationship between the testator and plaintiff. The plaintiff permitted a campaign of intimidation directed at the testator, who was over 70 years and against the people to whom his lands had been transferred; behaviour including efforts to organise boycotting, arson attacks, abusive telephone calls. The plaintiff and two local men were prosecuted for their role in these activities.

The plaintiff continued to occupy the home farm from 1986 to date without any further payment and in flagrant breach of the court order.

The plaintiff argued that he had left school at an early age to assist on the home farm, whereby the testator was under a moral obligation to provide for him, and in particular to allow him to remain on the lands.

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Held by the High Court (McCracken J.), in dismissing the plaintiff's claim, 1, that the moral duty of the parent may be affected by the behaviour of the child toward the parent, even if such behaviour fell short of that envisaged by s.120(4) of the Act of 1965, as in this case. Such behaviour was a circumstance which should be taken into account together with the benefit which the plaintiff had in fact got over his lifetime.

2. That there was a relatively high onus of proof on an applicant for relief under s. 117 of the Act of 1965.

E.B. v. S.S. [1998] 4 I.R. 527 ; *F.M v. T.A.M.* (1972) 106 I.L.T.R 82 ; *C.C. and Ch. F. v. W.C.* and *T.C.* [1990] 2 I.R. 143 followed.

3. That the occupation of the testator's land and other benefits amounted to a considerable benefit to the plaintiff during the testator's lifetime, notwithstanding the appalling behaviour of the plaintiff. In these circumstances, the legacy had fulfilled the moral duty of the testator.

The plaintiff appealed to the Supreme Court.

Held by the Supreme Court (Barrington, Keane and Barron JJ.), in allowing the appeal, 1, that the moral obligation on the part of a parent towards a child, which was recognised by s. 117, was one which existed from the relationship of the parties and which was continuous from the birth of the child until the death of the parent unless it had been satisfied or extinguished.

2. That, while it was the factual situation at the time of the death of the testator which must be taken into account by the court in determining whether any moral duty to the plaintiff existed at that time, the probability was that if the plaintiff had not taken the stance he did in dealing with the testator the lands of the testator would have been dissipated and nothing would have remained for him, and that was a factor to be taken into account when considering whether any moral duty existed at the time of the testator's death.

3. That the testator's decision to eject the plaintiff from the lands must have been in breach of his moral obligation to provide for his son and, more particularly, the moral obligation which he owed his son for keeping the farm going.

4. That the bad behaviour of the plaintiff towards his father was a factor to be taken into account in determining whether the moral obligation of the testator had been extinguished or diminished, and in this case the plaintiff's behaviour did not extinguish his moral claim to the estate of his father but it did diminish it.

J.H. v. A.I.B. [1978] I.L.R.M. 303 considered.

5. That, while in the ordinary way benefits which would satisfy the moral obligation on a testator would be advancements, either on education which would enable the child to make his way in life or advancements of money which would enable the child to establish himself in life. The advancements to the plaintiff were limited by their temporary nature, and the learned trial judge overstated the benefit which the plaintiff had received from the testator during his lifetime.

6. That the plaintiff having remained on the land, while his brother decided to leave the land and was now in a position to earn his own living, it would have been expected that the plaintiff would have been left over half the lands but the testator having already disposed of some of the lands only 170 acres remained in the estate, so even allowing for the plaintiff's bad behaviour towards the testator, and allowing also for the limited advancements received and the legacy provided for in the will, the diminution in the testator's moral obligation should not be so great as to disentitle the plaintiff to any of the remaining 170 acres.

Cases mentioned in this report:-

C.C. and Ch. F. v. W.C. and T.C. [1990] 2 I.R. 143; [1989] I.L.R.M. 815.

E.B. v. S.S. [1998] 2 I.L.R.M. 141.

F.M v. T.A.M. and Others (1972) 106 I.L.T.R 82.

J.H. v. A.I.B. [1978] I.L.R.M. 203.

P.McD. v. M.N.

Special summons.

The facts have been summarised in the headnote and are fully set out in the judgments of McCracken and Barron JJ., *infra*.

By special summons dated the 18th October, 1994, the plaintiff instituted proceedings against the defendant in her capacity as executrix of the will of the testator, pursuant to s. 117 of the Succession Act, 1965. By order dated the 20th December, 1994, the Master of the High Court granted liberty to the parties to proceed by way of plenary hearing.

The matter was heard before the High Court (McCracken J.) on the 29th and 30th October, 1998 and the 27th November, 1998.

Michael Counihan S.C. and Jeremy Maher for the plaintiff.

Noel MacMahon S.C. and Johanna Ronan for the defendant.

Cur. adv. vult.

McCracken J.

18th December, 1998

The plaintiff is the eldest son of J.McD. (hereinafter "the testator") who died on the 15th November, 1993. The testator was a widower at the date of his death and was survived by two children, namely, the plaintiff and T.McD.

By his will dated the 25th May, 1993, the testator appointed the defendant to be sole executrix thereof and after directing her to pay all his just debts, funeral and testamentary expenses, provided:-

"I GIVE, DEVISE AND BEQUEATH unto my executrix hereof in trust for her daughter, M.N., Junior, all of my property of every kind and description absolutely and forever when she shall attain the age of 18 years subject to the payment of £5,000 to my son, P.McD., in discharge of any moral obligations which it might be considered I have."

The plaintiff has brought these proceedings pursuant to s. 117 of the Succession Act, 1965, which provides as follows:-

"(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

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

The history of the relationship between the plaintiff and the testator is a very sad one, and unfortunately, it is necessary to relate the background in some detail for the purpose of determining this application. The testator had originally been a substantial farmer in M. and in particular had been the owner of a farm of 156 acres in the townland of B., another of 124 acres at Bn. and what had been the home farm with the family dwellinghouse and 114 acres at Ba. In addition, he had two smaller holdings of land amounting to some 64 acres. He had engaged in mixed farming, and had always had an interest in horses. In 1963, the testator was badly injured in an accident, and thereafter was physically unable to work the farm. At this stage the plaintiff was 14 years of age and was attending the local technical college, although he acknowledged in evidence that he was not good at the books. He left school shortly after his father's injury and helped his mother to run the farm. She died in 1968, and the plaintiff and the testator remained on in the family home at Ba. At this stage I am satisfied that the day-to-day running of the farm was substantially undertaken by the plaintiff, although there was a local labourer employed for two or three days a week. The testator did the dealing with the cattle at the mart and looked after the horses.

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The testator had become very friendly with the N. family, who were also local farmers and who were related to him. There appeared to have been a number of dealings with horses which he undertook in conjunction with the N. family. He began dealing in horses, and also buying horses on behalf of other people. During the 1970's he would at times stay with the N. family, although I am satisfied that at this stage it was only on an occasional basis.

T.McD., the plaintiff's younger brother, also left school at about 15 years of age and for a short time worked on the farm, but he was not content with a farming life, and in 1967, got a job in a meat factory for one year. In 1968, at about 17 years of age, he got employment with a glass factory, and became a skilled glass cutter, but he continued to live in the family home with the plaintiff and the testator until he married in 1978. His evidence, which I find more reliable than that of the plaintiff, is that during this period, while the running of the farm was left to the plaintiff, the testator did provide for them in that he ran an account in the local shop, from which they could get their day-to-day needs. In addition, it would appear that the plaintiff had 45 or 50 acres of tillage land which he farmed for his own benefit, although the testator may have taken some of the produce for feed for his horses. In relation to the period up to 1980, I find that the plaintiff was primarily responsible for working the farm, other than the horses that were kept on it by the testator, and did not get paid anything in the nature of a regular wage. On the other hand, I do not accept that he was effectively left to fend for himself, as he had his food provided for him from the local shop and he had the benefit of the tillage land.

The real problems appear to have begun about the year 1980. The testator had been spending more and more time with the N. family, and by about 1979, he seems to have been residing with them permanently. In 1980, the plaintiff got engaged to be married to B.I. The testator appears to have had a dislike for the I. family, and was opposed to the marriage. This was the beginning of a serious rift between the testator and the plaintiff.

In January, 1981, the plaintiff married B.I. The testator did not go to the wedding and did not make any form of settlement on the plaintiff, but the plaintiff and his wife continued to live on the lands. At this stage the testator had some 150 cattle on the lands, as well as some horses. In July, 1982, B.McD., the plaintiff's wife, got a herd number, and the testator seems to have assented to this as the land owner. About the same time the testator removed all his own cattle from the land and sold them, despite the protests of the plaintiff. The plaintiff put his own cattle on the lands and has now built up a herd of some 75 cattle. From this time on the plaintiff effectively occupied the lands for his own benefit, and he also opened up a quarry on the lands of Bn. which he worked for his own benefit.

I have no doubt that in or around the time of the plaintiff's marriage, and in the year or eighteen months thereafter, both the plaintiff and his brother, T.McD., put considerable pressure on the testator to sign the lands over to them. At this stage he was living with the N. family and not working the lands. The testator had been the master of the local harriers, and kennelled the dogs on his lands. As part of the pressure being put on him, the plaintiff and his brother threatened not to feed the dogs and for a period blocked the way into the kennels. Matters deteriorated between the testator and the plaintiff to the extent that in August, 1982, the testator and his son, T.McD., who by this time seemed to have made things up with his father, attempted to take some of the hay from the lands for the testator's horses, with the assistance of N.N. The plaintiff tried to prevent them from doing this, and a fight ensued in which N.N. struck the plaintiff with a pitchfork, and in the course of which it was also made clear by the plaintiff that he had a gun in his lorry. Following this, a complaint was made to the gardai and the plaintiff's gun was confiscated by them. This incident appears to have been the last straw for the testator, and the testator consulted his solicitor, who then wrote to the plaintiff and demanded possession of the lands and threatened proceedings. On the 1st October, 1982, the testator issued an equity civil bill against the plaintiff seeking an injunction compelling him to vacate the dwellinghouse and lands and restraining him from entry on, occupying or using them. On the 20th September, 1983, a defence was entered, together with a counterclaim for monies due to the plaintiff for work done by him on the lands. By order dated the 27th September, 1983, His Honour Judge Sheridan granted the injunctions sought, and awarded the plaintiff £11,000 on his counterclaim, with a stay of execution until the plaintiff vacated the lands, and in

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any event a stay of execution for one year. The plaintiff remained on the lands, and worked them for his own benefit. At this stage a member of the local clergy intervened in an attempt to resolve the differences, and negotiated an agreement that the plaintiff could remain on the lands until April 1985 on payment of £1,000 and could further work the quarry during that period on payment of a further £1,000. These monies were in fact paid by the plaintiff to his father. However, the plaintiff has conceded in evidence that he never had any intention of leaving the lands when the term negotiated in that agreement expired, and in fact he did not do so. At this stage there is no doubt that the plaintiff was working the lands purely for his own benefit, and the testator was getting no benefit whatever from them.

Matters again came to a head in 1986, as the plaintiff had not vacated the lands, and a motion was brought to the Circuit Court to attach or commit the plaintiff for his failure to comply with the order of the court to vacate the lands. The plaintiff refused to leave the lands and on the 10th June, 1986, an order for attachment was made by His Honour Judge Sheridan, which order was executed on the 12th August, 1986. The plaintiff was removed to Mountjoy Prison, but consistently refused to purge his contempt. In the meantime, the plaintiff's wife and son continued to occupy the lands and to work them for their own benefit.

The plaintiff continued to refuse to comply with the order, and remained in Mountjoy Prison for some eleven months. He was ultimately released in July, 1987, having given some form of undertaking to His Honour Judge Sheridan, the nature of which is not absolutely clear. In the meantime, although the plaintiff's wife worked the home farm during the time the plaintiff was in prison, his father took back possession of the lands of Bn., which he transferred to his son, T.McD., in October, 1986, and also other land which he sold about the same time to a Mr. T. From this time on, not only did the relations between the testator and the plaintiff disintegrate totally, but the whole affair led to intense bad feeling locally, with neighbours taking sides. Graffiti appeared with phrases such as "T.Mc Betrayed his Brother" and "N. the Grabber", and this graffiti was signed "I.R.A.". I am quite satisfied that at this time an organised and vicious campaign was conducted locally against the testator, the N. family, the T. family who had purchased the lands, and who were in fact English and to a lesser extent T.McD. Apart from graffiti appearing, there were threatening telephone calls, the testator's horses were let loose, local shops were approached not to serve them and abuse was shouted at them, tractors owned by the T. family were burnt and an excavator was burnt out. This continued after the plaintiff came out of prison, and in 1988, two local men were given a three month suspended sentence and bound to the peace in relation to these activities. More importantly, on the 19th May, 1988, the plaintiff appeared before the local district court on seven summons alleging breaches of the peace, which appeared to have consisted of verbal abuse and threatening gestures, and was bound over to keep the peace for two years on his own bond. The plaintiff and his wife deny organising these incidents, but I am quite satisfied that, not only were they aware of them, but they certainly did nothing to stop them. It should be said that the campaign against the T. family was successful in that they were forced to leave the lands which they had purchased from the testator.

I have no doubt that the plaintiff's behaviour towards his father, at least from 1984, when he refused to leave the lands, was quite appalling. He effectively took over his father's lands for his own use, and while the testator managed to retrieve two of the farms while the plaintiff was in prison, the plaintiff and his family continued to reside on and work the home farm and the family home, to this day. They clearly have no right whatsoever to do so. The plaintiff also permitted and encouraged a campaign of intimidation against his father, who at this stage was in poor health on the plaintiff's own evidence. It should be noted that the worst of this intimidation appears to have taken place when the testator was over 70 years of age.

The case is sought to be made by the plaintiff that some of this land has been in the family for some 300 years, and that the plaintiff left school at an early age to assist on the farm, whereby the testator was under a moral obligation to provide for the plaintiff, and in particular to allow him to remain on the lands. It is also suggested that the sale of part of the lands to Mr. T. was in fact done for the benefit of the N. family, and that the proceeds may have gone to assist them. This may or may not be so, and I have no conclusive evidence either way. However, it must be remembered that at the time the land was sold, the

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testator had been living with the N. family for at least six years, and had been effectively excluded from his own lands by the plaintiff.

It is quite clear from the terms of the testator's will that he was aware that he might have a moral obligation towards the plaintiff, as he left him a legacy of £5,000 "in discharge of any moral obligations which it might be considered I have". It is against this background that I have now to consider whether the testator failed in his moral duty to make proper provision for the plaintiff in accordance with his means. It is a tragic background, and gives rise to considerations of whether and to what extent the behaviour of a child towards his father may affect the father's moral duty under the section.

The basic approach which should be taken in considering s. 117 of the Succession Act, 1965, has been laid down by the Supreme Court in several cases, including the most recent reported case of *E.B. v. S.S.* [1998] 4 I.R. 527. In that case, as in several other cases, the court cited with approval two passages from earlier authorities. The first of these is from the judgment of Kenny J. in *F.M. v. T.A.M. and Others* (1972) 106 I.L.T.R. 82, where he said at p. 87:-

"It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon (a) the amount left to the surviving spouse or the value of the legal right if the survivor selects to take this, (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death, (c) the means of the testator, (d) the age of the child whose case is being considered and his or her financial position and prospects in life, (e) whether the testator has already in his lifetime made proper provision for the child. The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive."

This was somewhat qualified in the judgment of Finlay C.J. in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143, where he said at p. 148:-

"I am satisfied that the phrase contained in s. 117(1), 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established."

A considerable number of cases have been cited to me, in most of which the principles set out above have been applied. Unfortunately, none of them really deal with the problems raised in the present case, namely, what effect the behaviour of the plaintiff towards the testator should have in determining the testator's moral duty. In *J.H. v. A.I.B.* [1978] I.L.R.M. 203 McWilliam J. did deal with the point to some degree. He said at p.

"The first issue which I have to decide is whether the testator did or did not have a moral duty to make provision for his children in accordance with his means. In considering this I have no duty to decide any question of responsibility for the estrangement between the testator and his wife. Nor do I have any duty to decide any question of responsibility for the subsequent lack of communication between the testator and the plaintiffs. In my opinion, there can be only one answer on this issue. The testator did have such a moral duty, however neglected, thwarted or aggrieved he may have felt."

I think that the wording of s. 117 would support the view that there is an assumption in the Act that a moral duty exists in general for a testator to make provision for his children. However, sub-s. (2) makes it clear that in considering whether there has been a failure in such moral duty, the court may take into account any circumstances which it considers of assistance in arriving at a decision that will be as fair

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as possible to the child to whom the application relates and to the other children. Perhaps the case that comes closest to the present is the recent Supreme Court decision of *E.B. v. S.S.* [1998] 4 I.R. 527. In that case, the plaintiff had developed a major problem with drink and drugs but had during his lifetime received a gift of shares from his mother worth approximately £275,000. By the time the plaintiff's mother came to make her will four years later, the plaintiff had dissipated the entire of this money. She left the larger part of her estate, after legacies to her grandchildren, to five named charities, and made no provision for the plaintiff. In refusing the plaintiff's application under s. 117, Keane J. in giving the majority decision in the Supreme Court said at p. 560 of the report, after considering the background of the case:-

"Against that background, the decision of the testatrix not to make further provision for him in her will may well have been prompted, not merely by a concern that her money should go where she could be sure that it could do most good, but also by a belief that, since the provision of significant financial assistance to the plaintiff had not in the past produced the best results, it might not have been in his own interest to provide him with further funds, even through the mechanism of a trust. It is, however, sufficient to say that this was clearly a view which a responsible and concerned parent could take and that it follows inevitably that the learned High Court Judge was correct in concluding that the plaintiff had failed to establish that the testatrix had failed in her moral duty to him."

Further down the page he dealt with the policy of the legislature as follows:-

"In the case of her children, the Oireachtas has transposed the moral obligation which she, in common with all parents, owed to her children into a legal duty enforceable in the terms laid down in section 117. The social policy underlying that provision, and which was, of course, exclusively a matter for the Oireachtas, was, it is reasonable to assume, primarily directed to protecting those children, who were still of an age and situation in life where they might reasonably expect support from their parents, against the failure of parents who are unmindful of their duties in that area. However, since the legislature, no doubt for good reasons, declined to impose any age ceilings which would preclude middle-aged or even elderly offspring from obtaining relief, the courts must give effect to the provision, irrespective of the age which the child has attained."

That case does support the view that there may be cases where a child is in serious need, but nevertheless no moral obligation to provide for that child exists. Admittedly, that was a case where the testatrix had already made considerable provision for the plaintiff during his lifetime, and therefore presumably could be considered to have fulfilled such moral obligation as did exist.

There is one further statutory provision which I should mention. Section 120(4) of the Succession Act, 1965, provides as follows:-

"A person who has been found guilty of an offence against the deceased, or against the spouse or any child of the deceased (including a child adopted under the Adoption Acts, 1952 and 1964, and a person to whom the deceased was in loco parentis at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117."

It is accepted that the plaintiff in the present case does not come within this section, but I think the section is of relevance in that it envisages a situation in which a child may have no right whatever to invoke the moral obligation of his or her parent, and that such moral obligation may be affected by the behaviour of the child. This also seems to me to be in keeping with the passage I have quoted above from the judgment of Finlay C.J. in *C.C. and Ch.F. v. W.C. and T.C.* [1990] 2 I.R. 143, to the effect that there was a relatively high onus of proof on an applicant for relief under the section. What I have to decide is

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whether a prudent and just parent, in the circumstances of the present case and given the behaviour of the plaintiff, reached a decision which was in accordance with his moral duty to the plaintiff.

In this case the testator made provision for his son, T.McD., by transferring lands to him during his lifetime. There is no question but that he did make proper provision for T.McD., and this is not an issue in the case, other than to support the plaintiff's argument that no proper provision was made for him because the testator did not make a similar provision for him in his will. However, I must look at what benefit the plaintiff did get during the testator's lifetime. Effectively, up to the year 1980 he got a roof over his head, he got food from the local shop and he got a small acreage of land on which he grew cereals. However, once he married in early 1981, and certainly by mid-1982 when the testator took his cattle off the land, effectively the plaintiff had the use of a farm of some 400 acres for which he paid nothing. He developed his own herd of cattle on the lands, he worked a quarry on the lands and he tilled some of the lands. The testator certainly grazed some horses on the land, and may have got some feed for the horses, but that is as far as it went. I think it is extremely relevant that the plaintiff got this benefit, not by a voluntary act of the testator but because he took it against the will of the testator. Even during the year that, thanks to the intervention of the local clergy, he was allowed to remain on the lands, the rent paid, even if it was only for the home farm, amounted to well under £10 an acre, and the sum of £1,000 for the unlimited use of a quarry for a year would also seem to be a gross undervalue. The fact is that, on the expiration of this agreement, the plaintiff continued to occupy the entire farm and the quarry until late 1986, without making any further payment and in flagrant breach of a court order. He continued to occupy the home farm from 1986, until the date of the testator's death, and indeed up to date, without making any payment for it. It is not for me to put a figure on the value of all of this, but it was a very real and substantial benefit taken by the plaintiff during the lifetime of the testator.

I am of the view that in 1993, namely at the time of the death of the testator, he was entitled to consider that he had in fact conferred a considerable benefit on the plaintiff during his lifetime, notwithstanding the appalling behaviour of the plaintiff. I am also of the view that the moral duty which undoubtedly existed, was affected by the plaintiff's behaviour, and I think this is supported by the provisions of s. 120(4), which envisages that a plaintiff's behaviour may be such that he is absolutely precluded from making a claim. I think that the scheme of the Act implies that among the circumstances which a court may take into account in assessing the fulfilment of a moral duty, is behaviour of the plaintiff towards his parent which, while not absolutely precluding him under s. 120, nevertheless is a circumstance which should be taken into account together with the benefit which the plaintiff has in fact got during his lifetime. It has been emphasised over and over again in the authorities that a parent does not have to treat all his children equally, and one of the reasons why he does not have to do so is that there may be circumstances such as those present in this case, which are envisaged by s. 117 as affecting the fulfilment of the moral duty. In this case the testator in fact left a legacy of £5,000 to the plaintiff, and in the light of the wording of the will, clearly did so in full knowledge of the provisions of s. 117, and indeed this has been confirmed by his solicitor. In the present case I am satisfied that in all the circumstances the testator's moral duty was fulfilled by giving a legacy of £5,000 to the plaintiff and I am of the view that the plaintiff has not discharged the onus of proof which is on him to show the failure of such moral duty. I would dismiss the plaintiff's claim.

By notice of appeal lodged on the 12th January, 1999, the plaintiff appealed against the judgment and order of the High Court.

The appeal was heard by the Supreme Court (Barrington, Keane and Barron JJ.) on the 5th July, 1999.

John Gordon S.C. and Michael Coughlan S.C. (with them Jeremy Maher) for the plaintiff.
Frank Clarke S.C. (with him Noel McMahon S.C. and Johanna Ronan) for the defendant.

Cur. adv. vult.

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Barrington J.

25th November, 1999

I agree with the judgment about to be delivered by Barron J.

Keane J.

I also agree with the judgment about to be delivered by Barron J.

Barron J.

This is an application pursuant to the provisions of s. 117 of the Succession Act, 1965, brought by the plaintiff who is the eldest son of the deceased in the title hereof.

The plaintiff is a farmer now aged 50 having been born on the 8th April, 1949. His father was a substantial farmer who in turn had inherited 465 acres from his father. This land was in a number of holdings. The largest was one of 156 acres. There was also a farm of 124 acres, and the residential portion and home farm comprised 114 acres as well as two smaller holdings comprising a further 64 acres. The deceased farmed the lands until the year 1963, when he was involved in a motor car accident. He sustained severe injuries to one of his legs which left it shorter than the other. As a result he was unable to drive and also unable actively to work the lands. At the time of the accident the plaintiff was fourteen and his younger brother was aged twelve.

The plaintiff had just started technical school. However, with his father unable to work the lands he was taken out of school and he and his mother, with some help two to three days a week, ran the farm. His mother died in 1968, at the age of 48 and thereafter the plaintiff ran the farm with the same help. Work on the farm involved feeding cattle, sowing and cutting corn and milking dairy cows.

The deceased never got over his wife's early death and over the next ten years or so spent increasing periods with his late wife's sister and her family (the N. family) until in the late 1970s he took up residence with that family permanently.

From the time that the deceased could no longer work the farm his sole interest lay with horses. He bought and sold horses which he grazed on the farm. He was a good judge of horse flesh and spent much of his time judging at horse shows. He also kept cattle on the lands.

The plaintiff's brother married in 1978 and now has two children. At the time of his marriage he left the farm. He had not been interested in farming and obtained employment and ultimately became a skilled glass cutter.

The plaintiff married in January, 1981. The deceased did not go to his wedding and appears to have had a serious dislike of his wife's family.

The plaintiff's marriage appears to have created serious bad feeling between himself and his father. In August, 1981, the deceased consulted his solicitor for the purpose of instructing him to bring proceedings to eject the plaintiff from the deceased's lands. The reason given to the solicitor was that he was determined, as is recorded by the solicitor in an attendance on his client given in evidence, "that not one inch would the I's get". The I's were the plaintiff's wife's family.

In accordance with his instructions the solicitor wrote to the plaintiff by letter dated the 18th August, 1981, seeking vacant possession of the lands.

In or about this time both the plaintiff and his younger brother sought to get their father to transfer lands to each of them. It appears that the solicitor also approached the plaintiff to see whether or not the claim for possession could be settled in some way.

As well as seeking possession of the lands, the deceased in October, 1981, sold his cattle which were grazed on the lands amounting to 140 head in all. In or around this time also the plaintiff and his brother sought to force the deceased's hand by refusing to kennel the pack belonging to a local hunt of which the deceased was master.

In August, 1982, there was a serious incident on the farm. It appears that the deceased and N. were seeking to take hay from the farm and that the plaintiff sought to prevent them. It is undisputed that N. struck the plaintiff with a pitch fork which resulted in a wound requiring eighteen stitches. Unfortunately, as with the issue of the dogs, the evidence does not delve sufficiently deeply to ascertain

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the full facts nor where the rights and wrongs of the matter lay. So far as the deceased was concerned the incident over the hay was the final insult and he again went to his solicitor to instruct him this time to issue the proceedings. Letters were written on the 4th August, 1982, and the 16th September, 1982, to no avail. Proceedings were then brought by way of civil bill on the 1st October, 1982.

The course of these proceedings is particularly unhappy. The plaintiff counterclaimed for remuneration for the periods during which he had been running the farm. Judgment was ultimately given in favour of the deceased for possession and in favour of the plaintiff, on foot of his counterclaim, for the sum of £11,000. Unfortunately, the plaintiff refused to leave the lands. He was ultimately attached and found himself in prison from August, 1986, to July, 1987.

While the plaintiff was in prison the deceased took possession of the holding of 156 acres which he sold for £90,000 to a friend at what is said to have been an undervalue. He also obtained possession of the holding of 124 acres which he transferred to his younger son. The plaintiff's wife remained in possession of the residential holding and the two smaller holdings which were worked with it.

It is not quite clear upon what terms the plaintiff purged his contempt in July, 1987. Suffice it to say that he was released from prison and apparently lived in some form of caravan adjoining the family farm. Whatever did happen thereafter he apparently got back into the farm and his father took no further action against him. His father died on the 15th November, 1993, having made a will on the 25th May, 1993, whereby he left the plaintiff the sum of £5,000 and the rest of his estate to the daughter of his wife's sister whom he made executrix of his will.

The plaintiff's claim failed in the High Court and the matter now comes before this Court by way of appeal from that refusal.

Until his marriage, the plaintiff appears to have received board and keep but no wages. The profits from the land and from the cattle and horses were taken by the deceased. From the time of his marriage, the plaintiff appears to have tilled some 45 to 50 acres and also to have opened a quarry on the lands which were ultimately sold. He held the benefit of the profits from the tillage and the quarry subject to providing some of the corn for the deceased's horses.

After the judgment in 1984 effort was made through the local clergy to settle the argument between father and son. This did result in a moratorium for a year but ultimately achieved no agreement. The resulting attachment of the plaintiff caused considerable ill will in the neighbourhood. The locals took sides and various hot-headed actions were taken against the purchaser of the lands and against the N. family. While the plaintiff and his wife were not the main instigators of this behaviour there was no doubt, and has been so held by the learned trial judge, that they did nothing to prevent it. For the purposes of these proceedings, it is sufficient to say that there were two camps in the neighbourhood and that the plaintiff and his father were on opposing sides.

Some reference must be made to the financial position of the N. family. In 1979 they appeared to have defaulted on loans with the Agricultural Credit Corporation. This body did not take action immediately and it was five years until a receiver was appointed by it in 1984. An order for possession was obtained in 1988. In the same year a settlement was arrived at between the N. family and the bank and the final payment thereunder was made in December, 1996. It is not unreasonable to infer from the evidence that the deceased was the main contributor to enable the N. family to pay off a major part of that borrowing.

While the immediate cause of the row between plaintiff and deceased was the family into which he had married, there is no doubt that the relationship between father and son was somewhat unusual. Sometime in the early 1970s the deceased had introduced his son to a neighbour as being one of his employees.

This case gives rise to what is in effect a new question in this field. It is, to what extent should account be taken of bad feeling between the parent and the child. Clearly the answer must depend upon the particular circumstances of each case.

While the Act of 1965 deals with unworthiness to succeed, in my view this does not mean that no other circumstances can be taken into account which would affect the worthiness of the child to succeed in an application under section 117. The only case which deals with this issue is *J.H. v. A.I.B.* [1978]

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I.L.R.M. 203. In that case the deceased had fallen out with his wife and his two children, his son and a daughter and had gone to live with his sister. He had left a small legacy to his family and the balance of his small estate to his sister. MacWilliam J. found that he was in breach of his moral obligation towards his children and was of the view that the bulk of the estate ought to have been left to them. He based his decision upon the ground that the testator had a moral duty to his children, however neglected, thwarted or aggrieved he may have felt. That, however, was a very clear case. Both the son and the daughter suffered from a depressive illness, the son more than the daughter, which disabled them from being able to hold down permanent employment. While MacWilliam J. found that the moral obligation existed he did not deal with the question to what extent, if any, such moral obligation may have been diminished by the bad relations between the parties.

Section 117 of the Succession Act, 1965, clearly recognises that the relationship of parent and child creates a moral obligation to provide for the child in accordance with the parent's means. This is an obligation which may be satisfied by will or otherwise: section 117(1).

The court has to consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children: section 117(2). It is interesting to note that the decision which has to be made by the court requires it to balance only the positions of the children inter se. There is nothing in the section which suggests that the court should also balance other moral obligations imposed upon the testator. Nevertheless, the jurisprudence on this section shows that account has been taken of other moral obligations.

Undoubtedly, if the plaintiff had not taken the stance which he did, it is probable that the lands of his father would have been dissipated and nothing would have remained for him. That clearly is a factor to be taken into account when dealing with the question, whether any moral duty existed at the date of the testator's death. Nevertheless, it is the factual situation at that time which the court has to take into account.

The section recognises a moral obligation on the part of a parent towards a child. The section deals with whether or not that moral obligation still existed at the date of death of the parent. Nevertheless, it is an obligation which exists from the relationship between the parties and is one which is continuous from the date of birth of the child until the date of death of the parent unless in the meantime it has been satisfied or extinguished. Consequently, whatever the legalities of the matter may have been, the decision by the deceased to eject the plaintiff from the lands must have been in breach of his moral obligation to provide for his son, and more particularly the moral obligation which he owed his son for keeping the farm going. That is not to say that the son's reaction was justified or something which should not be taken into account.

In my view the question which should be asked by the court is, what would have satisfied the moral obligation of the parent to the child in the particular circumstances of that family? In the present case, the deceased had two sons. One decided to leave the land and was in a position to earn his own living. The other, the plaintiff, stayed on the lands and had no other means of livelihood. In the ordinary course of events it would have been expected that he would have been left something over half the lands by his parent. In the present case that would have suggested a holding of some perhaps 250 acres in all. The next question is, should the behaviour of the son be taken into account either to extinguish or to diminish the obligation of the parent. It seems clear that the answer to that must be yes. A further question which should be asked is, what benefits, if any, did the child receive from the parent in satisfaction of his moral claim against his father?

In the present case, the learned trial judge has held that the son received substantial benefits in the way of his keep and the profits which he was able to make from the tillage and from the quarry. In my view, the learned trial judge has overstated those benefits. In the ordinary way, benefits which will satisfy the moral obligation should be advancements. They should relate either to an education which enables the child to make his way in life or else advancements of money which would enable the child to establish himself by their use. In the present case there were advancements in the sense that the plaintiff did not

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have to rent either the lands which he tilled or the quarry which he operated. To that extent there was advancement to the child but this was limited by the temporary nature of the provision. It is also a factor that the work which the son carried out for his father before the action was brought was worth £11,000 which he never received.

The learned trial judge was appalled by the plaintiff's conduct towards his father. Admittedly, it was very bad. Nevertheless, it was prompted by a defence of what he regarded, to use a biblical term, as his birthright. However much one may deplore his conduct one cannot ignore the reason for it. Nor should the unreasoning and unreasonable attitude of the deceased that the I's should get no part of his lands be ignored. Admittedly, the deceased did sign papers to enable his daughter-in-law to start a herd on the lands, but this is something which remains inexplicable given his attitude to her family.

I do not accept that the conduct of the plaintiff has extinguished his moral claim on the estate of his father. There are a number of factors to be taken into account. The plaintiff's behaviour was initially prompted by his father's reaction to his marriage. That reaction was in itself a breach of the independent moral obligation the deceased owed to his son for maintaining the farm, which the deceased would have been unable to do.

No doubt the son's reaction became appalling when he stood by when the bad feeling in the neighbourhood erupted, but there is no activity on his behalf directed against his father. In judging a child's behaviour towards a parent, it is important to determine whether that conduct would have been the same had a stranger been involved. It should not be overlooked that parents and children have the same genes and that an uncompromising stubbornness in the one is likely to be mirrored in the other. The particular situation would never have developed had the plaintiff been farming a stranger's lands. That really was the essence of the problem in the present case. The son reacted badly to what he regarded as his father's unfair attitude towards him. This had already been seen in his introducing his son to a neighbour as his employee. Further, the attitude of the plaintiff can be measured by the fact that his brother also reacted against his father and only ceased when his father made over one of the farms to him.

Whatever way one looks at the behaviour of both the deceased and the plaintiff it must be taken to diminish the parent's moral obligation towards the child. Certainly, if the deceased had had a moral obligation as he felt he had towards the N. family the bad behaviour of the child would have increased the nature of such competing moral obligation.

It is quite clear that the deceased wished to befriend the N. family. It also seems reasonably clear that the large capital sums which the deceased obtained from the sale of his farm and from the sale of his herd and which were spent during his lifetime were probably spent in assisting the N. family. Whether or not this is so, he would not have had any moral obligation to provide for them on his death to the detriment of his son.

There is now some 170 acres of land in the estate of the deceased. While the behaviour of the plaintiff towards his father cannot go unrecognised, I do not regard it in the circumstances as extinguishing the moral obligation of the deceased towards him. To allow him no more from his father's estate is to ignore his position in such circumstances. His only training is as a farmer and he would then be left in mid-life with no lands and no capital to acquire any. Nor taking into account the limited advancements and the legacy should it be diminished so as to disentitle him to any of the remaining 170 acres. It was likely that he would have received 250 acres and he would still have lost a probable 80 acres.

At the same time, the wishes of a testator should not be totally ignored. The deceased wished to benefit the N. family. He chose his niece because of that family's financial difficulties. He left her the land because that was his only asset. In the context of the present case, to split off any part of the holding in favour of this beneficiary may engender unnecessary further ill will. It may be better for this reason to provide that the entirety of the remaining lands should pass to the plaintiff instead of his legacy upon condition that he pays to his cousin a sum of money as if it were a pecuniary legacy.

Before deciding on this matter the court would like to hear the wishes of the parties and to be provided with information as to the present value of the lands and any other assets of the estate and as to the amount which would have to be borne by the parties in respect of costs of these proceedings.

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[Reporter's note :The matter was adjourned and came on on the 11th January, 2000. At that stage the parties had not reached agreement.

The Court ordered that the appeal be allowed, that the order of the High Court be set aside and in lieu thereof ordered that, pursuant to s. 117 of the Succession Act, 1965, in substitution for the provision for payment to the plaintiff of the sum of £5,000 in the will dated the 25th May, 1993, the executrix of the will vest in the plaintiff the lands of the deceased comprising the 114 acres, including the family home, together with all stock and chattels referred to in the Inland Revenue affidavit sworn by the executrix on the 29th September, 1994, other than the balance on the account of the deceased in his bank, and in all other respects the said will be confirmed.]

Solicitors for the plaintiff: Michael Lanigan & Co .

Solicitors for the defendant: Walter A. Smithwick & Son.

Ronan Munro, Barrister

Neil Gleeson, Barrister