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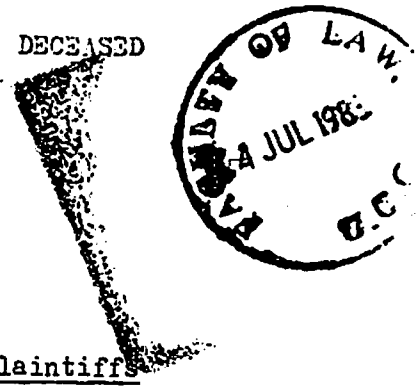
1981. No. 1042 S

IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT 1965, AND

IN THE MATTER OF THE ESTATE OF J. H. DECEASED



BETWEEN:-

M. F. H. AND OTHERS

Plaintiffs

-and-

W. B. H.

Defendant

JUDGMENT of Mr Justice Barron delivered 2 March 1983

In this case, the testator died on the 30th May 1980 having made his last Will on the 8th May 1980. He was survived by his second wife and nine children all of whom were the children of his first wife. The testator was a farmer and also carried on business as an agricultural contractor. His first wife died in 1974. From then on, he was assisted in his farming and contracting business by his son L., the Defendant herein. In 1977, he re-married and purchased a bungalow at Arden Heights in the town of Tullamore where he went to live with his second wife. From then on the farmhouse on his farm was occupied by his unmarried children.

His assets at the date of his death comprised his farm of 48 acres at Spollenstown, Tullamore, now worth about £120,000; stock thereon and agricultural machinery valued together at £31,750; the bungalow in which he lived now worth about £30,000; household contents valued at £1,500; £1,100 with the Credit Union; and a motor-car valued at £5,000. Much of the machinery was subject to loans from the Agricultural Credit Corporation amounting in all to approximately £22,000. The purchase of the bungalow in Tullamore was financed by bank loans which at the date of his death amounted to somo £25,000. He also had other liabilities amounting to approximately £12,000.

By his last Will dated the 8th of May 1980 the testator appointed his son L. as sole executor and left his bungalow at Arden Heights to his widow for her life and after her death to a grandson, being the son of one of his married sons. He left the residue of his estate to his son L. He made no bequest by his Will to any of his other children.

Of his nine children, five including L. were married. The remaining four, two sons and two daughters were unmarried. It is these latter who are the Plaintiffs in the present proceedings.

None of the children obtained more than a primary education. Each of them has essentially made his or her own way in life. N. the eldest was born in 1943. He now owns his own farm and seeks nothing from the estate of his father. M. F. H., one of the Applicants, was born in 1945. He left school at the age of fourteen and since then has moved from job to job in his occupation as a chef. His job has taken him away from home and he returned only during annual holidays for one or two weeks in the year. As a result, he became a virtual stranger to his brothers and sisters who remained at home. Since his father's death he has been out of work for approximately 18 months and has got to know the unmarried members of the family from staying and living in the family home with them. He has since he was a child suffered from deafness in his left ear and uses a hearing aid. He is unmarried and has no assets other than his pay when in work which is of moderate proportions.

P. J. B. was born in 1946. He is married and lives in Durrow. He has a bulldozer contracting business and makes no claim against the estate of his father. The next child L., the Defendant in these proceedings, was born in the year 1949. He learnt his

trade as a mechanic in Tullamore and went to England in 1971, where he obtained steady employment. When his mother died in 1974 he returned home and stayed on to help his father. From then on until his father's death he assisted his father both in the running of the farm and to a lesser extent in his agricultural contracting business. He is married and lives in a bungalow which he built on a site provided for him on the farm by his father. J. L. who was born in 1951, is an agricultural contractor. He is married and also lives in a bungalow which he built on a site on the farm provided for him by his father. He makes no claim against the estate of the testator. The next son J. M. was born in 1953. He is a claimant and is unmarried and lives at home. He is a haulage contractor and at the date of his father's death was not in a very good way of business. Since then he has done considerably better.

The next child E. was born in 1954. She is married and makes no claim against the estate of her father. The last two children are girls both of whom live at home. They are both claimants. B. C. was born in 1955 and works as a clerk in Tullamore and has a reasonable wage having regard to the nature of her employment.

M. F., the youngest child who was born in 1960 has had various jobs since she left school, mainly as a factory worker. Although of normal intelligence, she is unable to read or write save that she can sign her own name. While she was able to hold down a job in a factory which she lost only through redundancy, she would be one of the last of the labour force to find employment. She is not able to look after herself fully in the sense that she requires assistance when shopping and the family would not like to see her alone at home on her own. In the last year, she was the victim of an assault by a man whom she met at a dance and suffered moderately severe facial injuries. The burden of looking after her in this limited sense has devolved upon her two sisters.

The testator's widow claimed her legal share and having done so agreed to accept in its place a life estate in the bungalow at Arden Heights and the sum of £15,000. Most of the agricultural machinery has been sold by the executor. He kept approximately £5,000 worth and the proceeds of sale of the remainder raised approximately £4,500 more than the money required to pay off the Agricultural Credit Corporation. The loan to the bank has been increased by interest and by payments made to the widow. In the result, there is now approximately £45,000 owing to the bank.

This application is brought under the provisions of Section 117 of the Succession Act, 1965. Section 117 so far as it is material is 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

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."

The approach to be adopted by the Court in applying the provisior of this Section was first considered by Kenny J., in F.M. .v. T.A.M. and Others 106 I.L.T.R. 82. In that case at page 86, Kenny J., said:-

"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 ... the Court, therefore, when deciding whether the moral duty has been fulfilled, must take all the Testator's property ... into account ...

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 on:-

(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 passage has been cited with approval in many later cases. In that case the applicant was an only child, who had been adopted. His father refused to recognise him as his son for this reason and had made no provision for him by his Will. Kenny J. granted him relief under the section.

In the matter of <u>N.S.M. deceased</u> 107 I.L.T.R. 1. Kenny J., had

to consider applications by the three younger children of the Testato proper provision having been made for the eldest child. In each case Kenny J., granted the applicants relief. The facts so far as they are material and the reasons for his decision are contained in a passage of the judgment at page 8. It is as follows:-

"The Testator, who had gross assets of about £430,000, made no provision for his three younger children out of his property. Two of them had strong moral claims on him. B.S.M. (one of the applicants) had been induced to believe that he would ultimately become owner of the S. stud and shaped his life accordingly. The whole foundation of his upbringing and training was swept away when the Testator sold the stud ... Mrs. P. (another of the applicants) had been persuaded by the Testator to settle the property which she had got from her Grandfather and from her Aunt in such a way that she is entitled to the income of it for her life but cannot leave any of it to her husband or her children. The Testator has made adequate provision for N.M.M (the eldest child) by putting him into a prosperous business where his considerable commercial talents make it certain that he will have a large income. ... I am .. of the opinion that the Testator fail i in his moral duty to make proper provision for B.S.M. and for

" Mrs. P.

I have found Mrs. N.'s (the third applicant) claim more difficult. With considerable wisdom she had refused to settle her property though the Testator was anxious that she should. By Irish standards she has a considerable unearned income. The Testator's obligation, however, was to make proper provision for her in accordance with his means. I think the size of the Testator's estate, the fact that all the expenses of her education were paid out of income to which she was contingently entitled and which she would get when she attains twenty five if it had been accumulated and the uncertainty of her future (married to a doctor who has just qualified), created a duty to make proper provision for her."

In M. L. and A. W. .v. M. L. an unreported decision of Costello J., delivered on the 22nd November 1977 the Testator had been divorced by his wife and purported to marry for a second time. There were children of this purported marriage and the question arose whether or not in providing for his legitimate children, he was entitled to take into account his moral obligations to these other children. In the course of his judgment, Costello J., said:-

"Basically, there are two issues which may require to be determined in all proceedings under the Section. Firstly, the

"Court must determine whether there has been a failure on the part of the Testator of the moral duty referred to in the Sectio which he owed to the Applicants. The second question .. concern the provision which the Court should make out of the Testator's estate ...

The Court must make an Order that is just. It is required by sub-section (2) of Section 117 to consider the application from the point of view of a prudent and just parent; and it is required to take 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 or children who are claimants under the Section and to the other children. A parent acting prudently and justly must weigh up carefully all his moral obligations. In doing so, he may be required to make greater provision for one of his children than for others. For example, one may have a long illness for which provision must be made; or one may have an exceptional talent which it would be morally wrong not to foster. But a just parent in considering what provision he should make for each of his children during his lifetime and by his will must take into account not just his moral obligations to his

" children and to his wife, but all his moral obligations. The father of a family may have many. Again to give an example, a father may have aged and infirm parents who are dependent on him and to whom he clearly owes a moral duty. When acting justly and prudently towards his own children he would have to bear in mind his obligations to his own parents and the provision he makes for his children may have to be reduced because of these other obligations. It follows therefore that if, after his death, a child of the Testator claims that insufficient provision was made for him, the Court, when considering whether this was so or not, must bear in mind all the moral duties which the Testator may have had and all the claims on his resources thereby arising. In considering the validity of the judgments which the Testator made during his lifetime and by his will and how he fulfilled his moral obligations it is obviously not relevant to consider only those obligations which could be enforced under the Act."

In J.H. and C.D.H. .v. Allied Irish Banks in an unreported judgment delivered on the 17th November 1978, McWilliam J., cited with approval the passage from the Judgment of Kenny J., in F.M. .v. T.A.M. to which I have already referred and part of the passage from the Judgment of Costello J., in M.L. and A.W. .v. M.L. to which I have also referred.

In this case, the Testator who had been estranged from his wife, son and daughter, had left his estate between his sister and her son. McWilliam J., was satisfied that the Testator had a moral duty to provide for his son and daughter in accordance with his means "however neglected, thwarted or aggrieved he may have felt." Dealing with the position of the Testator's sister and nephew in the context of whether or not the Testator had failed in this moral duty he said:-

> "In this context, adopting the view of Costello J., with regard to other possible moral duties, it is relevant to consider the position of the Testator's sister and nephew, not by comparison with the position of the Testator's widow, but objectively and independently. It is perfectly clear that, however attached the Testator was to his nephew and his nephew's family, he had no moral obligation to provide financially for his nephew, who is comparatively well to do. With regard to his sister, although I accept that she is not very well off, there is no suggestion of destitution or financial or physical distress and, notwithstanding the kindness which she undoubtedly showed to the testator, I cannot see that the testator had any moral duty to make provision for her either."

These cases show the approach which the Court adopts in the

exercise of its jurisdiction under the section. They also indicate some circumstances in which a Testator has been regarded as having failed in his moral duty to his child to make proper provision for him in accordance with his means. A similar approach has been adopted by the Courts in Australia and New Zealand. In Re Allen .v. Manchester, 1922 N.Z.L.R. 218 at page 220 - a passage cited by Lord Romer in Bosch .v. Perpetual Trustee Company Limited 1938 2 All E.R. 14, at page 21 - Salmond, J. indicates the test which the New Zealand courts adopt in relation to legislation which requires the court to consider whether under the will of the Testator adequate provision has been made for the proper maintenance and support of his spouse and children. He says:-

"The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and

"children had he been fully aware of all the relevant circumstances."

In the exercise of its jurisdiction, the section requires the Court to approach its decision from the point of view of a prudent and just parent, and must take into account the position of each of the children and any other circumstances which it may consider to be of assistance. Having taken these matters into account, it must reach a decision which is as fair as possible to the applicant child and, where there are other children, to those other children also. In this context, the expression "other children" means any other child who is also an applicant or who is a beneficiary under the will and whose benefit thereunder may be affected by the exercise of the Court's powers. The Court should not be required to take into account provision or lack of provision made for children not in either of these categories. The provision made for such children cannot be affected by its order. It must strike a balance, where necessary, between the children before the Court on the basis of what is just having regard, as well as to the other matters it has to take into account, to the means of the testator passing by his Will.

In my view, it is clear that what the Court is being required to do is to be fair in all the circumstances. Since the Court must see

whether or not proper provision has been made in accordance with the means of the Testator, it follows that "proper" means what is fair in the light of the matters which it has to consider and that the standard to be applied depends on the means of the Testator. The Court must decide whether or not any or any further provision ought to have been made for the applicant child and, if so, what further provision would have discharged the Testator's moral duty. In reaching its decision on both these questions, the Court must take into account all the matters indicated in sub-section (2). The position of an applicant child cannot be taken in isolation. The quantum of what is proper provision in any particular case is not an absolute but is dependent on all the matters which the Court must take into account. The opening words of sub-section (2) make this clear. If it had been otherwise, the opening words would not have been "the Court shall consider the application from" but would have been "the Court shall consider any relief to be granted from". It is the duty of the Court to consider the entirety of a Testator's affairs and to decide upon the application in this overall context. In other words, while the moral claim of a child may require the Testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

The Court has to consider whether or not the Testator has failed in his moral duty. This suggests that the duty existed at the date of death of the Testator. Nevertheless, 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. I would regard any such factor as being one of "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." In my view, the principles of fairness require every relevant consideration to be taken into account when the decision is being made.

The power of the Court is to order such provision for the child concerned out of the estate as the Court thinks just. I would regard the nature of the provision made by such order as being part of the decision of the Court. Accordingly, "just" in this context also means fair having regard to the interests of the applicant but also to the interests of the other children and such other person to whom the Testator owed a moral duty.

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 Court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the Court power to make a new will for the Testator. Of course, once the Court exercises its powers, this affects the disposition of the Testator's estate and to that extent his will is re-written. However, the Court has no power to ensure that all or any particular part of the Testator's disposable estate is divided between his children. 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, then the Court has no power to intervene.

In the present case, the position of the defendant is that he returned home on the death of his mother in the expectation if not the promise that he would be left the family farm on the death of his father. Although he carried on his own agricultural contracting business after he returned home, he also worked with his father both on the farm and in his father's contracting business. However, he does not appear to have received any remuneration for so doing save that he was from time to time permitted to retain small debts owing to his father. Although L. went to England in 1971 following a bad car accident and with the need to pay off debts which he had incurred at home, I think it is clear that he had established himself in England and only came home on his mother's death in order to be in a position to assist his father.

Of the remaining children both M.F.H. and J.M. set themselves on their respective courses in life which each was suited for and which each wished to adopt. B.C. lived at home and presumably would have remained at home until she married. The same can be said of M.F. except that having regard to her backward nature she is probably unlikely to get married. None of these remaining children has his or her own home, and to that extent cannot be said to have been established in life independent of the assistance of the Testator. M.F.H. has a physical infirmity and a significantly poorer standard of living

than his parents. J.M.'s business is now doing better, but nevertheless there is an absence of the security which would be present in a less precarious type of business. B.C. is established in her own career. However, as a daughter, she would have been expected until after the death of her mother and, even more so on the remarriage of her father, having regard to the needs of her sister M.F., to run the family home. To this extent her plans for her own life would have been affected. If she was expected to look after her sister on a long term basis, her plans would have been even more affected. M.F. clearly requires care on a permanent basis.

The present financial position of the estate is that the defendant has bee left assets worth approximately £155,000 in respect of which there were either liabilities or he has assumed liabilities amounting in all to approximately £70,000. He has indicated that he would hope to be able to pay off these liabilities without resorting to sale of any of the assets provided that no further pecuniary liabilities were imposed upon the estate. I think that this is a reasonable view.

The defendant's main source of income lies in his business rather than in his profits from farming. To that extent, loss of part of the lands would not be so severe a burden. This view is supported by the existence of a planning application for a housing development on part of the lands.

The defendant had hoped to enhance the value of the lands affected by the application so that he could pay off the liabilities of the estate with the proceeds of sale. This plan has not matured since the necessary permission has been refused both by the Local Authority and by An Bord Pleanala on appeal.

In my view, a prudent and just parent considering the respective positions of the four applicant children and of the defendant and having regard to the means available to him would have been relucant to divide up his lands between his children, but would have left them as a unit to one child. At the same time, he would have have made some provision for the remaining children. In the present case, L. is clearly the child to whom the lands ought to have been left. The remaining assets have been insufficient to meet the liabilities of the estate including the right of the widow of the Testator to her legal share in his estate. As a result, the bequest of L. has already been diminished. Having regard to my view that some provision ought to have been made for each of the plaintiffs, this means that this benefit must be further reduced. Such reduction must be as fair as possible to L. as to the children for whom provision must be made.

In my view proper provision for the plaintiffs in accordance with the means of the Testator would have been as follows:- J.M. should be entitled t

a licence to reside in the family home until he marries, or if he does not marry then for his lifetime. In the event of his marriage, or, if he so wishes, without any decision to marry, he should be provided with a site upon which to build a home at his own expense. M.F.H. should be entitled to a similar licence to reside in the family home and should be provided with a site upon a similar basis. M.F. should be entitled to a licence to reside in the family home until she marries and if she does not marry then for life. During the period of such licence, she should have an exclusive licence in comm with B.C. or such other member of the family who in default of B.C. so doing may from time to time be living in the family home and looking after her to use and occupy Part B on the map adduced in evidence subject to the right of L. to use the farm buildings whether for the purposes of his business as a farmer or as a contractor. During such time as she is entitled to such licences and she is unemployed, L. should make such provision for her maintenance as is reasonable having regard to the wages earned by her when employed and her social welfare payments received by her when she is not. The lands should also be stocked with a limited number of young cattle for the benefit of M.F. and the member of the family looking after her to a value not exceeding the value of the cattle of a similar nature kept by the girls in the family during the lifetime of the Testator. B.C. should be entitled to a

licence to reside in the family home until she marries and if she does not marry then for life. So long as she continues to look after M.F. and conditional upon her so doing she should after her marriage and during the lifetime of M.F. be entitled to a licence for herself and for her husband and children to reside in the family home.

The lands the subject matter of the recent planning application have no yet come into the category of development land, but it seems that it is only a matter of time before they do so. When this happens they will be worth considerably more relatively than at present. In my view, a prudent and just parent would have wanted such benefit to be shared between his children, certainly between such of his children who were weakest financially, a category into which each of the plaintiffs falls. Accordingly, in addition J.M., M.F.H., M.F. and B.C. should be entitled to the lands the subject matter of the recent planning application as tenants in common in equal one fifth shares with L. Conditions should be imposed upon this right and for such time as the lands ceased to be primarily agricultural in character so as to enable L. to use them for agricultural purposes. Included in such conditions should be one providing for the grant of successive con acre lettings of such lands to L. who should pay a reasonable con acre rent for them.

In indicating what I consider constitutes proper provision for the

plaintiffs having regard to the means of the Testator, I have had regard to the fact that the estate is entitled to the reversion of the bungalow at Arden Heights subject to the life estate of the Testator's widow and that this reversion has been bequeathed to a grandson of the Testator to whom no moral obligation was owed by the Testator. I have not sought to make this reversionary interest available either to the plaintiffs or to the defendant as compensation for what has been taken from him. The Testator's widow was born on the 21st December, 1937. Accordingly, having regard to her life expectancy, the value of this reversionary interest would be small. Both on this ground and from the nature of the interest itself, I do not consider that taking this benefit from the beneficary named in the will would alter materially the provisions for the plaintiffs which I propose to direct.

I have not sought at this stage to determine precisely the nature of the rights which I have indicated ought to have been provided for the plaintiffs by the Testator. Questions arise as to the location of the sites, the upkeep of the family home, the care of M.F., if B.C. is unwilling to undertake the responsibility, settlement of the share of M.F. in the lands the subject matter of the recent planning application, amongst others. It would be preferable for the parties to draw up a trust deed dealing with all these matters. There will be liberty to apply if any problems arise as to its form.

2/3/83