

THE HIGH COURT

[2012 No. 256 SP]

IN THE MATTER OF THE ESTATE OF H.P....DECEASED D

AND

IN THE MATTER OF THE SUCCESSION ACT 1965

AND

IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT 1975

AND

IN THE MATTER OF AN APPLICATION BY

G.P.

PLAINTIFF

AND

G.R. AND P.M.

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 15th day of July, 2013

Factual context

1. The plaintiff is one of four children of the first marriage of her father, H.P. (the testator). The testator was survived by his widow, R.P. (the widow) and by two children of his second marriage, B.P., who was 40 years of age at the date of his death, and A.P., who was 37 years at the date of his death.
2. The testator made his last will and testament (the Will) on 26th March, 2009. He appointed the defendants, both solicitors, to be executors thereof. He devised and bequeathed all his property to the widow for her own use and benefit absolutely should she survive him by 30 days. The deceased died on 30th June, 2011. Probate of the Will was issued to the defendants on 19th January, 2012.
3. The widow survived the testator by 30 days and, accordingly, she is the sole beneficiary under the Will.

The proceedings

4. In these proceedings, which were initiated by a special summons which issued on 27th April, 2012, the plaintiff invokes s. 117 of the Succession Act 1965 (the Act of 1965) and seeks relief in accordance with subss. (1) and (2) of section 117. Those subsections provide 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."

5. In her grounding affidavit sworn on 1st May, 2012, the plaintiff has averred that at no stage did she obtain financial assistance from her father nor did any of her siblings from his first marriage. She has stated her belief that her stepsisters, A.P. and B.P., had the benefit of a College education paid for by her father and that they have received extensive gifts all their lives including cars, houses and holidays. In a replying affidavit sworn on 2nd July, 2012, the widow did not specifically address the assertion that her daughters had received extensive gifts all their lives, including cars, houses and holidays, but she did deal generally with the treatment by the testator of the children of his first marriage and the children on his second marriage. In her second affidavit, which was sworn on 2nd November, 2012, the plaintiff reiterated her belief that her stepsisters had received extensive gifts during the testator's lifetime stating that each had received a new motor vehicle from him and each had received a house as a gift from him. In her second replying affidavit, the widow did not address that averment.

The application

6. The application before the Court is an application requiring the defendants to make discovery of thirteen categories of documents. Most of the thirteen categories relate to the means and assets of the widow, A.P. and B.P. during the lifetime the testator and since his death. The documents sought range from documents in relation to all gifts of any type over the value of €500 received by any of those parties from any source and in relation to the provision made for them by the testator or by any third party to documents evidencing the assets held by them at the date of the testator's death, their qualifications, their education, employment and occupational history and their medical condition or disability at the date of the testator's death or since his death. One category sought is tax returns of the widow and A.P. and B.P. for a period of ten years.

7. The plaintiff's solicitors made a request for voluntary discovery of those categories by letter dated 26th March, 2013 to the defendants' solicitors. The reason for seeking those categories was outlined in that letter and it was stated, inter alia, that, in order to assess the plaintiff's entitlement to any provision from the estate of the testator, it is necessary for the proper resolution of the proceedings that discovery of those categories be made. It was also asserted that the documentation sought is necessary in order that the Court might properly appraise whether there has been a failure in moral duty on the part of the testator and secondly whether any provision should be made for the plaintiff. In order to properly appraise such matters, it is necessary that the Court should know the nature and extent of the means and resources of the widow, A.P. and B.P. as of the date of the testator's death

and further any documentation necessary to ascertain whether there has been a significant material change up to the present time, it was asserted.

8. The response of the testator's solicitors by letter dated 11th April, 2013 was, in effect, that the categories of documents sought were neither relevant nor necessary, pointing out that neither A.P. nor B.P. is a beneficiary of the estate of the testator. It was contended that any lifetime provision that may have been made for them is irrelevant to the plaintiff's cause of action under s. 117. It was explicitly stated that the defendants would not make discovery of any documentation in relation to the financial status or in relation to gifts provided to either A.P. or B.P. As regards the widow, it was stated that, as the plaintiff had not made any claim pursuant to s. 121 of the Act of 1965, documents in relation to any gifts received by the widow were not relevant or necessary. However, without prejudice to that position, it was confirmed that the widow will swear an affidavit of means as at the date of the death of the testator.

The law

9. What the Court is concerned with is an application for *inter partes* discovery, not an application for non-party discovery. Essentially what the Court has to decide is whether the documents sought are relevant to any matter in question in the proceedings and whether they are necessary for disposing fairly of the cause or matter or for saving costs. The application of that test necessitates considering how the Court exercises a statutory jurisdiction conferred on it by section 117.

10. Counsel for the defendants referred the Court to the following passage of the judgment of the High Court (Barron J.) in *In the Goods of J.H. (Deceased)* [1984] I.R. 599 (at p. 606):-

"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 to 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."

11. That passage was quoted in the judgment of the High Court (Carroll J.) in *K.C. v. C.F.* (Unreported, 16th December, 2003). However, Carroll J. found that there were special circumstances to be taken into account in the case before her, in that the sole beneficiary of the estate of the testatrix in issue there had sworn an affidavit that he held money residue of the estate on a solemn trust for his eleven brothers and sisters, including the plaintiffs, equally, so that the other brothers and sisters, while not beneficiaries under the will, would be affected by the exercise of the Court's power. There is nothing of that nature in this case.

12. Counsel for the plaintiff relied on the decision of the High Court (Kearns J.) in *X.C. v. R.T. (Succession: Proper provision)* [2003] 2 I.R. 250. In that case, Kearns J. at p. 262 helpfully set out the legal principles to be derived from previous authorities on the application of section 117. Having carefully considered those principles, I am not satisfied that any of them displaces what was stated by Barron J. in the *J.H.* case. The most relevant principle is that set out at (l) which is as follows:-

"In dealing with a s. 117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether."

Application of the law to the facts

13. It is important to emphasise that all the Court is concerned with at this stage is to determine whether the documentation sought by the plaintiff meets the "relevant" and "necessary" criteria which must be established before an order for discovery is made. What the "entirety of the testator's affairs" and the "overall context", to adopt the words of Kearns J., entails for the proper exercise of the Court's jurisdiction will be a matter for the trial judge.

14. As regards the "relevant" criterion, it is difficult to see how the means or assets of B.P. or A.P. during the lifetime of the testator or at or since his death are of any relevance to the issues raised on the s. 117 application, given that neither is an applicant under s. 117 nor benefits under the Will of the testator, and both were independent adults at the date of the testator's death. Aside from that, most, if not all, of the documentation sought is not, as a matter of probability, in the possession or procurement of the defendants, who are sued in their capacity as personal representatives of the testator. Were the defendants to ask B.P. and A.P., for example, for their tax returns for the past ten years, B.P. and A.P. would be fully justified in telling the defendants to "mind their own business". As regards the "necessary" criterion, the burden, scale and cost of making discovery of the documentation sought in relation to B.P. and A.P., even if it was relevant, which it is not, would be likely to be disproportionate in the context of the disposing of the proceedings in a fair and just manner.

15. In relation to the documentation sought in relation to the means and assets of the widow, the affidavit of means as at the date of the testator's death proffered by the defendants should be sufficient to meet the needs of the plaintiff in making her case under section 117. However, it may be that, when the affidavit of means is furnished to the plaintiff, that the plaintiff will be able to make some case for discovery of some documentation. Therefore, I propose adjourning the motion as regards the documents sought in relation to the widow for a specific period to enable the affidavit to be furnished and to allow time for consideration of it by the plaintiff's legal advisers. However, it must be understood that the focus of s. 117 is on the position as at the death of the testator and each and every category of the thirteen categories sought, even in relation to the widow, is far too wide.

Order

16. There will be an order dismissing the application for discovery of documents in relation to A.P. and B.P. The balance of the application will be adjourned as indicated in para. 15.