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Neutral Citation Number: [2007] IEHC 68

THE HIGH COURT
DUBLIN

Case No: 2005/210SP

E. H.

PLAINTIFF

E. P. O'C., O. H.
D. H. AND S. H.

DEFENDANTS

Judgment delivered Mr. Justice Herbert on Thursday, 21st December, 2006

1. Mr. Justice Herbert: The late Mrs. AH died testate in 2004. She was predeceased by her husband Mr. DH, who died intestate in 1994. At paragraph 8 of the affidavit of Mr. OC solicitor, the sole executor by the last will and testament of Mrs. AH, sworn in these proceedings, it is stated that after the death of Mr. DH the late Mrs. AH had assumed sole possession and ownership of all the assets of Mr. DH.

2. The Plaintiff and her brother DH gave evidence that all of the children of Mrs. AH and Mr. DH had executed waivers in favour of their mother, though, the Plaintiff asserted, she had done so under duress from her late mother and without having had any legal advice.

3. The late Mrs. AH executed her last will and testament on 3rd July, 2003. By it she gave, devised and bequeathed her shop and residential premises, together with all stock in trade, trade fixtures and fittings and household furniture, and also her motor car to her daughter OH. She gave, devised and bequeathed her lands in the townland of K Upper, together with her lands in the townland of MK, but excluding a meadow on the right-hand side of the C to D road as one travels towards D to her son SH. She bequeathed lands in the townland of K lower and in the townland of MN to her son DH. To the Plaintiff she bequeathed the aforementioned meadow, her engagement ring and watch, her telecom shares and the money, if any, in the credit union in C. She appointed her said four children to be her residuary legatees and devisees and devised and bequeathed all the rest, residue and remainder of her estate to them in equal shares. In the events which have occurred there was no residue in the estate.

4. At the hearing of this case before me it was agreed that the total net value of the estate of the late Mrs. AH was €2,422,289, and that her debts and funeral expenses amount to €22,320.65. At the conclusion of the Plaintiff's evidence-in-chief it was conceded by the Defendants, through their senior counsel, that the late Mrs. AH had failed in her moral duty to make proper provision for the Plaintiff in accordance with her means, either by the terms of her said last will and testament or otherwise.

5. The Plaintiff EH was born in 1976. She received primary and second level education. She told the Court that she had done well in the Junior Certificate examination but didnot achieve a pass level at the Leaving Certificate examination. She told the Court, and I have no reason to doubt her evidence in this regard, that this was because she was

distraught following the recent death of her father, with whom she had a close and affectionate relationship.

6. The Plaintiff stated that her ambition had been to become a nurse, but she had been frustrated in this ambition by her lack of success in the Leaving Certificate examination. She told the Court that she had helped in the family shop from the age of 8 years of age onwards. The Plaintiff has therefore no academic or professional qualifications and no marketable skills, other than as a salesperson in a general convenience store, but with no accounts, stocktaking or ordering skills or experience.

7. The Plaintiff is, and was on the day before the death of her mother AH, a single parent with two minor children, D born in 1997 and M, born in 1999. Both children have the same father, she told the Court, but he has not acknowledged paternity and makes no financial contribution whatsoever towards her or their maintenance. Both children happily enjoy excellent physical and mental health.

8. In October 1996 the Plaintiff purchased a modest dwelling house in her native town. She utilised for this purpose savings of £8,000, former currency, accumulated working in the family shop. Her late mother, Mrs. AH, gave her £34,000, former currency, and she obtained a mortgage of £30,000, former currency, from a financial institution. The Plaintiff told the Court that at this time her brother DH and her sister OH were assisting her mother in managing the shop and lands, so that the Plaintiff was obliged to obtain employment in a number of local businesses successively. At this time also she established a small business,which she carried on from her own home.

9. In the year 2000 her brother DH established his own,now very successful, retail business in another town in Ireland, a very considerable distance from the family base. After he left, the Plaintiff had resumed workingin the shop with her sister OH and also continued with her business , working late into the night. The Plaintiff told the Court that up to Christmas 2000 relations between her and her sister OH were very strained, and she had no contact at all with her brothers DH and SH, who offered her no help or support.

10. The Plaintiff told the Court, and I accept her evidence on this, that in May 2003 her late mother AH gave her €6,000 to discontinue her business and instead to look after her. In 2003 also her late mother AH had given her £3,800 sterling to enable the Plaintiff to obtain treatment outside this State for an unpleasant and serious eye problem, which treatment fortunately appears to have been very successful.

11. The Plaintiff told the Court that in 1997, after the birth of her first son D, she had suffered a nervous breakdown, of which her late mother AH was fully aware. Dr. MC, a general medical practitioner, who had been the Plaintiff's physician for upwards of 17 years, and Professor C, a professor of psychiatry and a consultant attached to a leading teaching hospital, gave evidence that the Plaintiff had in fact suffered a severe reactive type of post natal adjustment disorder. The Plaintiff told the Court, and I have no reason to decline to accept her evidence, that her late mother AH had accepted her first child D, but would have no contact at all with her second child M, and that this had caused her intense

hurt and sorrow. Professor C told the Court -- and though strongly challenged in cross-examination did not alter her opinion, and no contrary evidence was led by the Defendants -- that the Plaintiff's problems continued from 1997 up to 2005.

12. Dr. MC told the Court that on 6th March, 1997 she had formed the opinion that the Plaintiff was suffering from a severe reactive type of post natal adaption disorder. In her expert opinion, this was due to the birth of the child, to lack of support from the child's father and from her own family, serious financial worries and to a sense of abandonment and isolation.Dr. MC was satisfied that the late Mrs. AH must have been fully aware of the Plaintiff's plight. She told the Court that she had referred the Plaintiff to Dr. S, a psychiatrist, who had seen the Plaintiff on 11th March, 1997.

13. In cross-examination it was put to Professor C that Dr. S had recorded in 1997, in his disclosed clinical notes, that the Plaintiff:

> "...had a difficult relationship with her mother and was not speaking to her siblings..."

14. Professor C agreed that in 1997 the Plaintiff had received treatment for 18 months, and thereafter had received no further treatment until May 2005, when she had received professional counselling for stress, attributable to the death of her late mother and to this unfortunate litigation. Professor C agreed that the Plaintiff had suffered no acute psychiatric illness after 1999. However, Professor C insisted that the Plaintiff continued to have problems. She described the Plaintiff as a very vulnerable person, naive,seriously lacking in self-confidence, with no social contacts and constantly overwhelmed by constant financial worries, who could be both willful and difficult, while at the same time easily moulded and misled and who demonstrates an unhealthy degree of interest in religion and self-help material.

15. Professor C told the Court that she was horrified to learn that on the advice of a person described to her by the Plaintiff as a social worker, the Plaintiff had borrowed £15,000 sterling and had travelled to the Americas for a form of alternative therapy. Professor C stated that in her expert opinion this clearly demonstrated the level of this Plaintiff's desperation. While she accepted that she was not an educationalist,Professor C told the Court that, in her opinion as a psychiatrist, the Plaintiff did not appear to have any particular learning difficulties and, in her expert opinion, had the capacity to pass a Leaving Certificate examination.

16. I accept the evidence of the Plaintiff's sister OH, and her brothers DH and SH, that the late Mrs. AH had obtained extra tuition for the Plaintiff during her primary and second level schooling. I do not, however, accept their opinion that the Plaintiff has what they described as "a learning difficulty".

17. The Plaintiff's sister OH was born in 1974. She is now engaged to be married, but on the day before the death of her late mother AH she was single. She had a similar level of education to the Plaintiff. All her life she had assisted her mother in managing the family

shop. She told the Court - and her evidence on this was not shaken - that she had no academic qualifications whatsoever and no skills other than in managing this shop. She told the Court, and I have no reason to doubt her evidence, that she was able to manage cash, do stocktaking and purchasing, and is proficient in ordinary bookkeeping. She told the Court that the late Mrs. AH had engaged a local person to do the business accounts for the shop, but that she herself knew nothing of accounting or of taxation. Since she took over the running of the shop, on the day after her mother's funeral, she employed an accountant - identified to the Court - to deal with these matters, and this accountant had commenced work two months after her late mother's death.

18. OH told the Court that a full stocktaking and checking was done by her in February 2005. She told the Court, and I accept her evidence, that though her late mother was terminally ill she had remained in total control of the shop business until the final week of her life, when she became a hospital inpatient. Only then had her late mother given her a key to the safe and relinquished control of the business to her. She toldthe Court that when she opened the safe it contained documents only.

19. In cross-examination, OH accepted that in the period after her mother was taken to hospital and in the immediate period after the death of her mother she operated a cash float of approximately €5,000 and had business takings of approximately €5,000. No issue arises in relation to these sums because, as senior counsel for the Defendant's correctly pointed out, the value of the estate was agreed and would include these sums.

20. OH told the Court, and her evidence was not challenged or discredited, that she lived with her mother in the residential part of the building, which included the shop. She had free accommodation and food, and her mother allowed her the use of her motor car. She was paid on average between €80 and €120, never a precise sum, in cash at weekends. Out of this wage she purchased her own clothes and met the other expenses of day-to-day living. OH told the Court that she enjoys good health and, thankfully, has no medical problems or infirmities.

21. While I accept the evidence of OH, that the late Mrs. AH was a courageous and strong willed person and very secretive in her business dealings. I am unable to accept her recollection that the Plaintiff did not physically care for their mother, at least to some extent, from May 2003 to the week prior to her admission to hospital. I am satisfied, on the evidence, that the Plaintiff during this period did whatever her mother asked or permitted her to do by way of caring for her.

22. OH told the Court, and again her evidence was not contradicted or discredited, that the business of the shop is good and that she had an average net profit of €2,000 per moth. She told the Court that she has savings of €49,000 in a particular named financial institution, and further savings of €40,000 in a named bank. She had also purchased a motor car on 22nd May, 2006 for a payment of €20,300. In cross-examination OH stated that the late Mrs. AH believed that the Plaintiff would continue to help in the shop after her death, but unfortunately she and her sister simply could not work together.

23. OH told the Court that the residential accommodation behind and above the shop is now, and has always been, her home and she intends to continue to reside there after her pending marriage, rather than on her intended husband's land.

24. Mr. DH was born in 1972. He received primary education only and has no academic or trade qualifications. I accept his evidence that from an early age he worked with his parents in the shop and on the land. I am satisfied that despite his very limited formal education Mr. DH is an astute, enterprising, extremely hard working and very talented businessman. I accept his evidence that he started buying cattle at a young age, and that when his father died in 1994 of the 120 cattle then on the land 30 belonged to him. His father and mother had permitted him to graze these cattle on the land without charge.

25. He told the Court that he sold these cattle in 1995 for approximately £25,000, former currency, and invested this money in post office bonds. After 1995 the lands were let to several local farmers for a total rental of £11,000, former currency, per annum and he was thereafter solely engaged in assisting his mother and his sister OH in running the shop until the year 2000.

26. Mr. DH is unmarried but has a child, now aged 10 years, by a former partner, from whom he is now separated. He pays maintenance to this former partner in respect of the child, who lives with her. He told the Court that he enjoys excellent health and has no medical or physical infirmities. On 22nd May 2000, Mr. DH purchased a retail business as a going concern in D. He told the Court that - and there was no evidence tothe contrary - that the purchase cost him £493,300, former currency, inclusive of stamp duty and legal fees. To fund this purchase he secured a bank loan of £350,000, former currency, on foot of a guarantee of up to £270,000, former currency, given by his late mother and secured by way of a deed of charge over her property. He admitted that in addition his late mother had given him £20,000, former currency, with which to stock this business.

27. The Plaintiff claimed that the sum given to her brother DH by their late mother AH was £80,000, former currency, and not £20,000, former currency, as he stated. This Mr. DH vehemently denied. However, Mr. DH told the Court that his late mother also took out two loans from a credit union in a total sum of £75,000, former currency, and had lent him this money. Mr. DH told the Court that he had repaid this loan to his late mother in various sums during the year 2000. He pointed to a number of entries in a payments account for the period May 2000 to December 2000 designated "cash", "CIGS", "AH/CIGS" and "credit union". He said that he believed that his late mother had used this money to repay the credit union. Of the balance of the purchase money for the business he paid £63,000, former currency, from savings and had negotiated a "deal" with the vendors in respect of the remainder. He told the Court that this £63,000, former currency, was made up of savings derived from the sale of cattle since he was eight years of age.

28. In cross-examination Mr. DH accepted that in his affidavit sworn on 15th May 2006 he had stated at paragraph 7 thereof that he did not receive any wages from his late mother, but when younger he had been given pocket money by her when he was going out at

night and that the £63,000, former currency, represented accumulated savings from the proceeds of dealing in cattle. It was put to him that in her instructions for a previous will given to Mr. OC, solicitor, in that solicitor's office on 28th April 1997, and recorded in writing on that occasion by Mr. OC, his late mother had stated that "D got c. £63,000 already from the sale of cattle". The witness denied that this was so and insisted that all of the £63,000, former currency, came from the sale of his own cattle, which were on the land, and not from the sale of any of his parent's cattle. No tag numbers or purchase or sales records were proved in evidence by this witness. I shall return to this issue later in the judgment.

29. Mr. SH was born in 1971. He married EM in 2005 and they have three minor children. Mr. SH and his wife and children all enjoy good health and do not suffer from any impairments infirmities. Mr. SH received primary education only, and has no academic qualifications and no trade qualifications. After leaving National School he helped for a time in his parent's shop and on their land. He then worked in a number of retail and wholesale grocery businesses until he was aged 23 years. In 1994 he purchased a van and commenced selling vegetables from door to door. This business prospered and in the year 2000 he purchased a larger van and started a wholesale tea and grocery business.

30. His late mother Mrs. AH gave him permission to build a shed on the site of existing agricultural buildings on her lands at K lower. Mr. SH told the Court that he employed a firm of steel erectors to do the structural steel work, and that he and his wife's brother, who was a builder by occupation, completed the remainder of the work themselves. The total construction cost was €42,000, in respect of which he received no contribution from his late mother.

31. His late mother, by the terms of her last will and testament, unfortunately left part of the land on which this shed is erected -- an area identified by a firm of consulting engineers, architects and building surveyors as comprising 0.22 statute acres -- to his brother DH. Mr. SH is presently seeking retention permission and permission for a change of use to light industrial use for this particular shed.

32. Originally Mr. SH and his life lived in rented accommodation, but shortly before the death of his late mother they moved to a house in the same town. After the death of his late mother, Mrs. AH, he commenced to build a new house, using direct labour, on part of the land on K Upper, containing approximately 69.25 statute acres, left to him by the terms of her last will and testament. Mr. SH told the Court that to date he has spent €78,000 in building this new house and that it will require a further expenditure of approximately €30,000 to complete the work. While the work is progressing he and his family reside in a mobile home next to the site. He believes that when completed this new house, with sufficient land, will have an open market value of between €400,000 and €600,000. Mr. SH told the Court that the average pre-tax income from his business is approximately €2,600 per month, that he is registered for VAT and that a number of Revenue audits have found everything in order. He stated that he has received to date €8,000 by letting the land given to him by the last will and testament of his late mother. In addition to the

gift to him in his late mother's will, he told the Court that he received a sum of €14,500 on her death as the surviving account holder of a joint deposit account with her. Mr. SH told the Court that he was indebted to the builder of his new house in the sum of €50,000 and owed €27,300 to a credit union.

33. Mr. CN, a chartered surveyor, valuer and auctioneer in practice in the relevant area, gave evidence, which was also the evidence of the other surveyors and valuers retained in this action, that is, Mr. G and Ms. AM. The Court is greatly obliged to these experts for the professionalism of the various surveys and reports produced to this Court, their personal attendances at the hearing of this case and the enormous saving in time and costs achieved by them in agreeing the following matters.

34. Mr. CN told the Court that the maximum present open market value of the shop, the attached residential accommodation and the large yard at the rear of the premises is €900,000. With vacant possession he considered that there was potential for a single rental apartment above the shop. The large yard at the rear of the shop he considered had some development potential, but this was very dependant upon access being obtained from a new public road scheduled to be constructed at the rear of the premises. He gave evidence that the lands of MN, contained in folios 10258F and 10525F, amounting to 15.75 statute acres or thereabouts, had an open market value, inclusive of any, if any, development potential, of €325,000 on 8th October, 2004, the day before the death of the late Mrs. AH, and €390,000 at the end of summer 2006.

35. He considered that it might be possible under the terms of the Draft Development Plan to obtain a grant of planning permission for a single dwelling house on these lands adjoining the dwelling house now being erected by Mr. DH. Mr. CN considered that the house being erected by Mr. DH required a surrounding site of 2.4 statute acres if its open market value was not to be diminished. He considered that a parcel of land of 2.4 statute acres surrounding this house could readily be severed from the remaining lands of MN without affecting the open market value of the remaining 13.35 statute acres of land. He valued the 2.4 statute acres of land at €125,000 on 8th October 2004, and €150,000 at the end of summer 2006. In his expert opinion he told the Court the open market value of the house now being erected by Mr. DH, together with a surrounding area of 2.4 statute acres, including the house site, was €600,000 at the end of summer 2006. Mr. CN valued the remaining 13.35 statute acres of land at €200,000 on 8th October, 2004 and at €240,000 at the end of summer 2006.

36. Mr. CN valued the lands of MK, containing 12 acres, two roods and 30 square perches, or thereabouts, at €130,000 on 8th October, 2004 and at €156,000 at the end of summer 2006. He considered that the meadow given to the Plaintiff by the will of her late mother Mrs. AH was unlikely to have any future development potential, having regard to its position, bounding a national primary route, and with no other practicable access, and having regard to the provisions of the Draft Development Plan. This meadow, as agricultural land, was valued at €20,000 on 8th October 2004 and €24,000 at the end of summer 2006. Mr. CN valued the lands of K Upper and K lower, which adjoined each

other and contained in total 84.46 statute acres, at €1,250,000 on 8th October 2004, and at €1,387,800 at the end of summer 2006.

37. In his expert opinion, there was development potential for one, or for perhaps two, house sites on these lands, in addition to the dwelling house and store being erected by Mr. SH. However, there was no possibility, he said, of obtaining planning permission for five or six house sites on these lands, as had been suggested. In his expert opinion, the land could be sold as a single unit or in one or more lots. He was satisfied that the market for house sites in this area had remained steady for the previous five years and he did not anticipate any change in this in the foreseeable future. He considered that the natural service area of land, as dictated by the topography of the location, to be sold with the dwelling house now being erected by Mr. SH, including the site of the house itself, was 6.28 statute acres if the house was to achieve its full open market potential. He considered that the shed, include the site of the building, required an additional operating area of 1.67 statute acres. Mr. CN valued this total land holding of 7.95 statute acres at €318,000 on 8th October 2004, and €382,200 at the end of summer 2006.

38. Mr. CN told the Court that there was little or no demand for retail property in the particular town, but that the demand for residential property remains strong. He considered that a three bedroom semi-detached dwelling house could at present, the end of summer 2006, command a rental of approximately €150 per week. While an apartment of one bedroom and shared facilities would most likely achieve a rental return of €50 per week.

39. In his opinion, the value of the lands passing by the will of the late Mrs. AH had increased in value by 20% since the date of her death, and in his expert opinion it would be prudent to avoid selling more land than was absolutely essential in the circumstances.

40. After some discussion between the solicitors for the parties and the surveyors and valuers, the Court was advised that it should anticipate that the costs of administration, including the costs of this litigation, together with sales cost and fees relating to sales of land and capital gains tax could amount to €550,000, or thereabouts. Mr. CN stated that the value of the stock in trade, trade fittings, furniture and motor car bequeathed by her late mother to OH was approximately €70,000. It had been put to OH in cross-examination that she had declined to permit Ms. AM to carry out a detailed valuation of the stock in trade and trade fittings.

41. A great deal of the disputation in this case centred upon the issue of what advancements, if any, were made by the late Mrs. AH to her four children other than by the terms of her last will and testament. While this litigation is inter partes, it nonetheless concerns family matters and the protagonists and non-expert witnesses are all members of the same extended family. In my judgment, it is very important for the Court, in determining the issues arising, consistent with its paramount duty of acting justly, fairly and impartially, to avoid to the greatest extent possible perpetuating or deepening any feelings of suspicion or hostility which this litigation has engendered amongst the family members.

42. Mrs. CT gave evidence that she was very close to her late sister, Mrs. AH, and visited her very often, particularly during the year 2000, when they both knew that Mrs. AH was suffering from a terminal illness. On one such visit, about two weeks before her death, when it was obvious that Mrs. AH was dying, her late sister had asked her to do a favour for her and she had agreed. Mrs. AH had then given her a plastic bag with currency notes in it and had asked her to give €20,000 each to the Plaintiff and to DH and SH. She took this bag of money to the home of her daughter, Mrs. JW, and together they counted the money on her kitchen table. It amounted to €55,507, and not €60,000.

43. Her daughter, who was the owner of a retail business, put the money in her safe. Next evening Mrs. CT said she told the late Mrs. AH of the shortfall. A week later the late Mrs. AH gave her another small plastic bag, containing currency notes, and had said "here's the difference". Mrs. CT returned to her daughter's premises and they both recounted the money and found that it now amounted to €60,300. Mrs. CT told the Court that she and her daughter, Mrs. JW, placed €20,100 in each of three plastic bags and Mrs. JW put them back into her safe, where they remained until after the death of the late Mrs. AH

44. Mrs. CT gave evidence that she had given one such bag with €20,100 to the Plaintiff, at her home, two weeks after the death of the late Mrs. AH. On that occasion she was accompanied by her daughter, Mrs. JW. About the same time she had telephoned Mr. SH and had arranged to meet him at a petrol station at C, on the road between C and D, where she had given him a bag containing €20,100. On this occasion also she was accompanied by Mrs. JW.

45. She told the Court that she had given the final bag, containing €20,100, to Mr. DH outside the Plaintiff's house after the months mind mass for her late sister Mrs. AH. Her daughter, Mrs. JW, was with her on that occasion also. Mrs. CT was positive that she had not mentioned this matter to anyone other than to her daughter Mrs. JW. Mrs. CT said that she had not inquired of Mrs. AH as to why she had not given a similar or any sum of money to her to give to OH.

46. Mrs. JW gave evidence and confirmed her mother's evidence in every respect. She recalled that the money was in 50, 20, and 10 euro notes. Mrs. JW recalled that the Plaintiff had asked Mrs. CT if anyone else was getting money. Her mother, Mrs. CT, had told the Plaintiff that she had money to give to Mr. DH and Mr. SH, but did not mention the amount. Mrs. JW told the Court that she had not discussed the matter with anyone other than her mother.

47. Both Mrs. CT and Mrs. JW were adamant that they had not discussed the matter with either Mr. SOC or Mr. JOC. Both were absolutely certain that the total sum involved was €60,300, and not €155,000, as the Plaintiff was now contending. Mrs. CT denied that she had given €50,000 each to Mr. DH and Mr. SH. She denied that she had told the Plaintiff that Mr. DH and Mr. SH had each got €50,000 and that OH had got €35,000. Mrs. JW stated that she was present at all times when her mother, Mrs. CT, was speaking to the Plaintiff in her home, and was positive that her mother had not said to the Plaintiff that she had given €50,000 each to Mr. DH and Mr. SH and €35,000 to OH.

48. Neither of these ladies deviated or was shaken in the slightest in giving evidence, and their evidence was clear, cogent and coherent. I was particularly concerned as to what weight I should give their evidence, as they had both been prepared to participate in a fraud on the Revenue, without any apparent moral scruples or any concern for the law. However, having observed them most critically while giving their evidence, and having very carefully scrutinised and analysed their evidence, I am driven to the conclusion that they are both telling the truth. I am satisfied that the Plaintiff is incorrect in her recollection that Mrs. CT had told her, in the Plaintiff's own home on the occasion when she had given her a bag containing €20,100, that she, Mrs. CT, had given €50,000 each to Mr. DH and Mr. SH, and €35,000 to OH.

49. OH told the Court that she was entirely unaware of this whole matter until she had received a letter from the executor dated 12th January, 2005. She said that she had immediately contacted her aunt, Mrs. CT, who had then told her that she had given €20,100 each to DH, SH and the Plaintiff, at the request of the late Mrs. AH. OH told me that she did not get €20,100 or 35,000 from either her late mother or from her aunt Mrs. CT. She said that she was both shocked and a little aggrieved on learning about this matter, particularly as the executor, Mr. OC, solicitor, had asked her over and over again as to whether she had got money in cash from Mrs. CT or directly from her late mother.

50. OH accepted in cross-examination that she had asked very Reverend Sister C to visit the Plaintiff after she had received a letter from the solicitor for the Plaintiff initiating this claim, with the purpose of persuading the Plaintiff to abandon her claim. While one must condemn this conduct on the part of OH as both altogether improper and bordering upon a contempt of this Court, and even though I was less than impressed by this witness in giving her evidence I am nonetheless satisfied on the balance of probabilities that she did not receive either €20,100 or €35,000 from her late mother through the agency of her aunt Mrs. CT.

51. Mr. SH told the Court that the first he knew that the Plaintiff was dissatisfied with the provision made for her by her late mother was when he received her solicitor's letter dated 12th January, 2005. He confirmed that he had received cash in the sum of €20,100 from his aunt, Mrs. CT, at the time and in the manner she had described. Mr. SH denied that he had spoken to SOC about this matter. He accepted that he may have met with and spoken to Mr. SOC after the death of the late Mrs. AH when he was delivering goods in the town where Mr. SOC resides, but he denied that he had told him that Ms. CT had distributed €155,000 in cash, of which the Plaintiff had received €20,000, OH had received €35,000 and he and his brother DH had each received €50,000. He also denied that he had brought Mr. SOC to visit the lands of K Upper and K lower, which had been left to him and his brother DH by their late mother Mrs. AH.

52. While Mr. SH was a somewhat unimpressive witness, tending to be at the same time blunt and argumentative in his replies to questions put to him by counsel, I am nonetheless satisfied, having carefully observed his demeanour in giving evidence and having weighed his answers in the context of the remainder of the evidence, that he did

not receive €50,000 from Mrs. CT, that he did not bring Mr. SOC to visit the lands at K Upper and K Lower, and did not inform him that Mrs. CT had distributed €155,000 in the manner above mentioned.

53. Mrs. EH, wife of Mr. SH, told the Court that she clearly recalled SH coming home late one evening and telling her that his mother had left €20,100 with his aunt, Mrs. CT, for him. He showed her the money in a black or very dark blue plastic shopping bag, but she had not counted it. They had put this money into the business account in the name of SH Wholesale. She was unaware that Mr. DH and the Plaintiff had also got money from Mrs. CT. They had some contact with Mr. DH at the time and he had not said anything, and neither had she. She had not said anything either to OH. She was not prepared to accept that her husband had "bragged to Mr. SOC that he had got €50,000 in cash from his late mother through Mrs. CT".

54. She told the Court that she had her husband discussed everything and she said that he was not the sort of man who bragged or who disclosed his business affairs. Having seen and heard Mr. SH in giving evidence, I am satisfied that this latter is a very correct assessment of him. I accept the evidence of Mrs. EH and I do not accept the evidence of the Plaintiff to the contrary, that she and the Plaintiff had got on very well and that she had quite often looked after the Plaintiff's children until her husband SH had received the letter of 12th January, 2005 from the Plaintiff's solicitor making the present claim.

55. Mrs. EH accepted that she should not have gone to the Plaintiff's home after this letter was received and climbed in through a window when the Plaintiff would not open the door to her insistent ringing of the front doorbell. She accepted that she had caused the Plaintiff to be absolutely terrified and intimidated, and to run out of her own home and to seek the protection of the local Garda Síochána.

56. I accept the evidence of Mrs. EH and Mr. SH, that he was entirely unaware of what she had done until a letter of complaint dated 19th January, 2005 was received from the Plaintiff's solicitor. I am unable to accept the evidence of Mrs. EH, that she had only wished to speak to the Plaintiff in the hope of persuading her not to go ahead with the intended action. However, despite this quite reprehensible and totally unlawful behaviour on the part of Mrs. EH, I am satisfied, on the balance of probabilities, that she and her husband are correct in their recollection that they did not tell anyone, and in particular Mr. SOC, that Mr. SH had received any money from Mrs. CT.

58. Mrs. EH accepted that she had met Mr. SOC a few times in the shop and at the funeral of the late Mrs. AH. I accept the evidence of Mrs. EH, that she had not told the Plaintiff at Christmas 2004 that SH had "got 50,000 or another €20,000". Insofar as this is the recollection of the Plaintiff, I am satisfied that she is mistaken in her recollection.

59. Mr. SOC, a first cousin of the Plaintiff, gave evidence that after the death of the late Mrs. AH he met Mr. SH in the town where he lives, which is a considerable distance from the town where the late Mrs. AH resided and carried on her shop business. He told the Court that Mr. SH had told him, in his van, that Mrs. CT had distributed €155,000 in cash and

that the Plaintiff had got 20,000, but OH had got €35,000, and that he and his brother DH had each got €50,000. He said that Mr. SH had driven him, in his van, to see the lands which he and his brother DH had been given in the will of the late Mrs. AH. In cross-examination Mr. SOC stated that he knew SH "well enough", but accepted that he did not see him "that often".

60. When asked why Mr. SH, on a casual meeting, would tell him all these things he replied that he did not know why, but that he had done so. He said that he had attended a consultation with the Plaintiff's legal advisors some time during 2005. He accepted that he had only sworn his affidavit in these proceedings on the 25th May, 2006, the very day on which he was giving evidence before the Court.

61. Having carefully observed and listened to this witness giving evidence I formed a very unfavourable impression of his evidence. He adhered resolutely to his account of what he said Mr. SH had said and done, but offered no other evidence which would enable this recollection to be checked in any way. Other than putting it to the witness that Mr. SH was emphatic that he had not said or done these things, counsel for the Defendants had nothing by means of which he could test this evidence. While making all due allowance for the fact that Mr. SOC might well be taciturn by nature or uncomfortable in his role as a witness before the High Court, I remained altogether unconvinced by this witness. Having later seen and heard Mr. SH giving evidence, there was nothing whatever offered by Mr. SOC which would explain what I believe, on the evidence, would have to be a wholly atypical and altogether surprising sharing of very confidential and potentially compromising information by Mr. SH with this distant relative and comparative stranger, information which I am satisfied on the evidence he had otherwise only shared with his wife, and not even with his siblings. I am, therefore, not prepared to place any reliance on the evidence of Mr. SOC.

62. Mr. JOC, a brother of Mr. SOC, and who lives in a nearby town to Mr. SOC, gave evidence. I found Mr. JOC to be very careful and forthright in giving his evidence and he did not shirk from answering any questions put to him by counsel. He told the Court that he and his mother had visited the late Mrs. AH shortly before her death. He had stayed with the Plaintiff and found her to be entirely rational, well-balanced and sane in every way. He said he was horrified to learn from her that she had gone abroad for alternative therapy, to a particular individual named to the court, on the advice of a social worker. He considered this to be entirely wrong and unethical, and he had pressed the Plaintiff to reveal the name of this social worker so that he could bring it to the attention of the appropriate authorities. The Plaintiff, however, had refused to give him the name of the person involved.

63. Mr. JOC told the Court that even though the late Mrs. AH was terminally ill, she was still very much in charge of the shop and remained serving behind the counter. Mr. JOC accepted that he had spoken to the Plaintiff on the telephone after the death of her late mother. He very warmly disputed, and was clearly very much offended by the question put to him by counsel for the Plaintiff, that he had said to the Plaintiff in that telephone

conversation that whereas she had only received €20,000, OH had got €35,000 and SH and DH had each got €50,000. He said that he had heard about three black bags with €20,100 which were handed over after the death of the late Mrs. AH. He had no doubt at all that what he had been told - but he could not recall by whom - was that each of these bags contained €20,100. I formed the impression that Mr. JOC may have been diplomatic in his uncertainty as to the identity of his informant. He described Mrs. CT as a lady of the highest probity and discretion, and he had no doubt she had most carefully and conscientiously checked the amounts involved. He said that he did not think it strange that the late Mrs. AH had not given any cash to OH because, as he put it, "a good shop is a gravy train to money". He said he had no explanation to offer why his brother SOC had told the Court that Mr. SH "was boasting about €50,000", but he simply did not believe it.

64. Mr. JOC told the Court that during the week prior to his giving evidence to this Court he had been contacted by another family member U McN, who was a solicitor, and she asked him did he hear what figures were being bandied about; that the High Court had been told the figure was €150,000. He told her that the figure he had heard was €60,300. He said that he would be in D the next day to purchase a Volkswagon Golf diesel motor car for his daughter and would call to the office of U McN and swear an affidavit to that effect. He later telephoned U McN and suggested that perhaps they should both travel to C and "get heads together". U McN advised him that it was better that they should mind their own business and let the Court deal with the matter.

65. For all these reasons, I am fully satisfied, on the balance of probabilities, on the evidence given to the Court that the Plaintiff, Mr. DH and Mr. SH were each given €20,100 in cash, and no more, by their late mother Mrs. AH through the agency of their aunt Mrs. CT. I do not find it established on the evidence that OH received €35,000, or any cash from Mrs. CT, or that Mr. DH and Mr. SH had each received €50,000 in cash from Mrs. CT.

66. On the evidence, I must accept that the late Mrs. AH obviously believed that DH had obtained the £63,000, former currency, at least in part, from the sale of cattle which she regarded as her property. On the state of the evidence I am unable to decide whether she was correct in this belief. I accept the evidence of the Plaintiff, that while she was in the United States of America for six months in 1995 on a holiday visa, the late Mrs. AH was constantly complaining to her on the telephone that DH, in addition to selling cattle of his own, had sold some of his father's cattle as well.

67. Mr. DH has given evidence that the €63,000, former currency, was derived entirely from the sale of his own cattle. But he adduced no evidence of any sort to support this claim. There was evidence that after 1995 all the lands were let to third parties and prior to that date DH had sold his cattle and had purchased post office bonds for approximately €25,000, former currency. There was no evidence that the late Mrs. AH demanded the return of this money or instructed her solicitor to seek its return. It is clear from the instructions which she gave to her solicitor on 28th April 1997, that the late Mrs. AH was prepared to treat this sum of £63,000, former currency, as an advance to DH. In the

circumstances, I am unable to conclude that this sum of £63,000, former currency, was in fact such an advance to Mr. DH by his late mother, Mrs. AH.

68. The Plaintiff told the Court that she believed that the late Mrs. AH had given DH £80,000, former currency, to stock his retail business in the year 2000. Mr. DH told the Court that his late mother had advanced him the sum of £20,000, former currency, for that purpose. Neither side in this case produced any evidence by way of corroboration. This advance is not mentioned by the late Mrs. AH in any of the three instructions for a will given to Mr. OC, solicitor, on 25th April 1994, 25th September 2001 and 3rd July 2003, particularly in the instructions of 28th April 1994, where the advance of £30,000, former currency, to the Plaintiff, to help her purchase a house, and the £63,000, former currency, to DH are specifically mentioned. The Plaintiff did not give any detailed basis for her belief that the sum given to Mr. DH was £80,000, former currency.

69. In my judgment, on the evidence, the Plaintiff is mistaken in her belief that the late Mrs. AH made an advance to DH to purchase stock in the year 2000 in the sum of £80,000, former currency. I find that the error probably occurred in the circumstances of the loan of £75,000, former currency, which Mr. DH admitted to the Court in cross-examination, though it did not appear in his affidavit of disclosure, had been made to him by his late mother in the year 2000 to help in the purchase of his retail business.

70. Mr. DH gave evidence that he had repaid this loan between May 2000 and December 2000, and that he believed that his late mother had in turn, out of his repayments, repaid the two loans which she had taken out from the credit union to raise the sum of £75,000, former currency. There is no mention of an advance of £75,000, former currency, to DH in his mother's instructions for a will dated 25th September 2001 or 3rd July 2003. There was no debt of £75,000, former currency, with or without interest, due to any credit union on the death of the late Mrs. AH. While I am quite unable to determine whether or not the various sums indicated by Mr. DH in the payments account of his retail business in the period May to December 2000 were in fact repayments of his mother's loan to him, though these are listed as "cash", "CIGS", "AH/CIGS" and "credit union". In all the circumstances to which I have alluded, I am satisfied on the balance of probabilities that Mr. DH did in fact repay the loan of £75,000, former currency, to his late mother.

71. It was agreed between the chartered surveyors and valuers that the present -- that is end of summer 2006 -- value of the Plaintiff's residence is €195,000.

72. The principles of law to be applied by this Court in giving effect to the provisions of Section 117 of the Succession Act, 1965 are most helpfully gathered together and succinctly set out by Kearns J. ,then of the High Court, at pages 262 to 264 of his judgment in *XC -v- RT* [2003] 2 ILRM, 250, High Court. This Court is also aware of the decision of O'Sullivan J. in *CW -V- LW* [2005], 4 ILRM, 439, High Court. Subsection 2 of Section 117 of the Act of 1965 provides as follows:

> "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."

73. As pointed out by Kearns J. at page 263 of his judgment in *XC -v- RT*, above cited, the test to be applied is not which of the various courses open to the testator, the Court itself would have adopted, if confronted with the same situation, but rather whether the decision of the testator to opt for the course she did of itself and without more constitutes a breach of moral duty to the Plaintiff.

74. In the instant case the Defendants are in agreement that the late Mrs. AH failed to make proper provision for the Plaintiff in accordance with her means. I entirely agree, having regard to the evidence to which I have referred in this judgment. Apart from her children the late Mrs. AH had no other potential moral obligation to any other persons. The relationship of parent and child does not of itself, without more, create a moral duty to leave anything by will to a child. But it is manifestly apparent that in this case there has been a positive failure on the part of the late Mrs. AH to make proper provision for the Plaintiff.

75. The Court must therefore consider the entirety of the testatrix affairs and decide this case in the overall context, having regard to the moral claims, if any, of the other children and mindful of the fact that though the Court has wide powers to make proper provision for this Plaintiff it does not have power to make a new will for the testatrix.

76. The Plaintiff has a house, but has no sufficient or reasonably secure income, or capacity to provide such an income because of her limited education and lack of any academic or vocational skills. She is now 30 years of age, with two dependent minor children, now aged 9 years and 7 years. She has no present means of further educating herself or educating her children. She has no capital, other than what was left to her in the will of her late mother, and the equity of redemption in her dwelling house, which she is in no position to realise. The total present value of the provision made for her in the last will and testament of her late mother AH is only approximately €36,500.

77. I am satisfied that the late Mrs. AH believed, but without any proper basis for this belief, that the meadow had a value of €150,000, or thereabouts. In my judgment, on the slightest inquiry from a local auctioneer or valuer, she would have been advised that the meadow almost certainly did not have any development potential and was worth only approximately €20,000 as agricultural land. The Court must also be mindful, as a prudent and just parent would be, of the costs of administration, including the costs of this action, the amount of the deceased's debts and funeral expenses, the cost of land sales and the sum likely to have to be paid for capital gains tax, the total of which sums has been estimated in evidence to court at approximately €570,000.

78. The Court will therefore order and direct that the last will and testament of Mrs. AH, deceased, bearing date 3rd July, 2003, be altered in the following respects:

(A) Give, devise and bequeath to the Plaintiff all the lands in the townland of K Upper and all the lands in the townland of K lower, other than the piece or parcel of land comprising 6.28 statute acres, or thereabouts, surrounding and including the site of the dwelling house now being erected by Mr. SH, and also the piece or parcel of land comprising 1.67 statute acres, or thereabouts, surrounding and including the site of the shed or depot erected by the said Mr. SH as both are shown on the map to be annexed to the Order of this Court, both of which parcels are given, devised and bequeathed to Mr. SH. The said lands of K Upper and K lower to be charged with the payment by the Plaintiff to Mr. DH of the sum of €100,000 and to Mr. SH of the sum of €50,000, within a period of 5 years from the date of perfection of this Order.

(B) Direct that all the lands in the townland of MK, including the meadow, and also all the lands in the townland of MN, being the lands comprised in folios 10258F and 10525F, other than the piece or parcel of land comprising 2.4 statute acres, or thereabouts, surrounding and including the site of the dwelling house now being erected by Mr. DH, as shown on the map to be annexed to the Order of this Court, which piece or parcel of land is given, devised and bequeathed to Mr. DH, to be appropriated, devised and bequeathed for the payment of all the debts, funeral, testamentary and administration expenses, including the costs of these proceedings, which the Court directs to be paid out of the assets of the deceased. In the event of the same being insufficient for that purpose, such shortfall shall be made good out of the property specifically devised and bequeathed to OH and to the Plaintiff, having regard to the terms of this judgment, ratably according to value, and the order of application of assets specified in section 46.3 and in Part 2 of the schedule of the Succession Act, 1965 shall be and is hereby varied accordingly. That is the judgment of the Court.