Neutral Citation No. 2005 IEHC 325

**THE HIGH COURT**

**[2001 No. 519SP]**

**IN THE MATTER OF THE ESTATE OF J. L. W., DECEASED AND IN THE MATTER OF THE SUCCESSION ACT, 1965 AND IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT, 1965**

**BETWEEN**

**C. W.**

**APPLICANT**

**AND**

**L. W.**

**RESPONDENT**

**Judgment of O'Sullivan J. delivered the 23rd day of February, 2005.**

**Introduction**

1. The applicant seeks an order under s. 117 of the Succession Act, 1965 ("the Act") that her father, the late J. L. W. ("the testator") failed in his moral duty towards her in the disposition of his estate. The testator died on 27th June, 2000 aged 91 and was survived by his wife L.A., then aged eighty four, and his four children, M., then aged sixty, L., the respondent, then aged fifty seven, O., then aged fifty one and C., the applicant, then aged forty seven.

**The Testator**

2. The testator, an only child, inherited approximately 1,000 acres of farmland at Clonee, Co. Meath in 1931 but had to pay substantial estate duty and determined not to let this situation arise again. He was a farmer all his life. In about 1970 he gave a substantial farm of 287 acres ("N. G.") to the respondent, the only one of his children who had showed interest in being and trained as a farmer. There was, and is, a substantial house at N. G. and at the time there were tenants in it; the respondent moved into it, as a bachelor, in 1978. The respondent had already been given parcels of land, portions of N. G., by his father a few years before and had been farming these. At the same time the testator gave a farm of some 131 acres ("L.") to O. The testator continued to farm L. paying O. a rent. L., however, clearly belonged to O and she was paid the compensation money for part of it which was compulsorily acquired later by the Roads Authority.

**His Estate**

3. At the time of his death the testator's estate consisted primarily of a remaining farm of some 202 acres ("the G."). There was also a substantial holding of shares, mainly in the Bank of Ireland, worth somewhat more than one million pounds.

4. There is a dispute as to the value of the G. at the date of the testator's death; it was valued for probate purposes at slightly in excess of €3.5 million and this is the value contended for by the respondent. The applicant says that it was worth approximately €7 million at the time. Both parties are agreed that the G. is now worth €10 million.

**The Wills**

5. The testator's will was made on 16th September, 1999 at home at the G. and witnessed by Ciaran Feighery, solicitor, and his wife. On the same occasion L.A. made her will. On that occasion the testator asked Ciaran Feighery whether he thought L.A. was capable of making a will and Ciaran Feighery who had spoken with her and knew her said he thought she was. The testator agreed. Both the testator and L.A. gave Ciaran Feighery permission to discuss each of their wills with the other.

6. Shortly before he died the testator instructed the respondent to arrange for the sale of sufficient Bank of Ireland stock to produce three bank drafts each of £190,000 to be given to his three daughters. These were to form part of their bequests under his will: he was anxious to ensure that they would receive an immediate payment. M. accepted this arrangement. The applicant rejected her bank draft suggesting that it was a trick to trap her into accepting her father's will; so did O.

7. By her will, L.A. left her entire estate to be divided equally between her three daughters: nothing was left to the respondent. The main provisions of the testator's will were to leave the G. to trustees on trust for L.A. for her life and thereafter absolutely to the respondent subject to some minor provisions not relevant here. In addition there were the bequests to each of his three daughters of Bank of Ireland shares to the value of £190,000 (a figure I am told which was close to the estate duty threshold).

**L.A.**

8. L.A. married the testator in 1938. They had four children referred to above. As already indicated the testator was sufficiently concerned about her mental capacity to raise this issue with his solicitor at the time of making his will in September, 1999. At the time of the testator's death in June, 2000 L.A. was suffering from dementia and a month later the High Court made her a Ward of Court. This order was made on the occasion of a successful application by the respondent that because of his mother's mental incapacity he be permitted to act as sole executor of the testator's will notwithstanding that it named both of them joint executors. Subsequently the Solicitor General was appointed L.A.'s committee and was directed to elect on her behalf to take her legal right share in the testator's estate.

9. Ciaran Feighery gave evidence that L.A. made no will with him after the one made in September, 1999 and it is clear that she became incapable of doing so before the testator's death. Accordingly, that will is her last will. Ciaran Feighery's evidence establishes that it was made in proper form and satisfied me that it is unlikely to be challenged on any technical basis. The respondent gave evidence that he will not bring s. 117 proceedings in relation to L.A.'s estate. That estate, accordingly, now substantial after an election having been made on L.A.'s behalf, will be divided equally between L.A.'s three daughters or in the seemingly unlikely event of s. 117 proceedings being brought by any of them possibly into four equal shares. Either way the applicant will receive a substantial inheritance under L.A.'s will.

**M.**

10. M. accepted the bequest under the testator's will and has brought no proceedings under s. 117.

11. After initial years at home being minded by staff and a governess she was educated by the Sacred Heart nuns at Leeson Street Dublin and Roscrea where she was later joined by the applicant. She went on to qualify as a teacher and did some teaching in this country before she emigrated to Australia where she married and settled down and had four children. She is now separated and working and owns a house. During her lifetime she received gifts from the testator which enabled her to buy a family home in Australia. The testator also gave gifts to her four children which were obviously substantial because they were sufficient to buy a

house in Australia for the four children. The gift to M. was also clearly substantial although I am not told exactly what it was.

**L.**
12. Aged fifty seven when his father died, the respondent is married with four children and farms the 287 acre farm at N. G. which he has owned for some three decades and where he is now living with his family in a substantial house on the lands. Both sides agree that today N. G. is worth €12 million. It was valued for probate purposes at slightly in excess of €3.5 million. I will return later to the issue of its value at the time of the testator's death.

13. After attending secondary school at Clongowes Wood College the respondent chose the more practical farming course at Warrenstown College rather than a Bachelor of Agriculture degree at university. After this he went to the United States to continue learning farming for the best part of a year. He had been interested and active in his father's farm since he was a boy and it was understood that he would be given a farm of his own when he finished his training. N. G. was given to him in stages around 1970 when at the same time his sister O. was given L. The respondent was always on good terms with his father and they helped each other out as neighbours with the loan of men and machinery as occasion required. In later years he occasionally himself worked for his father who remained active, albeit decreasingly, in farming until his 88th birthday at which stage his activities had reduced themselves to owning three cattle on a paddock around the house at the G., the remainder of the farm then having been let out to neighbours at a rent which was increasingly less than market value.

14. In evidence the respondent said he always got on well and continues to do so with his sister M. in Australia: rather less so, I gathered, with O. and the applicant. He broke off relations with the latter two when they initiated proceedings against the testator's estate. O's proceedings were withdrawn on the first day of the hearing before me: that was not surprising given that the current value of L. is somewhat short of €6 million.

15. The respondent said that he visits his mother at the G. in recent times only when the applicant (who has been minding her mother since her father's death and who minded both parents for over a year before he died) is not there because if she is, she causes rows and unpleasantness with him which are apparent and upsetting to his mother despite her dementia.

16. The testator gave substantial gifts to the respondent's children which are set up in a trust fund for their benefit: the respondent said that this fund had to be used from time to time for educational purposes. His four children are still wholly dependent.

17. The respondent accepted in evidence that his father had discharged all his moral obligations to him and said that whatever he did in his will this would remain his attitude; he has no intention of contesting his mother's will or bringing proceedings in relation to her estate.

18. It was put to him on behalf of the applicant that given her circumstances, her repeated efforts at holding down jobs and limited means, she was not properly provided for by the testator. He acknowledged that there was something of a shortfall but added that this should be considered against what the testator did for her by way of education and the fact that she was better off when employed and also the fact that O's substantial bequest was a fiasco in the sense that following it O. gave up work, lived off the rent and did not develop her asset so that his father was reluctant to repeat this arrangement with the applicant.

19. The respondent gave his evidence in an impartial and disinterested manner.

**O.**
20. O's early home life and education followed a pattern similar to her sister M's. She was educated by the Sacred Heart nuns, trained as a teacher and after school had a year abroad in Germany (M. had had a year in Switzerland). She has not married. She worked as a teacher in a number of different jobs, and some time after receiving L. she retired from work suffering from chronic tiredness and has not worked since. She lives off the income from her land. Also there were two adjoining cottages on L. which her father helped her to renovate. O. lives in one of them and gets some rent from the other. For some time the applicant lived in the adjoining cottage and paid O. a small rent. O. gets on well with the applicant.

**The applicant**
21. The applicant was born with a large birth mark covering almost the entire of the left side of her face. All her life, she says, she has been prone to depression and tearfulness and she said that at very early age when out on a walk with her minder and her sister O. she tried to commit suicide by running out in front of a lorry. She hesitated, however, and was saved by her sister.

22. Her upbringing was very similar to that of M. and O: like them, she was educated by the Sacred Heart nuns. However, at the first attempt she failed maths and French in her leaving certificate exam and was therefore not able at that point to go to university. Following this, she tried several different courses and careers and it is greatly to her credit that in the end she succeeded in getting an honours degree in social science at Coleraine University. This came after she had spent a year in Germany learning German, done wood carving, and attended Maynooth College for a BA without success.

23. Following her degree from Coleraine she went to Swansea University for a certificate in social work but suffered a breakdown that winter and had to return home to the G.. She then studied pottery in Galway and set up a wood turning business with her sister O. She also tried to become a nurse in London without success. Subsequently she spent a number of years working on FÁS courses including as a researcher for three years with Fingal County Council. She enjoyed this work greatly and produced two historical pamphlets which she feels when published will stand the test of time. She worked in the Kylemore Café, St. Stephen's Green as a dishwasher from mid 1998 until the end of 1999 when her father who was suffering from pneumonia asked her to return to the G. to mind him and her mother which she did.

24. Her father agreed to pay her the same wage, €100 a week, as she was earning at Kylemore Café, which he increased to €150 shortly after she came home to mind her parents. She was living at home all found and had the use of a car without any cost to herself. After her father's death she remained on at the G. to help mind her mother who needed round-the-clock assistance. Her mother's committee in the Wards of Court Office, the Solicitor General, has increased her wage to €600 a week. There are other staff members at the G. who help mind her mother and the applicant is therefore free from time to time to visit her sister or do whatever she likes.

25. During his lifetime the testator gave the applicant a number of gifts including £10,000 worth of Bank of Ireland stock in 1973 when she was 21. This would have bought two average houses at the time. She received £1,000 in 1984 and further Bank of Ireland stock in 1992 to a value of £10,000 and in 1993 to a value of £6,000 and in 1996 to a value of some £5,000, these gifts totalling £32,000. The applicant used the dividends to pay for her education in Coleraine and has kept her capital intact. Today this shareholding is worth approximately €200,000.

26. At one point the applicant stayed in her sister O's cottage paying her a small rent, but decided to leave and buy a portacabin for herself which she parked on O's land and in which she lived until the winter of 1999 when she went to live in the G. to mind her parents and where she has been living ever since.

27. At no stage has the applicant been able to earn very much more than the unemployment benefit or the FÁS allowance. She has carefully husbanded her assets and was rightly described by her brother as a trier. She says that when she has to work with people this causes her difficulties after some time. Her brother expressed the view that she was better off in employment.

28. She gave an account of her ongoing tendency to depression and said that she is on continuing medication. This evidence was not challenged. Counsel for the respondent, however, submitted that it was of little or no weight because it was not supported by medical evidence: the applicant's counsel responded that because the evidence had not been challenged there was no need for medical evidence and indicated that there was abundant medical records exhibited to the affidavits. The case was heard exclusively on oral evidence and I deliberately did not read the affidavits. However, in the situation just described I consider it would be unreal not to accept that the applicant has indeed a tendency to depression and is on medication for it.

29. Apart from my own general observation I accept her evidence on this because it is obvious that the applicant has a somewhat fragile personality, has suffered from it throughout her entire life and is unlikely to command more than the level of wage she has earned in the past at the Kylemore Café or under the FÁS schemes. The wood-turning enterprise with O., whilst producing quality work, was never a financial success. In this context it was suggested to the applicant that she is now qualified for a career as a carer given her experience at home minding her parents and her attempt to become a nurse. In my view the €600 paid to her weekly by the Solicitor General is a measure of her value to her mother rather than an estimate of her earning capacity in the open market, where she is unlikely to match it.

**Issues**
30. There are two issues, one of fact and one of law, which I have to decide before reaching my conclusions in this case.

**Value of the G. in June, 2000**
31. The G. was valued for probate purposes by Paul Doyle, Auctioneer, at slightly in excess of €3,500,000. He gave evidence supporting that valuation. I had evidence, as well, from Robert Craigie, auctioneer, that its value in June, 2000 was approximately €7 million. I prefer the evidence of Robert Craigie for two reasons, namely, he seems to me to have been the better qualified of the two to give evidence because he specialises almost exclusively in agricultural valuation and secondly, he gave comparisons to support his valuation which seemed to me to have been closer to the mark than those offered by Paul Doyle. Robert Craigie's valuation in June, 2000 gives a price per acre of €36,000. One of his comparisons was a 121 acre farm sold in October, 2002 for €4.1 million giving a value of €33,884 per acre. Another was a sale of a stud farm in May, 2001 for a price yielding €38,000 per acre. A third comparison, a sale of 67 acres in September, 2000 at a price yielding €75,800 per acre was less strictly comparable because the successful purchaser had valuable land right nearby and the under-bidder was rumoured to be hoping to set up a waste facility on the land. By contrast the comparisons offered by Paul Doyle, who had valued The G. for probate purposes, struck me as less impressive. They were further away on average and one was in Wicklow. The lands and set-up of his comparisons were less comparable with the G., I thought, than of those offered by Robert Craigie. It may be that Robert Craigie's valuation is on the high side but I think it is closer to the mark than that of Paul Doyle. Both these experts agree that the current value of the G. is €10 million.

32. Accordingly, in my opinion the testator's estate at the time of his death was in the order of €9 million when his share holding and some other items are taken into account.

**L.A.'s will**
33. The second issue, of law, is as follows: in deciding whether or not the testator discharged his moral obligation to the applicant, do I credit him with the prescient foreknowledge that the applicant will in due course inherit a large sum from her mother? (If L.A.'s will stands she will get a third, if not most likely a quarter, of her mother's estate which as things have turned out is one-third of the testator's).

34. A deduction will, of course, have to be made in respect of the value of L.A.'s residence in the G. and environs which has been valued at €77,000 in the Wards of Court office and also for sums paid by the respondent for her maintenance at the G.. The evidence shows that this amounts to some €60,000 to €75,000 per annum. Taking a figure of €70,000 this expenditure will amount to some €425,000 up to next June being the fifth anniversary of the testator's death. Meanwhile, of course, L.A.'s estate has been, on the valuation evidence, increasing in value.

35. I think it unlikely that L.A.'s estate will be worth less than €3,500,000 and accordingly unlikely that the applicant will receive thereunder less than some €1.2 million if L.A.'s will stands or some €900,000 if it does not. Either way, therefore, and making allowance for tax, the applicant will in due course receive a substantial sum. Do I or do I not take this substantial sum into account when considering whether the testator has discharged his moral obligation to her?

36. In *Re N.S.M. deceased* [1973] 1 I.L.T.R. the three younger children of four, two sisters and a brother, claimed under s. 117 of the Act that their father had not discharged his moral duty to them. The will left nothing to the sisters but the residue of the estate to the son. The court held that the testator had not discharged his duty to all three of them. Because of the incidence of estate duty and the costs of litigation nothing was left for the son. In holding that the testator failed in his duty not only to the sisters but also to the son, Kenny J. said:

> "It is not an answer to say that the testator tried to make provision for (the son) and that this failed because of the large amount of estate duty and legal costs which will be payable. The court must attribute to the testator on the day before his death, knowledge of the amount of estate duty which will be payable on his estate and a remarkable capacity to anticipate the costs of the litigation which will follow his death. I realise that this is unreal, that the amount of estate duty payable is usually mercifully hidden from most testators and that it is impossible to anticipate what litigation will follow on death. I am convinced, however, that s. 117 must be interpreted in this way."

37. A remarkable passage! The interpretation of the section is *unreal*. It is *impossible* to anticipate the litigation. Yet this is the way the Act has to be read. The judgment in *N.S.M.* has been adopted and approved by the Supreme Court in *I.A.C. deceased* [1989] I.L.R.M. 815. Although further principles were added constituting qualifications, the foregoing remarkable paragraph was not affected by them. On the contrary in *JR v. JR* (Unreported, 13th November, 1979) Keane J. (as he then was) acknowledged that the test is an objective, not a subjective one. If the test were a subjective one it could well be said in the present case that the testator well knew that his wife would never claim her legal right share and would accept his will. Objectively, however, he must in my view of the authorities be credited with the foreknowledge that she would be taken into wardship and that her committee would, on her behalf,

elect to take her legal right, one-third share of his estate.

38. This interpretation appears to me to be consistent with the provisions of s. 117 (3) of the Act which provide that an order under the 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…"

39. It was submitted that the policy behind this provision is that one of two joint parents of children may cooperate with the other in discharging the statutory moral obligation of each. Under the subsection an order may not affect a devise or bequest even of the entire estate to a spouse if that spouse is also a parent of the testator's children. The operation of the section would, in such a case, be postponed until after the survivor's death. The subsection does appear to contemplate in certain circumstances the treatment of common parents as having what amounts to a shared obligation.

40. In considering the question whether he has discharged his moral obligation to the applicant, therefore, I take the testator as having been aware that the applicant would inherit not only the bequest to her under his own will of shares valued at €240,000 but that she would also inherit a substantial sum (either somewhat more or somewhat less than €1 million) from her mother. It is on this basis that I now come to consider whether he has discharged his moral obligation to the applicant.

41. In doing so I will, of course, be guided by the jurisprudence which has been extensively opened during the hearing, and not least by the comprehensive list of principles set out by Kearns J. in *In the matter of the estate of A.B.C., deceased* [2003] 2 I.R. 250

**Conclusion**
42. Under her father's will the applicant will receive a bequest of approximately €240,000. Her own accumulated savings amount to approximately €200,000. She is likely to receive either slightly more than or somewhat less than €1,000,000 from her mother's estate. In the round, therefore, and after making appropriate tax deductions under both estates, her assets, once her mother's estate is distributed, are likely to amount to well in excess of €1 million.

43. Her earning capacity, as I have indicated, is quite limited and I would estimate that an earned income of €100 per week on average throughout any year up to age of retirement is probably about what she could achieve. Once she reaches the age when she is entitled to a State pension this may turn out to be something more than her own earnings. Her income from her shares is about €5,000 a year so she could expect to double this from her own earnings or pension.

44. Excluding the value of her shares, for the moment, the asset fund out of which she must purchase a home and provide an income stands somewhere in the region of €1,000,000. A home is likely to cost her around a quarter of a million euro or more, leaving a capital fund of some €700,000 to provide an income. This might yield an income of €20,000 a year which, together with the income from her shares and my estimate of her earning capacity, would produce a gross annual income of €30,000 after she has bought herself a house, that is, somewhat less than €600 per week (gross).

45. Whilst, it may well be said, that the applicant has shown an ability to get by with relatively straitened means, and a keen ability to conserve and husband her assets, under the section I must ask myself whether a prudent parent would be satisfied with these arrangements? In my opinion prudence dictates in this case that the applicant would have a somewhat greater security so that if circumstances beyond her control, for example if yields from investments were to perform worse than expected, she should nonetheless be able to continue to live at the reasonable and by no means luxurious standard which an income for a single person of something in excess of €600 gross per week would indicate.

46. With regard to the applicant's clear concern for her old and late old age which is related in her mind to a history of family longevity and also a risk of mental frailty towards the end of her life, I consider that a prudent parent would ensure that if she had to live in a nursing home or equivalent for an extended period towards the end of her life she should be able to do so.

47. In the way I have approached my decision in the foregoing I have identified a figure of some quarter of a million euro or €300,000 whereby the applicant might buy herself a house and if she had to leave the house and reside permanently in a nursing home this of course could be sold and the proceeds used to pay her way in the nursing home. Whilst this is a genuine concern of the applicant's I consider that in the way I have attempted to analyse her circumstances this concern would be met by the sale of her house.

48. My conclusion is that the applicant has demonstrated a need for greater security of income (after her mother's estate has been distributed) than will have been catered for under her father's will.

**Further provision for the applicant**
49. In my view I should, accordingly, make an order which would provide greater security of income for the applicant in the period following distribution of her mother's estate. My estimate of the potential yield from her assets under her father's will and after buying herself a house is that she would have something like €30,000 a year. In evidence she told me that she thought she would need €50,000 a year. I do not quite agree that she would be entitled to such an amount under an order in this case. My view is that the income which a prudent parent should have provided would be €800 a week or approximately €42,000 per annum. Provision on my calculation has been made for €30,000 and there is a shortfall, therefore, of €12,000 per annum.

50. Because there may be many considerations as to how best this should be provided I propose, having delivered this judgment, to allow counsel to assist me in regard to the particular order I should make so that such an income could be achieved.