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THE HIGH COURT

2002 22 SP

IN THE MATTER OF THE ESTATE OF M.K. DECEASED AND

IN THE MATTER OF S. 117 OF THE SUCCESSION ACT 1965

BETWEEN

M.K., P.K. AND P.A., A WARD OF COURT SUING BY HER MOTHER AND NEXT FRIEND A.K.

PLAINTIFFS

AND

F.D. AND T.D. (AND BY ORDER) J.R.

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 21st day of January 2011

This is an application brought by the plaintiffs pursuant to the provisions of s. 117 of the Succession Act 1965.

The litigation that now comes before the court has a long and unfortunate history. In the course of that history, Laffoy J. delivered a judgment on the 16th April, 2010, on foot of an application by the personal representatives seeking the court's approval of the settlement of the proceedings, notwithstanding the opposition of the third named defendant J.R. In the course of that judgment Laffoy J. set out in some detail the history of the matter to that point. The summary that is now offered by way of background draws heavily on the narrative set out by her.

Background

M.K. (the testator) died testate on the 30th December, 1999. By his will dated the 16th September, 1997, he had appointed the first and second defendants (the personal representatives) to be executors and trustees thereof. On the 22nd November, 2001, the Grant of Probate of the will of the testator issued to the personal representatives.

The testator was survived by two sons M.K. and P.K. and by his daughter P.A. They are the plaintiffs in these proceedings. All of the plaintiffs were of full age at the date of the testator's death. However, P.A. has had severe epilepsy since infancy. Dr. Norman Delanty, Consultant Neurologist, has reported that she is a person of unsound mind and incapable of managing her affairs. She lives with her mother A.K. When the proceedings commenced she sued as a person of unsound mind not so found by inquisition, but who was suing by her mother and next friend. By order of the President of the High Court dated the 21st October, 2010, P.A. was taken into wardship and her mother A.K. was appointed Committee of her person and of her estate.

The testator was a married man but he and his wife were estranged. Judicial separation proceedings involving the deceased and his wife, A.K. were compromised on the 11th July, 1996, as a result of which A.K.'s entitlement to any interest in the estate of the testator was extinguished. No claim against the estate of the testator by A.K. has been advanced.

So far as the defendant J.R. is concerned the evidence is that as of the time of the deceased's death that she was his partner and that she had been in a relationship with him for some time, according to her since 1983. J.R. lived with the testator during the last three years of his life. The testator suffered two strokes in 1997 and the evidence of J.R. is that she took time off work to look after him and eventually left work so as to be in a position to take care of him on a full time basis. There is some controversy on the affidavits as to the extent of the incapacity of the deceased after his strokes and his requirement for care, but for present purposes that overview of the deceased's last years is sufficient.

In summary, the position in relation to how the deceased dealt with his assets is that:-

> (a) Under the terms of the will, the testator devised a house site on lands owned by him to J.R. for her absolute use and benefit. Subsequent to the making of his will, on the 14th November, 1997, the testator transferred the house site to himself and J.R. as joint tenants and subsequently a bungalow was built on that site in which the testator and J.R. resided. On the death of the testator, J.R. became solely entitled to the bungalow, by right of survivorship. The bungalow is quite a substantial one having five bedrooms and it comes with a garden of approximately one acre. At the date of death it was valued at €378,000 with bank loans amounting to €26,000 leaving a nett value at the time of €352,330. The premises are now valued at €400,000.
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> (b) The testator was the owner of a number of acres of agricultural land. At various stages, the acreage involved has been estimated at eight or ten acres. Prior to his death, he had entered into a contract to sell a site comprising approximately half an acre to a third party. This transaction gave rise to litigation and the sale was completed after his death. By his will, the testator devised a house site of half an acre out of the agricultural land to each of his sons, M.K. and P.K. However, of note is that he expressly provided that the devise was to be subject to his sons obtaining planning permission within 24 months of the date of his death. These sites have had a complicated planning history but the end result is that planning permission was not obtained by either son within the time prescribed. The application for planning permission by both sons failed before An Bord Pleanála following an objection which had been lodged by J.R. Subsequently her solicitors confirmed that she was not consenting to the extension of the time set out in the will for procuring planning permission.
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> (c) The testator owned a yard comprising three commercial units which at the time of his death were producing a rental income, though in the case of one unit the rent was significantly in arrears. By his will he devised this property which he

described as his "commercial yard" to his sons M.K. and P.K., his daughter P.A. and J.R. in equal shares absolutely.

The testator's residuary estate consisted of household contents and machinery and tools and money, including the proceeds of the sale of the site. The testator devised the residue of his estate to J.R.

In summary, therefore, the will devised the commercial yard to his three children and J.R. in equal shares. The residue of the estate he devised to J.R. In particular the agricultural lands, referred to by the testator as the "field" he devised to J.R. The "field" devised to J.R. comprised the entire field following the failure of his sons to obtain planning permission during the requisite period.

The Proceedings
I have referred to the fact that the proceedings have had a long and unfortunate history and it appears appropriate to refer briefly to that history. These proceedings were initiated by special summons issued on the 17th January, 2002. Initially, the plaintiffs' claim was only under s. 117 of the Succession Act 1965, however, subsequently the plaintiffs sought and obtained liberty to amend the Special Summons so as to include a claim under s. 121 of the Succession Act for a declaration that the transfer of the house into the joint names of the deceased and J.R. be deemed to be a bequest made by will and to form part of the estate on the grounds that the transfer was made for the purpose of defeating or substantially diminishing his childrens' entitlements. However the s. 121 application was later withdrawn and the matter proceeded at hearing as a claim under s. 117 *simpliciter*. Before the s. 121 application was withdrawn however, J.R. applied to be joined as a defendant and was joined by order of the Master of the High Court. As the case progressed, and progress was very slow for a number of reasons including the death of the solicitor for the plaintiffs, there were a number of applications to the court. Some of these were quite unusual. J.R. brought an application for an order directing the personal representatives to pay out from monies belonging to the estate a sum to her on the basis that she was in need of funds for her ongoing needs. On the 17th December, 2008, that application was refused on the basis that the court did not have jurisdiction to make the order sought.

By order of the Court made on the 16th January, 2009, it was directed that a preliminary issue be tried to determine where the liability for debts that were outstanding to Allied Irish Bank on foot of a number of accounts that appeared to be linked to the acquisition of the bungalow fell. A dispute had arisen as to whether these debts fell upon J.R., or upon the estate of the deceased or fell jointly upon J.R. and the deceased. On the 28th July, 2009, the Court made an order approving a settlement which had been negotiated by the personal representatives with AIB in relation to these debts. The debts in question at that stage amounted in total to €155,450.41 and the settlement involved a payment of €95,000 to the bank. The settlement was without prejudice to the determination of the issue where responsibility for the debts lay. Whilst stoutly maintaining the position that J.R. was as a minimum liable for half the debts, the plaintiffs and the personal representatives have subsequently agreed that no effort will be made to pursue this aspect further with J.R. This judgment takes account of that concession by the plaintiffs. The approach that they have taken has conferred a significant benefit on J.R.

By notice of motion dated 25th November, 2009, the personal representatives sought directions and in particular sought the court's approval of a proposed settlement of these proceedings on terms which were put before the Court. J.R. opposed the settlement. That application by the personal representatives was refused as the Court felt that there was no jurisdiction to make the order sought.

The Legal Background
A significant body of *jurisprudence* now exists in relation to the provisions of section 117. Most, if not all of the cases are helpfully reviewed in The Succession Act 1965 and Related Legislation - A Commentary by Spierin with Fallon (Dublin, LexisNexis Butterworths, 3rd ed., 2003) at page 312 and subsequent pages.

The legal principles involved in cases of this nature were very succinctly summarised by Kearns J., as he then was, in the case of *X.C. v. R.T. (Succession; Proper Provision)* [2003] 2 I.R. 250 at pg. 262. There, he commented "counsel on both sides were agreed that the following relevant legal principles can, as a result of the authorities, be said to derive under s. 117;

> (a) The social policy underlying s.117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents, against the failure of parents who are unmindful of their duties in that area.
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> (b) What has to be determined is whether the testator, at the time of his death, owes any moral obligation to the children and if so, whether he has failed in that obligation.
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> (c) There is a high onus of proof placed on an applicant for relief under s. 117, which requires the establishment of a positive failure in moral duty.
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> (d) Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.
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> (e) The duty created by s. 117 is not absolute.
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> (f) The relationship of parent and child does not, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.
>
> (g) Section 117 does not create an obligation to leave something to each child.
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> (h) The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.
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> (i) Financing a good education so as to give a child the best start in life possible and providing money, which, if properly managed, should afford a degree of financial security for the rest of one's life does amount to making "proper provision".
>
> (j) The duty under s. 117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.
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> (k) A just parent must take into account not just his moral obligations to his children and to his wife, but all his moral obligations, e.g. to aged and infirm parents.
>
> (l) 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.

(m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly.

(n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.

(o) Special needs would also include physical or mental disability.

(p) Although the court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court a power to make a new will for the testator.

(q) The test to be applied is not which of the alternative 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 he did, of itself and without more, constituted a breach of moral duty to the plaintiff.

(r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else."

The value of the estate as of the time of death and the current value of the assets

In seeking to apply these principles it is necessary in the first instance to identify the value of the estate both at the time of death and at the present time. It has consistently been stated in the Case Law that the relevant date for ascertaining whether there has been a failure to make proper provision is the date of the testator's death. In *F.M. v. TAM* [1970] 106 ILTR 82 at 87 Kenny J. stated that "the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death." As of the date of death the nett value of the estate was approximately €815,800. Of this the sum of approximately €417,000 was attributable to the commercial premises and €330,031 to the agricultural land. The personal representatives have averred that each of the sites devised to the sons of the testator had a value at the time of death of approximately €88,881 with the benefit of planning permission.

However, the decided cases indicate that if the stage is reached where a court has to decide what provision should be made for children regard has to be had to the value of the entire estate not only at the date of death but also at the date of the hearing. In *M.P.D. v M.D.* [1981] ILRM 179 at 188, Carroll J. held "in deciding what provision the Court should make for the children regard must be had to the value of the entire estate, not only at the date of death but also at the date of hearing." These proceedings have been so long in gestation that the value of the estate has fluctuated widely rising sharply during the Celtic Tiger years and falling sharply in more recent times. It is estimated that the assets at present have a value of €543,450, made up as to €310,000 for the industrial units (€250,000 with vacant possession). €165,000 in respect of the agricultural land, €63,450 cash and €5,000 contents/farm machinery. One has to express disappointment that the resort to litigation and the conduct of the litigation has seen a significant fall in the nominal value of the estate. In real terms the fall is even greater, because obviously the purchasing power would have been significantly higher in 1999. That remark is made even before one begins to take into account the considerable legal costs that must have been incurred in these proceedings.

It is also necessary to consider the circumstances of relevant parties as of the date of death and as of the date of hearing.

Position of M.K.

M.K. was twenty-four years of age at the date of death of his father. At that time he was residing with his mother. He had left school at fourteen years of age without sitting the Junior Cert or Group Cert. When he left school he obtained work in a hardware store and at the date of death was an assistant manager. His affidavit, sworn in October 2002, refers to the fact that his nett take home pay was €520 per week, and he was contributing €100 at home. He did not have any real property but had a savings account with a balance of €11,500. He had an outstanding car loan of €6,300 which he was repaying at €250 per month. No unusual or particular provision was made for M.K. by his father during his lifetime save that he was given a gift of IR£500 towards the purchase of his first car in 1990.

His present position is that he is thirty five years of age, is married with two young children. He and his wife jointly purchased a home in September 2003 for €277,000 paying for the house by way of a deposit of €27,000 which came from savings and a mortgage of €250,000. They re-mortgaged the house in 2007 for €250,000. It is estimated that the property is currently worth approximately €270,000 with an outstanding amount in respect of the mortgage of approximately €220,000. He was made redundant in May 2009 and since then has been unemployed. His wife is also not working and the family are dependent on welfare payments for an income.

Position of P.K.

The position of the second named plaintiff P.K. is that he was twenty-one years old at the time of his father's death. He was unmarried and was living with his mother. He had left school at sixteen years of age after transition year. On leaving school he obtained employment in a hardware store where he had worked part-time as a schoolboy. To date he remains in employment with that store. His affidavit sworn in October 2002 refers to the fact that he was earning €502 nett per week and contributing €90 to the household. At the time of his father's death he had no significant assets though he had a savings account where the balance stood at €672. He had an outstanding car loan for something less than €4,500 which he was repaying. As in the case of his brother no particular or unusual provision was made for him during his father's lifetime save that he too received assistance with the purchase of his first motor car. In this case the sum involved was €634. His present position is that he is thirty-two years of age working as an assistant manager. The downturn in the construction industry has rendered his position precarious. The number of hours that he works has been reduced and there have been a number of redundancies in the store leaving his future uncertain. He lives with his partner in an apartment owned by her, which is the subject of a mortgage.

So far as M.K. and P.K. are concerned their situation is broadly similar. It is true that as at the time of their father's death that the position of M.K. was somewhat the stronger but today the situation has been reversed. However their situations have not diverged to such an extent that the court would be justified in treating them differently. Their father made identical provision for them and in so far as the plaintiffs and the third named defendant have canvassed possible approaches to settlement, it is has never been suggested

that there was a need to differentiate between them.

The Position of P.A.
At the time of her father's death P.A. was twenty-three years of age, was unmarried and was living with her mother. She was and is a very severe epileptic, having had part of her mid brain removed by surgery because of recurring grand mal seizures. At the time of her father's death she was having frequent seizures on a daily basis. She was attending a community centre on a daily basis and her only source of income was disability benefit. She had no significant assets and at the time was incapable of managing her own affairs.

The present situation is that P.A. is thirty-four years of age and continues to attend the same community centre. She was, as we have seen, taken into wardship on 21st October 2010 and her mother was appointed as her committee. It is her mother who cares for her. P.A. averages two or three seizures per night and requires constant supervision including the administration of her medication three times daily. Understandably, her mother is finding it increasingly difficult to look after her. P.A. is in receipt of disability allowance, which at present is €204 per week. This is likely to remain her main source of income. As a result of recent developments in relation to the Government's four year plan and the so called bailout agreement, it is unlikely that these welfare payments will increase in the short to medium term and on the contrary are very likely to be further reduced.

In considering whether the provision made by the testator amounted to proper provision, it is worth pausing to view the provision that was actually made for the children and indeed for J.R. in cash terms and percentage terms on a number of alternative suppositions.

On the basis of the net value of the estate in accordance with the Inland Revenue affidavit and on the basis that the house sites with planning permission each had the value of €88,000 attributed to them, the position would seem to be this; M.K. and P.K. in money terms would each have received approximately €193,000 while P.A.'s inheritance, one quarter of the commercial yard would have been valued at approximately €104,250. J.R. in money terms would benefit to the extent of just under €325,000. In percentage terms this amounts to 23.7% for each of his two sons, 12.8% for his daughter and 39.8% for his partner, J.R. (these figures are slightly different than calculations that were carried out by the plaintiffs which were referred to during the course of argument but nothing turns on this and the order of magnitude remains the same).

The plaintiffs in these proceedings have referred to the benefit to J.R. represented by the bungalow and indeed, as we have seen, went so far as to bring a claim under s. 121 of the Succession Act. If, for illustrative purposes, regard is had to the value of the bungalow, then the position would appear to be this; if the bungalow was brought back into consideration then the nett estate would have a value of approximately €1.167 million, this calculation being on the basis of the bungalow having a nett value of €352,330. On this basis the provision in percentage terms would amount to just over 73% for J.R. and just under 9% for each of the three children. Again, if one was to perform the exercise of adding the house to the value of the estate, but having regard to the sites as if planning permission had been obtained then the position would be that the share of each son would be approximately 16%, P.A's share would remain unchanged at 9%, while J.R. on this assumption would take 59%. If one took the view that 50% of the bungalow was held by J.R. in her own right and that 50% was held in trust for the estate, then the nett value of the estate at the time of death was €991,165 with the provision for each of the three children amounting to 10.5%.

Decision
In a case where the parties have managed to agree on very little, there is in reality a consensus that proper provision has not been made for P.A. In their initial affidavit sworn on the 17th November, 2005, the personal representatives commented:-

> "In relation to the deceased's daughter, [P.A.] we say and believe that it would appear from the affidavit filed by her next friend that the deceased failed in his moral duty to make proper provision for her in accordance with his means. It would appear that she has a severe medical condition and that she is incapable of caring for herself or of generating an income, and that there is no realistic prospect of any significant improvement in her condition. In these circumstances, the deceased's principle duty would have been to [P.A.] and the provision made by him for her in his will, amounting to some €104,000 would appear to have been somewhat meagre."

J.R. in her affidavit sworn on the 21st August, 2006, comments:-

> "In relation to the claim of [P.A.] suing through her mother and next friend, I say that she appears to be dependent on her mother and I believe that a court might view that the deceased failed in his moral duty to make proper provision for her, bearing in mind her care needs and lack of prospects in life."

Later in the affidavit she observed "while provision was made for the third named plaintiff it may not be deemed proper provision by a court in light of her circumstances". She has followed up on that while addressing possible terms for settlement by indicating a willingness to see her share adjusted to facilitate the making of additional provision for P.A. In her oral submissions to the court she indicated that she was prepared and had always been prepared to go further than the position that she appeared to be proposing in an affidavit sworn by her on the 2nd December 2009.

I am firmly of the view that there was a clear failure on the part of the testator to make proper provision for his daughter. Given his daughter's medical situation and her inability to care for herself and provide for herself, there was a moral imperative for the testator to address his daughter's needs and make proper provision for her.

So far as the position of the two sons is concerned, the situation is less clear cut. At the time of making the will and indeed at the time of death both were young men in good health making their way in life. The provision that he sought to make would seem to me to be unimpeachable. A quarter share in the commercial yard along with a valuable residential site which is what the testator sought to achieve in his will would seem to me to amount to proper provision and indeed to generous provision. However, where I do believe that there was a failure on the part of the testator, was in imposing conditions relating to the provision of the sites. The requirement that obtaining the sites was dependent on planning permission being obtained in each case within two years of death meant that the extent of the provision that he was making depended on decisions outside of the control of his sons and depended on judgment calls that would be made by the Planning Authority and An Bord Pleanála. Moreover, given the proximity of the sites concerned to the lands which were being left to J.R. this meant that she was being placed in a powerful position to attempt to block any planning application that was not to her liking. In the event this is what happened. No doubt in making his will the testator believed that he was making proper provision and no doubt it was his intention to do so but his intentions were not realised.

The testator was obviously very conscious of his obligations in relation to J.R. It is true that he had no statutory obligations towards her but in a situation where they were partners, and where she had reorganised her working and domestic life to support him after he became ill, I believe there was a moral obligation to make proper provision. Put slightly differently, I do not believe that the testator was acting immorally or wrongly or capriciously in seeking to make provision for J.R. As Clarke J. stated in *A.C. (A minor) v. J.F., F.G.*

& P McE. [2007] I.E.H.C 399 (at page 10 of his judgment) "it is clear from a number of the authorities that the persons in respect of whom a deceased may owe a moral duty are not confined to those persons in respect of whom a legal obligation arises". However, obviously the deceased's resources were finite, and his capacity to make provision for his children was defined by the extent of the provision that would be made for J.R. In considering what was required if proper provision was to be made for his children, the testator, in my view erred in failing to have regard to the fact that in providing that J.R. would acquire the bungalow by right of survivorship that he was conferring a significant benefit on J.R.

In order to make provision for all those who have a legitimate interest at this stage it would seem essential that all of the assets in the estate should be converted into cash and then distributed. I would direct that the nett assets then be distributed on the basis of 50% for P.A. and 16.66% for M.K., P.K. and J.R. It is a sad fact that this means that three of the beneficiaries will receive smaller inheritances than they would have done had these proceedings never been instituted. Unfortunately, the fall in the value of the assets makes that unavoidable. I am conscious that the outcome will not please M.K., P.K. and J.R. In particular J.R. is likely to be left with a sense of grievance. She is benefiting to a much lesser extent than the testator would clearly have wished. However, if provision is to be made for P.A. whose needs are very real and if any provision is to be made for M.K. and P.K. as the testator would appear to have wished to have made, that is also unavoidable. In departing from the terms of the will as I have been forced to do, I have been driven by the need to see provision made for P.A. and influenced by the fact that provision was made for J.R prior to the deceased's death which does mean that J.R now occupies a fine home with only a very modest mortgage indeed. I am also influenced by the attitude that the plaintiffs have taken to the settlement by the estate of the debts to A.I.B. which meant that they conferred a significant benefit on J.R. Were it not for this they would not be benefiting now equally to J.R. as it was clearly their father's intention to make greater provision for her than for them, and I would have wished to respect his decision.