Neutral Citation: [2015] IEHC 851

THE HIGH COURT

[2011 No. 7826 P.]

IN THE MATTER OF THE ESTATE OF S.F. DECEASED

BETWEEN

J.F.

FIRST PLAINTIFF

AND

S.G. AND T.D.

THE HIGH COURT

[2011 No. 663 SP.]

IN THE MATTER OF S.F. DECEASED AND

IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT 1965

BETWEEEN

CC.F.

SECOND PLAINTIFF

AND

S.G. AND T.D.

DEFENDANTS

JUDGMENT delivered on the 18th day of December 2015 by Mr. Justice Michael White

1. The plaintiffs issued proceedings pursuant to s. 117 of the Succession Act 1965, as amended ("the Act of 1965"). The case was at hearing for eight days commencing on the 20th October, 2015, and concluding on 12th November, 2015, when judgment was reserved. The proceedings issued by the second plaintiff were conditional on the outcome of the first plaintiff's proceedings. It was agreed that the Court would hear the cases sequentially, even though a substantial portion of the evidence was common to both.

2. The first plaintiff is the son of S.F. deceased ("the deceased") who died in 2008. The deceased had six children all of whom are now adults. His wife predeceased him in 2005. His six children are T.F., C.L., D.F., J.F., C.F.,and CC.F.

3. He made his last will and testament on the 4th March, 1996, leaving his estate to his six children in equal shares.

4. The relevant grant is letters of administration with will annexed granted to the defendants on the 21st November, 2011.

5. The first plaintiff also made a claim for promissory estoppel alleging that the deceased had promised to transfer to him his entire shareholding in F.P. Ltd. This company is the most valuable asset in the deceased's estate.

6. The first plaintiff had been an executor of the deceased's estate and a grant of probate was issued to him, and the defendants, on the 28th March, 2011, but that grant was revoked when, by order of this Court on 11th July, 2011, the first plaintiff was removed as executor. Previously letters of administration were issued on the 15th October, 2010, limited to the defence of proceedings issued by AIB.

7. The net value of the estate at date of extraction of letters of administration with will annexed was €29,695,671. The value of the estate as of the 19th October, 2015, was €14,820,604.

8. Some preliminary issues were decided by the High Court on the 23rd August, 2013. Laffoy J. in a written judgment decided that the time limit to issue proceedings did not run from the issue of the limited grant on 15th October, 2010, but from the first grant of probate of the 28th March, 2011. The Court also decided that the relief claimed of promissory estoppel and constructive trust was statute-barred.

9. It is not appropriate for this Court to allow any issue touching promissory estoppel to be considered in s. 117 proceedings, when it is statute-barred other than to consider in the context of the section what special provision should be made if any for a child because the child has worked in the family business instead of pursuing an independent career.

The Law

10. Section 117 of the Act of 1965 states:

> "(1) Where, on application by or on behalf of a child of a testator, the court
>
> is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
>
> (1A)(a) An application made under this section by virtue of Part V of the Status of Children Act, 1987, shall be considered in accordance with subsection (2) irrespective of whether the testator executed his will before or after the commencement of the said Part V.
>
> (b) Nothing in paragraph (a) shall be construed as conferring a right to apply under this section in respect of a testator who dies before the commencement of the said Part V.
>
> (2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.
>
> (3) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.
>
> (3A) An order under this section–
>
> (a) where the surviving civil partner is a parent of the child, shall not affect the legal right of that surviving civil partner or any devise or bequest to the civil partner or any share to which the civil partner is entitled on intestacy, or
>
> (b) where the surviving civil partner is not a parent of the child, shall not affect the legal right of the surviving civil partner unless the court, after consideration of all the circumstances, including the testator's financial circumstances and his or her obligations to the surviving civil partner, is of the opinion that it would be unjust not to make the order.
>
> (4) Rules of court shall provide for the conduct of proceedings under this section in a summary manner.
>
> (5) The costs in the proceedings shall be at the discretion of the court.
>
> (6) An order under this section shall not be made except on an application made within 6 months from the first taking out of representation of the deceased's estate."

11. Comprehensive principles were set out in the case of Re: *ABC Deceased XC & Ors. v. RT & Ors.* [2003] 2 I.R. 250 at p. 262, Kearns J. stated:

> "Counsel on both sides were agreed that the following relevant legal principles can, as a result of these 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.
>
> (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.
>
> (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.
>
> (d) Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.
>
> (e) The duty created by s. 117 is not absolute.
>
> (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.
>
> (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.
>
> (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.
>
> (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."

12. This is not an exhaustive list of the matters the Court should consider.

13. It is a two-stage process; the first is that the Court must decide if the testator has failed in his moral duty to make proper provision for the child, only if he has failed to do so does a court proceed to decide what provision it will make for the child.

14. While the deceased in his will stated that no advancement within the meaning of s. 63 of the Act of 1965 shall be brought into account in the distribution of the estate, it is relevant in this application because of the reference in s. 117(1) to "whether by his will or otherwise."

15. The position of the children other than the plaintiff is relevant and that includes provision made for them during the testator's lifetime.

16. A relevant but by no means conclusive consideration is the financial position of the child.

17. The moral duty is judged on objective standards in the light of the situation prevailing at the time of the testator's death.

18. The Court should disturb or interfere with the provision of a will to the minimum extent necessary to make provision for a child under the section.

19. In deciding what provision a court should make if a testator has failed in his moral duty, the Court can take into consideration the value of the estate at the date of hearing.

20. It is also open to the Court to credit the testator with quite remarkable powers of prescience.

Matters In Dispute

21. The first plaintiff has sought a declaration that the estate is obliged to honour a guarantee provided by the deceased in respect of borrowings for the purchase of lands in a suburban area of a city in Ireland from F.P. Ltd. The Court is entitled to deal with this matter in the context of the s. 117 relief and decide if the deceased failed in his moral duty to the first plaintiff by not referring to the guarantee in his will. The estate has claimed that this is a personal debt of the first plaintiff for which the estate has no responsibility.

22. There are a number of factual disputes which the Court has to resolve. To that end the Court has been greatly assisted by the evidence of T.D., one of the executors, and defendants. T.D. was a financial advisor and friend to the deceased. He has acted honourably in his role as executor, and I am satisfied that while their business relationship and his role of financial advisor decreased over the years as the first plaintiff became involved in the family firm, he still remained a close confident of the deceased.

23. The first plaintiff is now forty-three. He is fourth in the family having two older brothers, an older sister, a younger sister and younger brother. He attended primary and secondary school in a city in Ireland and sat his Leaving Certificate in the early 1990s. He attended third-level college in a city in Ireland for two years and in another city in Ireland from early 1994. When in the other city, he lived with his older sister C.L. who was married and living there. He sat his final accountancy examinations in 1997. He commenced employment with an accountancy firm and worked there for three years up to 2000. He joined the family firm in 2000. His initial salary was IR£21,000 per year (€26,000). It was increased in 2005. He became a director of a number of the group companies in 2002. His salary from 2005 was €60,000 annually up to the death of the deceased.

24. The deceased was a hard-working private man, who was still active at the date of his death and still much involved in his business. He reflected on his major business decisions. His will of 1996 was a holding will and there were detailed discussions over a substantial period of time with advisors about tax planning. The first plaintiff was involved in these discussions. The deceased wished to be fair to all his children. I am satisfied from the evidence that he wanted to make equal provision for his children but wanted the first plaintiff to run the business eventually. He would not have contemplated a transfer of F.P. Ltd., the main asset of the group, to the first plaintiff without ensuring the other children were not disadvantaged.

Transactions F.P. Limited to the first plaintiff

25. On the 1st September, 2006, F.P. Ltd. entered into a contract for sale to the first plaintiff of 1.98 acres of land in a suburban area of a city in Ireland. The consideration was €1.2 million financed by a loan from AIB in the first plaintiff's name, which was guaranteed by the deceased. It was intended that the lands be developed as a neighbourhood shopping centre. In March 2006, the property was valued at €1.2 million. Part of the contract was an option agreement giving F.P. Ltd. the option to buy back the property for the purchase price paid, plus stamp duty, legal fees and interest and borrowings, together with any consumer price index increases if the neighbourhood centre was not built within five years, or if the first plaintiff sought to sell the lands to a third party within five years. The market value of the property on the 6th July, 2008, was €495,000. The AIB loan was a short-term loan and was rolled up every year until the deceased's death. The first plaintiff's valuer, valued the land in October, 2015 at €160,000.

26. There is a conflict of evidence between the first plaintiff and T.D. on this transaction. The first plaintiff stated in evidence that the purpose of the transaction was to provide liquidity for F.P. Ltd. in relation to other transactions and that the company was going to buy back the lands. T.D.'s view was that it was a real project, not a funding project, and that there were discussions about whether the long-term project once developed would be owned entirely by the first plaintiff or some of his brothers would come in with him. It was T.D.'s opinion that it was about taking care of the first plaintiff.

27. A considerable amount of time during the course of the hearing was spent on the transfer of assets by the deceased during his lifetime to the other children. The Court does not need to go into detail about these matters other than to state that substantial provision was made for the five children which did not include the first plaintiff.

Decision

28. On Thursday 29th October, 2015, Mr. Dwyer asked T.D. a question "did S.F. envisage that on his death J.F. would be left with this valueless piece of ground and a large debt?" T.D. replied "none of us foresaw what was going to happen". Pressed by the Court on the matter, T.D. stated "if the rest of them were ahead and J.F. was under water S.F. would have balanced it up".

29. In 2008, property values for development land had fallen sharply. It would not have been remarkably prescient for an experienced builder and developer like the deceased to appreciate this. The first plaintiff on €60,000 a year could not repay a short-term development loan of €1.2 million, without the assistance of the deceased. It was obvious and foreseeable if anything happened to him his provision for the plaintiff of one-sixth of his estate would be considerably reduced compared to the other children and that the first plaintiff would end up financially compromised without employment if the business had to be liquidated to provide for all of the children.

30. He failed in his moral duty to the first plaintiff who was his trusted advisor in the business and one of two siblings working in the company with him. I do not accept the evidence of C.L. and C.F. that there was an incipient rift developing between the first plaintiff and his father which would bring about a change of mind such that the deceased would deliberately disadvantage his son J.F. to the advantage of his other children.

31. On the other hand, I do not believe that the deceased would have finalised the affairs of F.P. Ltd. so that he would have seriously disadvantaged the other children in favour of the first plaintiff.

32. Having found that the deceased failed in his moral duty, I have to make provision for the first plaintiff. The appropriate provision is that the estate remains responsible for the debt to AIB on the 2006 transaction, now paid by the estate to AIB in the sum of €1.6 million. It is further appropriate that the first plaintiff be allocated over and above his one-sixth share the sum of €500,000 and be allowed to retain the lands the subject of the AIB transaction, without the lands being included in his one-sixth share. The Court considers the lands to be the property of F.P. Ltd., but is allowing the first plaintiff to retain the lands as part of the provision made by the Court pursuant to s. 117 of the Act of 1965.

33. The second plaintiff is the second youngest child of the deceased and was 32 years of age at the date of death of the deceased. He attended primary school and secondary school in a city in Ireland and attended third-level college there from the mid to late 1990s and worked part-time in the deceased's business. He continued his studies at weekends from the late 1990s to 2003, wherein he qualified as an accountant. He presently works as an accountant with a gross income of approximately €38,000 per annum.

34. At all times he resided with the deceased and his mother in a city in Ireland and continued to reside with the deceased in the family home after the death of his mother and wishes to continue in the family home and have that property conveyed to him as part of his share of the estate.

35. Provision was made for him during the lifetime of the deceased. In particular he was allocated a share of sale of lands in his home city in the sum of €725,000 gross. €245,550 was applied to repayment of an AIB loan on the property, €110,477 was applied to Capital Gains Tax on the transaction and €169,221 applied to repayment of a separate loan for the purposes of purchasing two other sites He presently owns these two sites which are landlocked and are currently valued at €15,000 each and a quarter share of a two acre site which is again landlocked and is valued at €12,500. There is a possibility, if there is agreement between family members, to have access opened up to these sites.

36. Due to the uncertainty of the claim by the first plaintiff who claimed a substantial share in F.P. Ltd., it was appropriate for the second plaintiff to issue proceedings pursuant to s.117 of the Act of 1965.

37. However, once the estate successfully contested the claim of the first plaintiff for relief pursuant to proprietary estoppel and when the appeal of the first plaintiff against the order of Laffoy J. was withdrawn in the Supreme Court, his inheritance was more transparent albeit reduced in value because of the general economic recession.

38. As already outlined in the general principles which the Court has a duty to apply, the Court had to take into consideration the position of the other children apart from the first plaintiff which included the provision made for them during the testators lifetime, and there also remained an onus on the Court to interfere with the provisions of the will to the minimum extent necessary to make provision for the first plaintiff.

39. The second plaintiff's claim is unusual in that it is conditional on the outcome of the first plaintiff's proceedings and therefore issued as a precaution because of the uncertainty of the outcome of those proceedings.

40. The second plaintiff was not justified in maintaining the proceedings subsequent to the withdrawal by the first plaintiff of his appeal against the order of Laffoy J.

41. I conclude that the deceased did not fail in his moral duty to the second plaintiff.

42. I see no reason why the executors of the estate, the defendants, should not transfer the family home to the second plaintiff as part of his one-sixth share of the estate. I would consider it unreasonable if any of the other beneficiaries objected.