

**THE CIRCUIT COURT
AN CHÚIRT CHUARDA**

Record No: 2018/05524

DUBLIN CIRCUIT COURT

**COUNTY OF THE CITY OF
DUBLIN**

**IN THE MATTER OF THE SUCCESSION ACT, 1965 AND IN THE MATTER OF
S117 OF THE SUCCESSION ACT AND IN THE MATTER OF THE ESTATE OF
W, A DECEASED (IN CAMERA MATTER)**

Between

PF

Plaintiff

And

BH

Defendant

Judgment of Her Honour Judge Jennifer O'Brien this 1st day of December 2023

1. This case comes before the Court by way of Succession Civil Bill issued on 7th September 2018. The plaintiff takes the proceedings as the lawful daughter of the deceased. The defendant is the son-in-law of the deceased and is sued in his capacity as legal personal representative. The deceased died on 29th August 2017. He died testate having executed his last will on 29th October 2013. Under the terms of his will, he named the defendant as sole executor, and a grant of probate was issued to him on the 27th of March 2018. The deceased made the following distributions under the terms of the will:

“4. I GIVE DEVISE AND BEQUEATH to my Trustee the balance of my estate upon trust to sell the same (with power to postpone such sale in whole or in part for such time or times as he shall think fit) and to hold the same or the proceeds of sale on the following trusts;

(a) to pay my debts funeral and testamentary expenses,

(b) my premises at 45 C, , Dublin to be sold and the proceeds of sale to be divided between my two children, 75% to C and 25% to W as tenants in common.

(c) In the event that W or C predecease me leaving children then the share to which C and W would have been entitled shall pass to their children.

5. *I LEAVE DEVISE AND BEQUEATH all rest residue and remainder of my estate both real and personal whatsoever and wheresoever situate to be divided as follows- 75% to my daughter C and 25% to my son W.”*

The sum of €353,723.91 is the current net value of the estate which is held in the client account of the executor’s solicitors.

2. The position of the plaintiff: The plaintiff is now 64 years of age and is a married woman with four adult children. She resides with her husband in a property outside of Dublin which has a current agreed value of €400,000 and is subject to a mortgage in the sum of €57,000, giving a net value of €343,000. The current joint income of the plaintiff and her husband is approximately €99,000 gross per annum. The plaintiff has limited pension entitlement. She received €5000 from her parents by way of a gift in and around 2008/9. It is agreed that she received debt forgiveness from her parents, in the sum of either €6000 or €4000. The plaintiff gave evidence that she was removed from secondary school at age 13 years in 1972 and put to work in a local sewing factory. She gave evidence that most of her wages were handed over to her mother each week. The plaintiff became pregnant at 18 years of age and shortly thereafter she married her husband, to whom she is married to this day. She later in life returned to education and obtained QQI level 5 certification in sports and recreation in 1991 through a VEC course. The plaintiff paid for this course herself. The plaintiff completed further coaching and fitness qualifications. She secured a position as a PE teacher however her position was not permanent, and her evidence was that this was on account of her lack of qualifications. She gave evidence that this meant she was unable to subscribe to a pension scheme at an earlier stage of life. The plaintiff gave evidence that her circumstances were modest at the date of her father's death. The plaintiff claims that the deceased made meager financial provision for the plaintiff during his lifetime. She contends that he failed in his moral duty to make proper provision for her in accordance with his means.

3. The defendant denies the contents of the civil bill and in particular denies that the plaintiff was compelled to leave school for the purpose of working in the sewing factory, as alleged or at all. Evidence was given by C (the plaintiff's sister) that both girls elected not to return to school, following a summer spent working at the sewing factory. Further evidence was given by C that she did not recall the plaintiff having aspirations to become a PE teacher when they were 13 years of age. C gave evidence that the girls handed up half of their income to their mother. She also gave evidence that the plaintiff received loan forgiveness in the sum of €6000 as opposed to the figure of €4000 claimed by the plaintiff.

It is agreed that the plaintiff spent a period of three to six months caring for her parents during the period of her mother's illness in 2013. C gave evidence that the vast bulk of care of each of their parents was provided by herself. She also gave evidence that the plaintiff was not in good contact with her parents. She said that the plaintiff was ultimately on bad terms with both their mother and their father. The defendant through counsel submits that the plaintiff is at an age and stage of her life that she can no longer reasonably expect provision from the deceased. It is submitted that both the plaintiff and her husband are well qualified and are financially independent. As such, the plaintiff has no need for financial provision. At the date of death, it is submitted that the deceased owed the plaintiff no moral duty to provide for her by will.

4. The position of the defendant and his wife C (the plaintiff's sister): The means and circumstances of the deceased's daughter C and her husband are summarized as follows. Their home, which is jointly owned, is unencumbered and has an agreed valuation of approximately €425,000. The defendant received a redundancy payment of €26,000 in 2008. The couple have joint savings in the sum of €153,000 which increased from €126,000, at the date of death. The defendant has a pension of €265 per week. He drives a secondhand car which was purchased for the sum of €23,000 in 2019. The couple received the sum of €5000 from C's parents in or around 2008/9. They benefitted from a total sum of €20,000 in respect of a credit union account nomination. They also received a gift of €20,000 in 2012. C receives a weekly income in the sum of €300 in her current employment.

5. W gave evidence of his circumstances which seem reasonably modest, and he seems to have little provision for his retirement. He did not furnish a sworn affidavit of means or

vouching documentation. He suffered financially on account of his separation, which resulted in him selling his retirement benefits in order to fund a deposit for a house. A sum of €16,000 was paid to W from another credit union account nomination.

6. Plaintiff's Legal Submissions: Turning to the legal submissions made by each party - counsel for the plaintiff sets out the test to be applied pursuant to section 117 of the Succession Act which provides as follows:

“(1) Where, an application by or on behalf of a child of a testator, the Court is of the opinion that the testator has failed in his moral duty to make provision for the child in accordance with his means, whether by his will or otherwise, the Court may order that such provision shall be made for the child out of the estate as the Court thinks just.

(2) The Court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the Court may consider of assistance in arriving at a decision that would be as fair as possible to the said child to whom the application relates and to the other children.”

It is submitted that the principles relating to the exercise of the jurisdiction of the Court under section 117 are well established though ultimately each case turns on its own facts. It is common case that any determination under section 117 is reached by way of a two-stage process:

“(a) the Court must first decide whether the testatorhas failed in his or her moral duty to make provision for a child;

(b) only if he or she has so failed, will the Court proceed to the second stage which is to decide what provision should be made for the child.”

The plaintiff must prove a failure in moral duty of the parent towards her and a need for provision. The Courts approach in assessing the question of failure in moral duty is to consider the claim from the position of a “prudent and just” parent, as outlined at s 117(2). A parent's moral duty to his child can be met by will or otherwise, and could, therefore, be discharged by *inter vivos* provision, including, potentially the provision of an education

that assists in establishing the child in life. It is the plaintiff's contention that the deceased failed to discharge his moral duty within his lifetime, as regards provision for her education.

"Moral duty" is not defined in the legislation and counsel for the plaintiff refers to the judgment of Kenny J in the case of *FM v TAM* [1970] 106 ILTR 82 where he stated at page 87:

"It seems to me that the existence of a moral duty to make provision by Will for a child must be judged by the facts existing at the date of death and must depend on the following:

- (a) the amount left to the surviving spouse or the value of the legal right if the survivor elects to take this;*
- (b) the number of the Testator's children, their ages and their positions in life at the date of the testator's death;*
- (c) the means of the testator;*
- (d) the age of the child whose case is being considered and his or her financial position and prospects in life; and*
- (e) whether the testator has already in his lifetime made for proper provision for the child."*

7. Counsel on both sides agree that the following legal principles apply as set out in the leading decision of *Re ABC: XC v RT* [2003] 2 IR 250 Kearns J at p 262 as follows:

"(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.”

It is submitted that the Court have never departed from these principles. It is clear from principle (b) that any moral duty is one which arises at the time of the parent’s death. Principle (d) dictates that a positive failure of moral duty must be established. The moral duty of a parent towards a child will be balanced against other moral obligations which the deceased may have had to others. The plaintiff places particular reliance on the principles at paragraphs (d), (h), (i) & (m). The plaintiff also relies on the decision of Carroll J in *MPD v MD [1981] ILRM 179* at page 189 and the definition therein of “proper provision”:

“I consider the proper provision for the children of the deceased according to his means should include provision not only to house, clothe, maintain, feed and educate them and ensure that medical, dental and chemist bills are provided for until they finish their education and are launched into the world but should also include some provision by way of advancement for them for life.”

Section 117(2) directs the Court to take into account “*the position of each of the children of the testator*” which in practice requires a comparative exercise to be performed between the claimant and the other children of the deceased, who are also beneficiaries of the will. Thus, in circumstances where the deceased in this case has not made provision for the plaintiff’s brother G, it is submitted that the Court should therefore only be concerned with the circumstances of the two beneficiaries of the will and of the plaintiff.

8. Counsel for the plaintiff also refers to the recent decision of *GS v MB [2022] IEHC 65* where Stack J considered the application of an adult child whom it was accepted, would appear to be financially comfortable in his later years of life. Reference is made to paragraph 44 of that judgment which provides:

“There is therefore no impediment to middle-aged or even elderly children from obtaining relief under the section. A mature adult child may find it more difficult to discharge the onus of proof on them, as they may themselves be financially comfortable and well established in life, but they are not precluded from succeeding in an application under section 117.”

In that case the Court went on to observe that while on one view it might be said that the plaintiff was not “in need” of provision at the date of death of the deceased having regard to his assets, neither he nor his wife had any real earning capacity, and his pension was relatively modest. The Court indicated that the assessment of the plaintiff’s level of “need” should be counterbalanced by a consideration of the level of provision that had been made for the plaintiff by the deceased, either during their lifetime or in the will.

9. Reference is also made to the decision of the Court in *CC v WC [1990] 2 IR 143* which is stated to support the contention that the testamentary views of the testator will more likely be challenged by the Courts where the relationship with the child was characterized by hostility. The plaintiff does not accept the account given by her sister regarding her relationship with her parents. Counsel for the plaintiff submits that the following factors support the conclusion that the deceased failed in his moral duty to make proper provision for the plaintiff:

- No financial assistance towards the upbringing of the plaintiff was provided by the deceased during his lifetime. The deceased did not finance a good education for the plaintiff, removing her from school at age 13, so as to work in a sewing factory. The deceased did not assist the plaintiff in having the “best start in life”.
- Owing to her late entry into education, the plaintiff’s prospects are extremely limited. On retirement the plaintiff will have an extremely modest pension plan having only accumulated 16 years of pensionable service.
- Special circumstances give rise to a moral duty as the plaintiff was contributing financially towards the family home and expenses from the age of 13.
- The delay in obtaining further qualifications has been an impediment to the plaintiff’s career progression.
- The plaintiff’s circumstances are sufficiently modest to give rise to an objective need for provision from the estate, having regard to the absence of *inter vivos* provision. In *GS* the Court indicated that the assessment of the plaintiff’s level of “need” is affected by the level of provision made, *inter vivos* or by will.
- It is submitted that the gift of 75% of the estate to the plaintiff’s sister far exceeds her moral claim in light of the plaintiff’s need for provision and that C had previously received cash gifts with a total value of €51,000.

- The plaintiff's brother W has been called upon to provide discovery as to his means and circumstances which he refused to do so other than by way of oral evidence in the course of the trial. The Court is of the view that the means of W are reasonably modest in all the circumstances. Counsel for the plaintiff submits that the deceased failed to make material provision for the plaintiff throughout her lifetime and further that he failed to make good that failure through his will and as such the deceased failed in his moral duty to make proper provision for the plaintiff in accordance with his means and within the meaning of section 117 (1). It is further submitted that the decision of this Court in *AC* provides that the moral duty being imposed on the deceased as of the date of death should include some reflection of "making up for the past failure of his moral duty" to provide any provision for the plaintiff throughout her adult life.
- It is further submitted that based on the plaintiff's means and resources at the date of her father's death and the complete lack of provision made for her by her father relevant to her father's means during his lifetime and under his will that the plaintiff has established a need for greater provision and a positive failure in the moral duty on the part of the deceased than C and W.

10. Defendant's legal submissions: The legal submissions on behalf of the defendant also reference section 117 of the 1965 Act. It is common case that the Court must adopt a two-step approach. Counsel for the defendant submits that a child does not have a legal entitlement to share in a parent's estate, where that parent makes a will. A parent is entitled, when making his or her will, to favour one child more than another, or indeed disinherit all the children. For a child to succeed in making a claim pursuant to section 117 of the Succession Act 1965 he or she must establish that there has been a positive failure on the part of the parent to discharge a moral duty to provide for that child. That involves also establishing that such a moral duty exists or remains, particularly where a child has reached adulthood and does not suffer any disability or have special needs. In order to qualify under section 117 for "proper provision" to be made, a child must have a need for provision. As Barron J, in the earlier case of *In re JH deceased [1984] IR 599* stated:

“The power of the Court arises only to remedy a failure on the part of the testator to fulfill the moral duty towards his child. In general, this will arise where the child has a particular need, which the means of the testator can satisfy in whole or in part. If no such need exists, even where no provision has been made by the testator”.

It is submitted that the plaintiff has no such need, or particular need, and where no such need exists the Court does not have the power to make provision from the deceased's estate. The Court cannot make a new will for the deceased or rewrite the deceased's will. Reference is also made to the decision of Kearns J in the case of *Re ABC, XC and others v RT* [2003] 2 IR 250, which sets out the principles that guide the Courts in assessing the merits of an applicant's case. Counsel for the defendant makes submissions on those principles as follows:

- The social policy underlying section 117 of the Succession Act 1965 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 the parents who are unmindful of their duties in that area.

The plaintiff is now 64 years of age, she's married and has four children of her own. It is submitted that the plaintiff was not financially dependent on the deceased and that the plaintiff is neither of an age or a situation in life that she might reasonably expect support from the deceased.

- What has to be determined is whether the testator at the time of his death owes any moral duty to the children and if so, whether he has failed in that obligation.

The deceased had four children. He died a widower and left an estate valued at €432,762, as at his date of death. After sale and payment of a fair deal nursing home charge, the estate currently stands at €353,723 (before trial costs). It is submitted that the deceased owed no moral duty to the plaintiff, who was an adult who had made her own way in life, with a great career, with her husband and family and had a home of her own and had substantial joint household earnings.

Counsel for the Defendant submits that there is a relatively high onus of proof placed on an applicant for relief under section 117 which requires the establishment of a positive failure in moral duty. In this regard the plaintiff needs to prove a positive failure in moral duty, not just that she would prefer that the deceased's estate devolved differently. It is submitted that the plaintiff cannot prove a positive failure in moral duty on the part of the deceased. It is further submitted that before a Court can interfere, there must be clear circumstances and a positive failure in moral duty must be established. It is submitted that the plaintiff has no immediate need for provision and does not set out any immediate need and reference is made to *MMcC v DHM* (Unreported High Court decision 31 October 2001 of McCracken J). It is submitted that the proceedings are now five years in existence and as such the plaintiff has no immediate need.

11. Counsel posits that the duty created by section 117 is not absolute. A parent is not obliged to leave anything to a child by will. Just because the plaintiff was not left anything in the deceased's will does not confer on the Court the jurisdiction to make provision under section 117 of the 1965 Act. The relationship of a parent and a child does not of itself and without regard to the circumstances create a moral duty to leave anything by will to the child.

It is further submitted that the deceased chose to benefit his daughter C and his son W in his will. C cared for the deceased and his late wife and the deceased was entitled to recognise that in his will. It is further submitted that in dealing with a section 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 particular provision for him, moral claims of others may require such provision to be reduced or omitted altogether.

The deceased chose to recognize the greater need of his daughter C and the care she provided to her parents. Counsel for the defendant goes through the remaining factors set out in that case, many of which are not relevant in the particular circumstances of the instant case. Counsel submitted that a Court could not make provision under section 117 simply because it would have made different provision under a will. The Court will not substitute its view of what is fair or just for that of the deceased. It is submitted that the Court does not look

subjectively at the case and attempt to create a new will for the deceased but looks objectively and only if there is established to be a breach of moral duty will it interfere and make provision. Counsel for the defendant submits that no failure has been established. It is further submitted that the deceased knew the plaintiff best and chose to write his will in the way he did. Finally, it is submitted that section 117 of the Succession Act 1965 is not about fairness or equality. It is submitted that it is not the Court's responsibility to alter what the plaintiff may perceive as an unfair decision of the deceased in the absence of a proof of a failure in moral duty, and only then to the minimum extent necessary. Any moral duty the deceased may have owed to the plaintiff in childhood or early adulthood has long since been discharged. It is submitted that the plaintiff is not in need of provision from the deceased's estate and while she may be unhappy with the terms of his will, that is insufficient to engage the Court's powers under section 117 of the Succession Act and where she has not established a failure in moral duty or any need for provision from the deceased's estate.

12. The Court's decision: The Court is persuaded by the decision of Kearns J in *Re ABC, XC and others v RT [2003] 2 IR 250*, at page 262 which sets out the various factors and in particular the factors set out at paragraphs (d), (h), (i) and (m). Before a Court can interfere, there must be clear circumstances and a positive failure in moral duty. Provision of an expensive education or indeed provision of an education in accordance with the means of the deceased may discharge the moral duty as may other gifts. Giving a child a good education is recognised as part of the moral duty owed by a parent to a child, so as to give the child the best possible start in life. There are also somewhat special circumstances in this case as the plaintiff contributed financially to the home from a young age. The Court also relies on the definition of what constitutes "proper provision" as set out in *MPD v MD [1981] ILRM 179* and Carroll J at page 189:

"I considered that the provision for the children of the deceased according to his means should include provision not only to house, clothe, maintain, feed and educate them and ensure that medical, dental and chemist bills are provided for until they finish their education and are launched into the world but should also include some provision by way of advancement for them for life."

The Court also places reliance on the recent decision of *GS v MB [2022] IEHC 65* where Stack J considered the application of an adult child whom it was accepted, would appear to be

financially comfortable in his later years of life. Reference is made to paragraph 44 of that judgment which provides:

“There is therefore no impediment to middle-aged or even elderly children from obtaining relief under the section. A mature adult child may find it more difficult to discharge the onus of proof on them, as they may themselves be financially comfortable and well established in life, but they are not precluded from succeeding in an application under section 117.”

In the circumstances of this case, the deceased, while providing for the plaintiff under each of the headings referenced above, he failed in his moral duty to provide a full secondary level education for the plaintiff. This failure of moral duty has had an ongoing impact on the plaintiff's ability to generate income and pension benefits for herself and for her family. While the plaintiff and her husband have acquired a nice home, with a small outstanding mortgage, the value of her pension benefits remains low. As compared with her siblings, who stand to benefit under the terms of the will - her sister's position is stronger in terms of owning her home outright and also having a reasonably large figure of savings on account. Having said that, her sister's and the defendant's income is appreciably lower than that of the plaintiff's household. W's means also seem somewhat modest in the sense that he does not have any valuable pension benefits for his retirement at this time. The plaintiff received very little *inter vivos* provision as compared with each of her siblings and indeed, she made financial contributions to the household herself from the age of 13, which is a somewhat unusual and special circumstance. I do not agree that the deceased failed to make *any* material provision for the plaintiff throughout his lifetime and it is common case that the deceased did provide all manner of comfort to the plaintiff and her siblings throughout their childhood. All seemed to enjoy a happy childhood, and all have fond memories of their father. The only gap in terms of meeting his moral duty to the plaintiff was in terms of provision of an adequate secondary school education which was available as a matter of course to children growing up in Ireland at that time and indeed, which was availed of and provided to her brothers.

The Court is of the view that the plaintiff's means and resources at the date of her father's death are such that she has established a need for greater provision, and she has established a positive failure in moral duty on the part of the deceased on a single issue, the provision of adequate education. The Court has also considered the moral claim of each of the Plaintiff's siblings and has taken into consideration their means and circumstances at the date of death, having

regard also to gifts received *inter vivos* by C and W. The Court has sought to maintain the intention of the deceased in preferring his daughter C and in doing so has sought to put the plaintiff on a similar footing as to her brother, W for the purpose of the will. The Court in making the following orders has taken account of the gifts already received *inter vivos* by each child and as such the Court has not sought to create equality, as between the plaintiff and W. The Court has merely sought to provide some redress to the plaintiff however it is acknowledged that the provision now made does not and could not adequately compensate the plaintiff for the loss of opportunity and disadvantage suffered, on account of not receiving a full education, during her childhood years. The Court makes the following orders:

1. A declaration that the deceased named in the title hereof failed in his moral duty to make proper provision for the plaintiff in accordance with his means by will or during his lifetime to the extent only that he failed to ensure that the plaintiff received an adequate secondary school education in accordance with his means.
2. An Order pursuant to section 117 (1) of the Succession Act 1965 directing provision for the plaintiff out of the estate of the deceased such that the plaintiff receives 25% of the proceeds of sale of the premises at 45 C, , Dublin and 25% of the rest residue and remainder of the estate and such that C receives 50% of the said proceeds of sale and also 50% of the rest residue and remainder of the estate and whereas W shall receive 25% of the said proceeds and 25% of the rest residue and remainder of the estate.
3. An Order for costs against the plaintiff in favour of the defendant as of 26th July 2021 to the current date on account of the contents of the *Calderbank* letter, to include reserved costs and costs of discovery, to be taxed in default of agreement.
4. Further an Order for costs against the defendant in favour of the plaintiff from the date of issue of proceedings up to the 26th of July 2021 to include reserved costs and discovery costs to be taxed in default of agreement.