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S.117 AND LIFE AFTER DEATH

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INTRODUCTION

When we die, the world will somehow pull itself together and struggle on. This unfortunate reality gives rise to an interesting legal issue concerning s. 117 of the Succession Act. It will be recalled that this section provides a mechanism whereby the children of a testator may apply to court for increased provision from the estate. What is the relevance of events which take place after the death of the testator but prior to the hearing of such an application? To take an extreme example, could a court take into account the fact that one of the children of the testator, in perfect health at the date of the testator's death, has since become permanently disabled as a result of a car crash?[1]

This article will consider a number of recent High Court cases where this general issue was discussed. Before moving on to those cases, it will be helpful to quote the relevant part of s. 117:

> (1) Where, on 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 proper provision for the child in accordance with his means, the court may order that such provision shall be made for the child out of the estate as the court

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[1] Striking practical examples of circumstances changing after the testator's death are provided by the Australian cases of In re Wheare [1950] S.A.S.R. 61 (accident causing serious injury to applicant) and Re Forsaith Dec'd (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171 (married daughter deserted by her husband).

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 will be as fair as possible to the child to whom the application relates and to the other children.

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As a further preliminary, it may be pointed out that in Re G.M.,[2] the first reported case on s. 117, Kenny J. established two elementary propositions. First, the applicable test is an objective one and it is irrelevant whether or not the testator regarded himself as having made adequate provision. A corollary of this is that an application may succeed even the behaviour of the testator was not blameworthy. He may have done his best to discharge his duty but may still, as a practical matter, have failed to make proper provision for his children. Secondly, Kenny J. pointed out that the date of death is the relevant time for assessing the question of failure in moral duty by testator. It would be no answer to an application to demonstrate that, at the time it was made, a particular will made proper provision for the applicant.[3] Circumstances might well have changed after the making of a will and the duty created by s. 117 extends to modifying testamentary provisions to ensure that they remain satisfactory.

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[2] (1972) 106 I.L.T.R. 82.

[3] See e.g. C.C. and Ch. F. v. W.C. and T.C. [1990] 2 I.R. 143, 149.

At first glance, the approach in Re G.M. appears to preclude any attempt to consider events after the date of death. However, the Irish courts have displayed a certain degree of ingenuity in finding ways around this problem. The case law reveals three separate strategies which have been developed to justify taking into account events which have taken place between the death of the testator and the court hearing. These will now be considered in turn.

A. FORETELLING THE FUTURE

In Re N.S.M[4], another early case, Kenny J. attributed to the testator a remarkable capacity to anticipate the future. The testator had given the residue of his large estate to his youngest son. However, as a result of estate duty and expensive litigation which followed the death of the testator, the value of the residuary gift had shrunk to nothing. Kenny J. held that:

> 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.

Kenny J. offered no justification for his approach. On the face of it, it would seem unacceptable to depart from

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[4] (1973) 107 I.L.T.R. 1.

reality in the manner which he appeared to envisage.[5] However, it is possible to rationalise the decision on the basis that the "just and prudent parent" mentioned in s. 117 (2) would take account of reasonably foreseeable events. Thus, it seems clear that a reasonable parent would ascertain the tax consequences of his or her testamentary dispositions. In addition, certain kinds of litigation might be foreseeable during the lifetime of the testator. Thus, in N.S.M., the litigation had been triggered by the fact that there were two women claiming to be the testator's surviving spouse under Irish law. The fact that he had divorced and remarried in England was presumably not "mercifully hidden" from the testator and, at a stretch, it might have been reasonable for him to foresee the legal dispute which arose after his death.

It is submitted that N.S.M. must be taken to stand for the sensible proposition that future events must be taken into account if they should reasonably have been foreseen by the testator during his life-time. This reasoning will not, of course, solve the problem in all cases. The next two approaches to be considered offer a method of taking events after death into account despite the fact that they could not reasonably have been foreseen.

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[5] Note the comments of Townley J. in the Australian case of Re Browne Dec'd [1952] Q.S.R. 47, 49-50: "To take into consideration changes in circumstances which could not have been foreseen by the testator would be to attribute to him not only wisdom and a sense of justice but also the gift of prophecy."

B. A DUBIOUS INTERPRETATION OF S. 117(2)

Reliance was placed on s. 117(2) in In the Goods of J.H., deceased.[6] Barron J. noted that the issue to be considered was whether the testator had failed in his moral duty. He conceded that at first sight it might appear that this duty had to be considered at the date of death. However, the learned judge argued that "the principles of fairness require every relevant consideration to be taken into account when the decision is being made."[7] He reasoned as follows:

> [It] is the decision of the court on the hearing of the application which has to be fair. Such a decision would not, in my view, be fair if it disregarded a relevant factor merely because it occurred after the date of death of a testator.[8]

Barron J. regarded any such factor as falling within the provisions of s. 117 (2) which require account to be taken of "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."

There had been an interval of over two years between the death of the testator and the date of the court hearing in J.H., deceased. Naturally, over that time, the circumstances of the children had changed somewhat. One of them, a chef, had become unemployed; another had enjoyed increased success

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6 [1984] I.R. 599.

7 Ibid., 607.

8 Ibid.

in his haulage business; and a third had been the victim of an assault which left her with "moderately severe facial injuries." Although his judgment does not indicate what precise weight Barron J. attributed to these issues, one presumes from his legal analysis that he took them into account in reaching the conclusion that there had been a breach in the moral duty owed to the applicant children.

In the subsequent case of In the Estate of J.H. de B., deceased,[9] Blayney J. quoted the relevant passage from the judgment of Barron J. in J.H.. Blayney J. agreed with and adopted "this very clear analysis of how subsection (2) of Section 117 should be construed."[10] On this basis, Blayney J. took into account the fact that two sisters of the plaintiff

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[9] [1991] 2 I.R. 105. The case is of note for two other reasons. First, it illustrates the dampening effect of a dictum of Finlay C.J. in C.C. and Ch. F. v. W.C. and T.C. note 3 supra, 148 to the effect that there was "a relatively high onus of proof" on an applicant. It would not be sufficient if the provision for the child merely appeared ungenerous, rather it was necessary to establish "a positive failure in moral duty." Blayney J.'s rejection of the application seemed strongly influenced by the Chief Justice's strictures concerning the onus of proof. Secondly, it is interesting that Blayney J. took account of the fact that the testator had encouraged his eldest son to believe that he would inherit the family farm. If any provision were to have been made for the plaintiff it would have come from his brother's interest in the farm. Blayney J. concluded that "the deceased could justifiably have taken the view that in the particular circumstances he had a moral duty to leave the entire of [the farm to the eldest son] and that that duty took precedence over any duty he might have had towards the Plaintiff." However, a testator is under a moral duty to provide for all his children. It would be odd if he could, by signalling in advance to one child an intention to favour him unduly, create a binding moral duty towards that favoured child, which would override the duty towards the other children.

[10] Ibid., 112.

had made a claim under s.117 which had been compromised by the executor (another brother), thereby reducing the assets from which an order could have been made to provide for the plaintiff.

The difficulty with the approach in these two cases is that it appears to do violence to the words of s. 117. The reference in subsection 2 to "other factors which the court may consider of assistance in arriving at a decision" is clearly conditioned by the fact that the decision in question relates to a failure in the moral duty mentioned in subsection 1. Unless the concept of moral duty is to be drained of all meaning, its fulfilment must be judged during the lifetime of the testator. Therefore it must be concluded, with all due respect to Barron and Blayney JJ., that the argument based on s. 117 (2) is unduly simplistic and ignores that subsection's context within s. 117.

C. A TWO-STAGE APPROACH

Finally, it is proposed to examine the more subtle approach adopted by Carroll J. in M.P.D. v. M.D.[11] Carroll J. felt that the inquiry under s. 117 should be approached in two stages. First, it was necessary to consider the question of failure in moral duty. This issue had to be determined with reference to the circumstances prevailing at the date of death. However, if such a failure in moral duty were established, one had to move on to the second stage of

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[11] [1981] I.L.R.M. 179, 188.

devising an order which made "just" provision for the applicant. At this second stage, the court was obliged to take into account the situation at the date of the hearing. On this basis, in M.P.D. Carroll J. would have been willing to take into account, in making provision for an applicant, the fact that the assets of the testator had doubled in value since the date of death.[12]

Under the general approach suggested by Carroll J., it would sometimes be possible to take into account unforeseeable events after the testator's death. Once the initial hurdle is surmounted of demonstrating that the testator has failed to some extent in his moral duty to provide for the applicant, it becomes possible in shaping the appropriate order to take account of all the circumstances at the date of the hearing, e.g. the consequences of a serious accident (or conversely the winning of a lottery) after the death of the testator. Presumably, if the developments after death were sufficiently serious, there would be a temptation for a Court to find an initial breach of moral duty on relatively flimsy grounds in order to ensure a just result.

It is submitted that Carroll J.'s approach is consistent with the words of s. 117 and provides an attractive, albeit limited, solution to the problem under discussion. Given the express mention of "moral duty" in s. 117, it is surely impossible to conduct the entire inquiry on the basis of the

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[12] On the facts of the case, Carroll J. held that she was precluded from making an order by the fact that the relevant application was made outside the time-limit laid down in s. 117 (6), i.e. one year from the taking out of representation.

facts in existence at the date of the hearing. On the other hand, it would be stultifying to insist that a court, in ordering provision for an admittedly deserving applicant, should ignore the circumstances prevailing at the time the order has to be devised. It is interesting to note that Carroll J.'s approach has a respectable pedigree, finding support in the decision of the High Court of Australia in Coates v. National Trustees Executors.[13]

CONCLUSION

The following conclusions may be drawn from the foregoing analysis:

1. It is appropriate to take into account events after death which were reasonably foreseeable within the testator's lifetime: Re N.S.M.[14]

2. Despite the views expressed in Re J.H., deceased[15] and Re J.H. de B., deceased,[16] it is not legitimate in assessing the question of failure of moral duty to consider unforeseeable events which take place after the death of the testator.

3. However, once a failure in moral duty has been established, it is permissible to consider the facts at the date of the hearing in determining what amounts to just

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[13] (1956) 95 C.L.R. 494. For recent confirmation of this approach in Australia, see e.g. the decision of the Full Court of the Supreme Court of South Australia in Eckert v. Starick unreported, June 15 1994.

[14] Supra.

[15] Supra.

[16] Supra.

provision for the applicant: M.P.D. v. M.D.[17]

[17] Supra.