

**THE HIGH COURT
PROBATE**

[2022] IEHC 65
[2017 231 SP]

**IN THE MATTER OF THE ESTATE OF T.N.
IN THE MATTER OF THE SUCCESSION ACT, 1965
AND IN THE MATTER OF SECTION 117 AND 121 OF THE SUCCESSION ACT, 1965
BETWEEN**

G. S.

PLAINTIFF

AND

M. B.

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 21st day of January, 2022.

Introduction

1. This is an application by the plaintiff pursuant to s. 117 of the Succession Act, 1965 ("the 1965 Act") for proper provision out of the estate of his mother, T.N., deceased ("the deceased"). The defendant is a niece of the deceased and is sued in her capacity as executrix of the estate of the deceased. The deceased died on 9 June 2015 at an advanced age. She made a will on 17 December 2004 appointing the defendant to be executrix of her will, and making the following bequests:
 - (a) leaving her dwelling house and land (which comprised a farm of approximately 70 acres) to her nephew, M., subject to two sites comprising a half acre at least to be made available to two of her other nephews, S. and D., cousins of M.;
 - (b) leaving the contents of her dwelling house to the defendant;
 - (c) leaving the sum of €5,000 to another niece, P., and the sum of €6,000 to a friend;
 - (d) directing that her livestock would be sold and the proceeds of sale divided equally between her nieces H., J. and the defendant;
 - (e) leaving the sum of €300 to the local curate for the saying of Masses;
 - (f) leaving the residue of her estate to the defendant.
2. At the date of death, the gross value of the estate was €671,533 and its net value was €663,998. I am told that the current net value of the estate is €778,998.
3. Apparently, at the date of death, the lands left to the deceased's nephew, M., were worth €590,000. The sale of the livestock and a tractor yielded €13,413.14, and the deceased left the sum of €61,483 in a permanent TSB account, from which debts of €7,535 were deducted. The lands were worth approximately €705,000 by the date of hearing, and I can take into account this value: *A. v. C. and D.* [2007] IEHC 120.
4. The plaintiff was born in 1955 and took early retirement from his employer company in 2011. He is currently in receipt of a pension from that company in the sum of €313.97 per week, which is not index linked. He now feels it was perhaps a mistake to take early

retirement as he has retired eight years too early to get the full pension. He has only worked casually since retirement and his gross income in the three years prior to the death of his mother was €8,159.00.

5. However, the plaintiff and his wife have significant assets. As set out in his grounding affidavit, as of the date of death of his mother, he and his wife had the benefit of the following real assets:
 - (i) A dwelling house situate in the town where he grew up which was valued as of June 2017, at the time of swearing of the affidavit, at €175,000. There is no mortgage on this house, and it is owned jointly by the plaintiff and his wife.
 - (ii) A semi-detached dwelling house in a provincial city in the name of the plaintiff's wife, valued as of June 2017 at €200,000. There is no mortgage on this house and it is currently rented. The court was not informed of the amount of income accruing to the plaintiff and his wife on those rental payments.
6. In addition to the foregoing, at the date of death of the deceased, the plaintiff also had the following personal assets:
 - (i) €30,000 in an account at Permanent TSB.
 - (ii) €104,000 in an account with An Post.
 - (iii) €50,000 in a Bank of Ireland account.
 - (iv) An Irish Life policy in credit in the sum of €200,000.
 - (v) A 2010 motor car valued in 2015 at approximately €11,000 (which the plaintiff is still using and which he now estimates is worth about €4,500).
7. In addition to that, the plaintiff's wife had a number of personal accounts containing a total balance of €62,000. The plaintiff's wife gave up work when their son was born approximately 20 years ago. She has recently sought work as a home help, but this yields only about €10 per hour and the plaintiff says it does not cover the cost of fuel to drive to the person she is caring for. I accept that the plaintiff's wife does not have any real earning capacity.
8. The plaintiff expressed the view in his evidence that his wife's assets should not be considered for the purpose of this application. However, I am satisfied that this is incorrect. The plaintiff's current financial circumstances and his future prospects cannot be considered without taking into account his wife's assets, as this is material to whether the deceased owed a moral duty to the plaintiff which obliged her to leave him something in her will.

Plaintiff's life circumstances and relationship with his mother

9. The plaintiff placed great stress in these proceedings on his upbringing and the fact that his mother and her family never provided for him at any time during his life. The plaintiff

was born in 1955, in a very different Ireland, and his mother was unmarried. His father died in an accident a couple of months before he was born. The plaintiff believes that he was born in a mother and baby home, and he gave moving testimony to the effect that other children in his situation had been accepted by and integrated into their maternal families in their adult lives, but this had not happened for him.

10. Instead, the plaintiff was brought up by another family, Mr. and Mrs. S, to whom he was apparently given by the deceased, possibly some months after he was born. There was no formal adoption and no objection was raised to the right of the plaintiff to maintain this application as a child of the deceased within the meaning of Part IX of the Succession Act, 1965, as amended, other than that the defendant insisted that the plaintiff supply DNA evidence of his relationship to the deceased, which he was able to do. The plaintiff was significantly distressed by this. His evidence, which I accept, was that it was well known in the family of the deceased and the wider community that he was the child of the deceased, and therefore his distress was understandable.
11. The plaintiff was clear that he was loved and cared for by Mr. and Mrs. S, who also fostered two older girls, one of whom is now deceased. They were not people of means. They lived in local authority housing and Mr. S. worked first in the army, then for a local authority, and cut turf in his free time for extra money.
12. The plaintiff has confirmed to his consultant psychiatrist that it was a happy and a loving childhood, even though it is clear that the plaintiff lived in very modest circumstances. He retains a grievance about the class distinctions of the time and the fact that children like him were treated differently by some of their teachers in school.
13. However, it appears that Mr. and Mrs. S. did stress the value of education, and the plaintiff did his Group Certificate, Intermediate Certificate and, in 1974, his Leaving Certificate. He obtained honours in Building Construction, Metalwork and Mechanical Drawing, and passed Irish, English and Maths.
14. He was then accepted into a Civil Engineering course in a local Regional College. This was a two-year certificate course, from which one could progress to a three-year diploma, and ultimately a degree. Unfortunately, at the end of the second year, the plaintiff failed one of the exams. It is a key part of his case that, because of the straitened circumstances of Mr. and Mrs. S., he could not afford to repeat this exam. He accordingly left third level without a qualification. He gave evidence that he had excelled in his results in other subjects and that nine of the eleven students in his class had progressed to studying engineering.
15. However, his aptitude for mathematical and technical subjects appears to be not in doubt, and he obtained skilled employment with several major companies as a draftsman and in other skilled, technical roles, until he took early retirement in 2011.
16. The plaintiff submitted a number of expert reports, which were agreed and not controverted in any way. These included a report of Dr. William Kinsella, an educational

psychologist attached to University College Dublin. He concluded that the plaintiff was best described as someone who presented with very good visual spatial skills, an excellent memory but with poor verbal language skills, the latter reflecting his social and cultural experience and the level of education he had received. Dr. Kinsella concluded that the plaintiff's psychological profile would give expectations of good academic achievement. While the plaintiff's numeracy skills were in keeping with those expected of a person of his level of intellectual functioning, his literacy skills were not in keeping with his intellectual ability, the inference being that the plaintiff had under achieved educationally.

17. Ultimately, Dr. Kinsella concluded that the plaintiff should have been capable of performing sufficiently well within the third level certificate course in Civil Engineering in order to be able to progress to study at diploma and possibly at degree level in that area. He was of the view that the plaintiff's low level of vocabulary and poor literacy skills very much reflected his social and cultural background and educational opportunities, that the plaintiff's deficits in vocabulary and literacy skills would suggest that his standard of education was less than adequate, and that he had not achieved his potential in relation to literacy skills.
18. On the other hand, the plaintiff's above average skills in other areas indicated very good mathematical ability. He offered the opinion that if the plaintiff had been better supported financially in his youth and had received a better education, it is most likely that his career trajectory would have been different and that he would have pursued a career in Civil Engineering, a career for which his psychological profile would render him very suitable. A report by an Occupational Therapist and Vocational Assessor, which relied in part on Dr. Kinsella's report, also concluded that qualification as an engineer was a realistic goal for the plaintiff.
19. The plaintiff also submitted an actuarial report calculating the capital value, as of the date of the report in 2017, of the plaintiff's lost earnings, on the assumption that he would have made an additional €10,000 or €15,000 gross per annum over his working lifetime had he qualified as a civil engineer. If the differential in income was €15,000, this report calculates the plaintiff's lost earnings to 10 February 2017 as €255,091 (excluding interest) and if the income differential were €10,000, that sum is €169,870.
20. However, it is my view that the court cannot grant relief to the plaintiff in relation to loss of earnings, as this is not the purpose of section 117. Section 117 requires the court to look at how the deceased ought to have provided for the plaintiff in her will, given the assets available to her at the time, and having regard to any other moral claims on her at the date of death. The relevant principles are discussed in more detail below. In my view, they do not accommodate any claim of this type for lost earnings, and in fairness to the plaintiff, this issue was not pressed at hearing.
21. The material point, it seems to me, flowing from the fact that the plaintiff was not able to repeat second year of the certificate course is that it is an instance which demonstrates that the deceased never made any provision for the plaintiff during her lifetime. However,

there is no dispute on this issue as it is accepted by the defendant that no such provision was made.

22. The plaintiff also called Dr. Noel Kennedy, who spoke to his report of 13 October 2016. This set out how, in 2013, the plaintiff had suffered from suicidal ideation. Due to this and to the severity of his psychotic symptoms, the plaintiff was hospitalised for a few weeks in late 2013. He improved greatly, was discharged, but ceased taking medication. He suffered further psychotic symptoms in 2015.
23. Dr. Kennedy gave evidence that he had diagnosed the plaintiff as suffering from paranoid personality disorder, stating that he satisfied six of the seven criteria set out in DSM-V, when only four were necessary for a diagnosis. Dr. Kennedy was of the view that the plaintiff had a propensity to over interpret neutral comments and wrongly ascribe negative connotations or meanings to them, due to his paranoia. This manifested itself with poor relationships at work which Dr. Kennedy suspected were affected by this personality disorder. Since 2012, the plaintiff unfortunately has suffered episodes of psychosis, some of which related to delusions about his former work colleagues, but some symptoms of which (such as "thought-broadcasting") had no connection with his work experiences at all.
24. Dr. Kennedy also gave evidence to the effect that the plaintiff described a sense of isolation and not belonging in childhood, which he ascribed to the fact that he was treated differently in a conservative rural community because his mother was unmarried and he was being raised by adoptive parents. Dr. Kennedy was of the view that this experience would feed into his personality in adolescence and ultimately in adulthood, potentially contributing to the paranoid feelings felt by the plaintiff, and ultimately his psychosis. He is of the view that, without treatment, the plaintiff was at an 80% risk of further psychotic episodes. The plaintiff also suffered from depression and was at high risk of recurrence of depression.
25. Dr. Kennedy was of the opinion that the plaintiff had been hampered in the last ten years by his illness, but previous to that the main restriction on the plaintiff's opportunities was his lack of education.
26. One can readily see how treatment such as that described by the plaintiff, occurring in childhood, would lead to difficulties later in life. There is no doubt that the plaintiff is significantly aggrieved and upset both by the treatment of him by his community, but perhaps more particularly by the deceased and her family who failed to welcome him into her family, even later in life.
27. The plaintiff first met his mother by arrangement in a hotel in a local provincial town when he was already 23 years of age and thereafter he kept in touch with her by phone. However, their relationship deteriorated when the deceased offered to sell the plaintiff a site, which the plaintiff could not afford to buy and which he felt ought to have been a gift. According to the plaintiff this changed their relationship. When he took his eighteen-month old son to see her, she did not even show any interest in her grandchild.

Furthermore, it would seem that the deceased only met the plaintiff in larger provincial towns and did not want to meet him locally. This all, very naturally, has led to great unhappiness and upset for the plaintiff.

28. On the other hand, as very fairly conceded by the plaintiff's counsel in closing the case, we cannot stand in judgment of a deceased woman who is not here to speak for herself. Although at this remove of time there probably can be no direct evidence of the deceased's family's reaction to her pregnancy, it was put to the plaintiff in cross examination that the deceased had no choice as her family would not allow her to return home as an unmarried mother, and she was effectively forced to give up her child. While it is true that the deceased resisted the development of any relationship with her son, or indeed her grandchild, when the plaintiff reached adulthood, it must still be remembered that when he travelled to play Gaelic football with his underage team in his mother's hometown, which was only ten miles away from where he lived, she always went to watch his matches. At that time, he noticed her but did not know who she was. Although she did not welcome the plaintiff into her life when he was an adult, the evidence of the plaintiff nevertheless presented a poignant image of this woman, who was still probably only in her late 30s or early 40s at the time, watching her only child from a distance. The court acknowledges and empathises with the plaintiff's feelings, but equally must bear in mind that it has no direct evidence of his mother's experiences and the pressures on her, both familial and social, and, as plaintiff's counsel correctly acknowledged, cannot stand in judgment on her.
29. Ultimately, nothing that the court can do in a s. 117 application can provide redress for these matters, nor is it any function of the court to comment on the rights or wrongs of what occurred. They are only set out here because they formed such a significant element of the plaintiff's evidence and submissions.
30. Therefore, I have concluded that these matters are not within the jurisdiction of s. 117. This application must be considered within the confines of the section and the jurisprudence establishing the legal test which must be met by a plaintiff in bringing a s.117 application.
31. There was a dispute between the parties as to the extent of the deceased's means during her lifetime. The defendant gave evidence that she lived a frugal lifestyle and the bank statements discovered to the plaintiff and put to the defendant in cross examination did not support a finding that the deceased had a large income. While the plaintiff in his evidence expressed what was, in effect, an assumption that as a farmer she must have been a person of means, it does not necessarily follow that the deceased had ready access to cash. The evidence was that the deceased sold sites from time to time when she needed money, and the defendant gave evidence that the deceased was not a good farmer. It seems that the deceased lived a low key, conservative, and somewhat old-fashioned lifestyle. In any event, it is relatively clear from the assets she left on death that the deceased's main asset was her farm: her income from it was most likely modest

and the savings that she left reflect a conservative attitude to money and lifestyle rather than a large income.

32. While it is therefore accepted that the deceased did not make any provision for the plaintiff during her lifetime, it has not been established that this occurred notwithstanding the enjoyment of a large disposable income.
33. That, however, is only one consideration in an application under section 117. Where no provision is made for a child during the lifetime of a deceased, the question on a s. 117 action turns on whether, in light of the assets available on death, there was a failure of moral duty on the part of a testator in failing to make good that position. When drawing up a will, the question of the testator's financial needs become irrelevant as the purpose is to provide for others on death, and the testator's own needs during her lifetime are obviously irrelevant to that question. I now turn to the legal principles relevant to the question of whether the deceased failed in her moral duty in not providing for the plaintiff in her will.

Relevant legal principles

34. Section 117 provides:

- "117.— (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.*
- (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.*
- (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 twelve months from the first taking out of representation of the deceased's estate."*

The deceased had no other children and therefore not all of the considerations in subs. (2) are relevant. Similarly, subs. (3) does not apply.

35. The principles relating to the exercise of the jurisdiction of the court under s. 117 are well established, though ultimately each case turns on its own facts. The starting point is the judgment of Kenny J. in *Re. G.M.: F.M. v. T.A.M.* (1970) 106 I.L.T.R. 82, in which Kenny J. stated (at p.p. 85-86):

"An analysis of s. 117 shows that the duty which it creates is not absolute because it does not apply if the testator leaves all his property to his spouse (s. 117 (3)) nor is it an obligation to each child to leave him something. The obligation to make proper provision may be fulfilled by will or otherwise and so gifts or settlements made during the lifetime of the testator in favour of a child or the provision of an expensive education for one child when the others have not received this may discharge the moral duty. It follows, I think, that the relationship of parent and child does not of itself and without regard to other circumstances create a moral duty to leave anything by will to the child. The duty is not one to make adequate provision but to make proper provision in accordance with the testator's means

It seems to me 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 and must depend upon (a) the amount left to the surviving spouse or the value of the legal right if the survivor selects 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, (e) whether the testator has already in his lifetime made proper provision for the child. The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that he did not owe any is not decisive."

36. The plaintiff relies heavily on this case as it concerned an adoptive child who was not accepted by his father and not provided for in his will, and I will return to this when I come to apply the legal principles to the facts of this case. For present purposes the material point is that those principles have never been disavowed, and they were specifically endorsed by the Supreme Court in *C.C. and Ch. F. v. W.C. and T.C.* [1990] 2 I.R. 143, at p. 148, where Finlay C.J., *per curiam*, approved them subject to the following qualification:

"I am satisfied that the phrase contained in s. 117, sub-s. 1, 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established."

37. More recently, in *X.C. v. R.T.* (Succession: Proper provision) [2003] 2 I.R. 250, Kearns J., at p. 262, restated the relevant principles as follows:

- (a) *The social policy underlying section 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 section 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 section 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 section 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 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 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."*

At hearing, counsel for the defendant stressed (e), (f) and (g).

- 38. It is clear from the caselaw that the plaintiff bears a high onus of proof in these proceedings in meeting the first of the two fundamental requirements for claiming relief under s. 117, which is to show that his mother failed in her moral duty towards him. It is perhaps the use of the phrase "*moral duty*" in s. 117 that had given the impression that the court somehow looks at the moral behaviour of individuals over a lifetime. However, the full phrase used in the section is "*moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise.*" As stated by Kenny J. in *Re G.M.* (at p. 86), the section does not require adequate provision, but rather proper provision, having regard to the means of the testator. The duty being considered by the court, therefore, is the duty to provide materially for one's child, and broader issues of acceptance and affection are not central to that consideration, albeit that determination of a claim under s. 117 requires the court to consider whether the parent provided for the child during his or her lifetime, and to consider, in light of the respective assets of parent and child on the date of death, whether the parent is in default of his or her moral duty to provide for the child.
- 39. Of course, in this case, it is accepted that the deceased never made any provision for her child. However, the defendant now argues that as the plaintiff cannot show financial need, he cannot therefore show a failure by the deceased to make provision for him. The defendant lays stress on the high onus of proof, and the repeated statements in the jurisprudence that there is no entitlement to a bequest solely on the basis that one is a child of the deceased.
- 40. That may be so in broad terms, but every case turns on its own facts. As can be seen from the list of considerations set out by Kearns J. in *X.C.*, there is no absolute obligation

to leave something to every child but neither do the factors enunciated in that case establish that merely because one is not in immediate financial need, one cannot meet the onus of demonstrating a failure of moral duty on the part of the parent.

41. In this case, in my view, there are a number of unusual factors here which lead to the conclusion that the deceased did indeed fail in her moral duty to make provision for the plaintiff.
42. First and foremost, there appears to be no competing moral claim by anybody else to provision out of the deceased's will. The deceased lived with her mother and half-brother. After the death of her half-brother in the mid-1970s, the plaintiff became the sole registered owner of the farm. Her mother died shortly afterwards, and it appears that, while she was close to one of her sisters and was frequently visited by her nieces and nephews, there is no evidence of any relationship of dependency whereby any of these people came to rely on the deceased financially or had any financial expectation of her at the date of her death. Unlike many of the other cases, therefore, where competing claims by other children, surviving spouses, and elderly and infirm parents, as well as adult siblings, are considered, the evidence in this case does not disclose that the testator had any moral duty to anyone other than the plaintiff at the time of her death.
43. As regards the emphasis by the defendant on the requirement of the plaintiff to show financial need, I think the judicial comments to that effect must be read in the context of the cases which were under consideration. I should say, as a preliminary comment, that the defendant accepts, and indeed this was clearly stated by Keane J. in *E.B. v. S.S.* [1998] 4 I.R. 527, at pp. 560 to 561, that even though 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, there is no age ceiling on an applicant who seeks relief pursuant to s. 117.
44. There is therefore no impediment to a middle aged or even elderly child 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.
45. The defendant relied on the *dictum* of Barron J. in *In the Goods of J. H. Deceased* [1984] I.R. 599, at p. 608, where he stated:

"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, these must not be construed as giving the court power to make a new will for the testator but only power to remedy a failure on the testator's part to fulfil the moral duty owed to 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 whether by his will or otherwise, the court has no power to intervene."

46. In this case, when one looks at the nature of the assets held by the plaintiff and his wife, without regard to any of the surrounding circumstances, one might say that they are not "in need". Their family home is owned outright, with no mortgage, and they have a rental property in a provincial city which, though the income from which has not been disclosed in evidence, must be capable of generating a reasonable rent, not least because it is a university town. Although the plaintiff gave evidence that previous tenants caused considerable damage to the house and he had to spend a lot of money on it, one would hope that that is not going to be a common occurrence. He also has considerable savings, some of which have been generated by the lump sum payment on his retirement in 2011.
47. The fact remains, however, that the plaintiff is 65 and neither he nor his wife now have any real earning capacity, and his pension is quite modest in nature. Their son is also still very young and they will, very naturally, want to help him establish himself in adult life, which is relevant to an assessment of their financial needs. Given their limited income, this will probably require them to have recourse to their savings.
48. Furthermore, it must not be forgotten that Kenny J. stated in *F.M. v. T.A.M.* that one of the considerations in determining whether there had been a failure of the moral duty to make proper provision for a child was the means of the testator. Indeed, when one applies the considerations set out by Kenny J. to this case, it seems to me that, in that case, because the deceased died leaving no spouse, child, or other person to whom she owed a moral duty, and given that she never, in her lifetime, made any provision for the plaintiff, the most relevant considerations on the facts of this case seem to be the means of the deceased, the age of the plaintiff and his financial position and prospects in life.
49. Furthermore, in considering the legal principles set out by Kearns J. in *X.C.*, it must be recalled that these were drawn up, as one would expect, to some extent in light of the facts of the case there under consideration. That was a case of a wealthy businessman who had remarried, and the s. 117 application was brought by the adult children of his first marriage, who were all in their thirties at the time of his death. The deceased's second wife was entirely dependent on him and while she was living in a valuable house, she had no income or capacity to earn. At the date of his death, the deceased had been survived by his elderly mother, to whom he also owed obligations.
50. The applicants in that case had all been privately educated and the two daughters were comfortably well off. The first plaintiff was an unsuccessful businessman who had dropped out of college and who had dissipated significant funds given to him by the deceased in his lifetime. However, he and his siblings had the potential to benefit from the discretionary trust created by the will. Ultimately, this court found that that was proper provision on the facts of the case. It was not the case, therefore, that the testator's adult children could not benefit at all from the estate of the deceased.

51. This is an entirely different situation where there is no competing moral claim, and no provision whatsoever was made during the lifetime of the deceased. I would accept that the authorities mean that the plaintiff cannot expect to succeed to the entire estate on the facts of this case, but I do not interpret them as precluding the plaintiff from succeeding.
52. Furthermore, while the plaintiff and his wife appear, by virtue of their own efforts and hard work to have done fairly well in life, the fact is that for the remainder of their lives they have a modest income in the form of the plaintiff's pension and the rental income from the plaintiff's wife's house, while their son is still very young and has only in the last few years commenced his apprenticeship.
53. Counsel for the defendant pointed out that, at the date of death, the assets of the plaintiff and his wife were roughly equivalent to that of the estate, but I am satisfied that a direct comparison of this sort does not determine the matter. The plaintiff and his wife do not enjoy liquid assets in the same way as does the estate of a deceased: they have to live in their house and without the rental property owned by the plaintiff's wife, their income would be restricted to a modest pension which is not index-linked and will therefore decline in value in real terms for the remainder of the plaintiff's life.
54. Although there was no evidence of the rental income from the plaintiff's wife's property, a return of 5% per annum on an asset with a capital value of €200,000 would yield an income of €10,000 per annum. Even taking account the upward pressure in rents, it seems unlikely that this property would produce much more than €12,000 per annum, once repairs, maintenance and possibly agent's fees are taken into account. Furthermore, any increase in the capital value of this property since the date of the 2015 valuation furnished to me may not, in light of the creation of rent pressure zones, have yielded a comparable increase in income. While I have no evidence in relation to any of this, even setting out an estimate in this way demonstrates that, although this kind of investment is undoubtedly a solid one, it does not necessarily yield an income of the type that might first be assumed.
55. My assessment of the assets of the plaintiff and his wife is therefore similar to my assessment of the deceased's means during her lifetime: they have significant assets, but they do not have significant income. Were they now, for example, to sell the rental property, it would no doubt be subject to capital gains tax and they would be left with a lump sum which might not be capable of replacing the current income they enjoy from the property. Without specific evidence, I can only make general observations on these issues.
56. As already stated, while it is true that the plaintiff and his wife have significant savings, but they are likely to wish to provide for their son as he seeks to establish himself in life and they will probably have to use their savings for that.
57. Furthermore, it seems that, in the last ten years or so, the plaintiff's life has taken another difficult turn as a result of the personality disorder which the evidence establishes

has been contributed to by the isolation he felt as a child which was due to the circumstances of his birth and the lowly social status of his adoptive parents. This occurred prior to the death of the deceased and is relevant to an assessment of the moral duty of the deceased as of the date of her death.

58. The question is whether the deceased, having regard to the assets she had available to her and the circumstances and prospects of the plaintiff at the date of her death, has made proper provision for the plaintiff in her will. I do not believe that she has. I am of the view that the plaintiff has discharged the high onus that is undoubtedly on him to demonstrate a failure of moral duty on the part of the deceased.
59. Given the absence of any competing claim, and given the fact that, notwithstanding that she lived quite a frugal life herself, she was about to leave considerable assets in her will to a series of nieces and nephews, it is my view that she ought to have provided for the plaintiff in her will. The situation might be different if she had a special and warm relationship with one or other of the beneficiaries, but there is no evidence of this, nor is there any evidence that any of them had a moral claim on her or were financially dependent on her in any way. There will no doubt be many cases where one or more nieces, nephew, adult siblings, or other relations or friends, will themselves have enjoyed a relationship with the deceased which would give rise to a competing moral claim. However, on the evidence before me, this is not such a case.
60. The question then arises as to what proper provision should be made for the plaintiff out of the estate of the deceased. As can be seen from the factual introduction to this judgment, the greater part of the assets of the deceased consisted of the farm of 70 acres. This was left to a nephew of the deceased, who apparently has a farm elsewhere, albeit that its value and profitability were not the subject of any evidence. However, this does not seem to be material when it was not established that the plaintiff owed any competing moral duty to this nephew.
61. Given the net value of the estate at the date of death, given the fact that the value of the primary asset, which is the farmland, appears to have appreciated in value to €705,000 since that date, and given that the plaintiff and his wife will have to live the remainder of their lives on what would appear to be a reduced pension and on income from the plaintiff's wife's rental property, it seems to me that proper provision for the plaintiff in these circumstances is that he should be provided with a lump sum of €225,000 out of the estate of the deceased, representing a sum of €15,000 per annum for the next fifteen years. This will increase the comfort in which the plaintiff and his wife can live their later years as it will supplement their current modest income.
62. Given the terms of the will and the fact that the agricultural lands constitute by far the most valuable asset in the estate, this sum should be charged on those lands and recourse should not be had to the smaller bequests in the will.
63. I will list the matter before me in early course to hear the parties in relation to the costs of these proceedings and the precise order which should be made.