1982 No. 917 Sp.

THE HIGH COURT

IN THE MATTER OF THE SUCCESSION ACT, 1965.

BETWEEN:

DARRA McNAMARA (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND GERARD McNAMARA)

PLAINTIFF

AND

BRIAN CUSACK AND PADDY McENTEE

DEFENDANTS

- Judgment of Mr. Justice Barrington delivered the 15th day of Feb 1984.

This is a claim brought by the infant Plaintiff against the estate of his mother under Section 117 of the Succession Act 1965. It is an unusual and tragic case. The infant Plaintiff was the only child of the textatrix. He is now aged thirteen. I have no doubt whatsoever, on the evidence, that his mother cared deeply for him and had his best interests at heart. Yet, in her Will, she, in the events which have happened, made no provision whatsoever for him.

On the other hand there is no question of the infant Plaintiff suffering any present hardship. He has been supported by his father who is a man of

substance, and he has been looked after by a Mrs. and Mr. Egan who are, respectively, his aunt and his uncle and who are accepted by all parties to this litigation to be admirable people.

The next friend in the proceedings is the father of the infant Plaintiff and husband of the textatrix. The father might also have had a claim under the Succession Act against the estate of his late wife and the possibility of a conflict of interest arose. However the father at all times said he wished to support his sons claim and, during the course of the proceedings, through his Counsel, formally waived his own case against the estate.

The facts of the matter are as follows. The infant Plaintiff's father and the textatrix were married on the 27th of October, 1968. The infant Plaintiff was born on the 20th September, 1969. The textatrix's mother died in 1973 and the textatrix's father, who was a county physician, invited his daughter and son-in-law to come and live with him. Unhappy differences subsequently arose between husband and wife and the husband left.

By order of the High Court dated the 24th day of October, 1975 the textatrix was given control of the infant Plaintiff and the husband was directed to pay maintenance at the rate of £50 per week in respect of his

wife's support and £10 per week in respect of the infant Plaintiff. These payments he apparently honoured. Nevertheless and despite the fact that the husband appears to have been successful both as a businessman and a farmer, he did not make adequate provision for his wife. It is hard to know what precisely was the cause of the unhappy differences between husband and wife but Mr. Patrick McEntee, Senior Counsel, who was a friend of the family and is one of the executors named in the textatrix's will, expressed the view that the husband was preoccupied with his business interests and never fully accepted the responsibilities of marriage. This appears to me to be plausible.

At paragraph 2 of her Will the textatrix declares as follows -

"I wish to make it clear that I am making no provision in this Will for my husband, Gerard McNamara, for two reasons, first that he has deserted me and I have obtained an amount from him by way of maintenance only after the institution of Court proceedings and on this ground alone I feel that he is not entitled to share in my estate and further that the major portion of the monies forming part of my estate has been given to me by my father .....".

The textatrix's Will is dated the 8th of August, 1978. She died on the 8th February, 1980. At the time she made her Will, the cancer which

subsequently killed her had not yet been diagnosed or suspected.

Despite the wording of the Will I am satisfied that a residual affection remain between husband and wife and the husband visited her in hospital during her last illness. I am satisfied also, however, that the textatrix was correct when she stated that the major portion of the monies forming part of her estate were given to her by her father.

The father retired in 1976 and, partly because he was himself growing old and partly because he recognised that his daughter was not properly provided for, he gave her his family home and other property. I am satisfied however that the bulk of this property was given to her in her own right and that there was no question of her holding it in trust for her father. I am satisfied also that the textatrix felt under a moral obligation to her father because of his generosity to her.

The textatrix's assets were valued for probate purposes at £110,581.00.

Besides her son and her husband the textatrix left her surviving her father and her brother, the first named Defendant in these proceedings.

By her Will she appointed her brother and Mr. McEntee executors.

She provided that in the event of her father surviving her by at least one calendar month he was to receive everything of which she died possessed.

She then provided that in the event of her father predeceasing her or dying within one calendar month of her own death, that everything was to go to her brother and her son in equal shares.

In the event of her son benefiting under this bequest, but being under the age of twenty-one years at the time of her death, she appointed her Executors to be trustees on behalf of her son and to hold the monies to which he would be entitled in trust for him until he reached the age of twenty-one years.

She appointed her sister-in-law Mrs. Mary Egan to be guardian of her son and requested that she exercise all such powers as the textatrix herself could have exercised during her lifetime with regard to her son.

She then went on to make the following declaration -

"I further make it clear that my express desire is that in the event of my aforesaid husband Gerard not providing sufficient funds for the maintenance education and other expenses relative and incidental to the up-bringing of my said son Darra, then the said Mrs. Egan shall be entitled to apply to my trustees in the event that my father has predeceased me in accordance with the terms of this my Will for the necessary funds to ensure that Darra is properly brought up and

educated".

I think it is possible, on the basis of the Will and the evidence, to reconstruct the textatrix's state of mind so far as her close relatives were concerned - (1) She felt under a moral obligation to her father because of his generosity to her. (2) In the event of her father predeceasing her she thought it proper that one half of the property (most of which came from the father) should go to her brother and the other half to her son the infant Plaintiff. (3) She felt that her sister-in-law Mrs. Egan was the best person to be guardian of the infant Plaintiff. (4) She knew her husband was a man of substance and that he loved his son and would provide for him. At the same time she knew that her husband preferred to plough his money back into his businesses and suspected that if someone else were providing for her son that he might not do so.

I fully accept that a testator, in making a Will, may have moral duties to persons other than his child and that the testator's moral duty to his child must be considered in the context of his moral duty to other members of his family. See the decision of Mr. Justice Costello in L. .v. L. (1978 Irish Reports page 288).

In the circumstances of the present case the textatrix clearly had a

moral duty to her father as well as to her child. It appears to me also that in exercising her judgment as to what disposition she would make of her property she was entitled to take into consideration not only purely financial matters, but her judgment of the character and likely course of conduct of various members of her family. Matters other than money may be highly relevant to the happiness and welfare of a child. The infant Plaintiff in the present case has the financial support of his father, and is looked after by his aunt Mrs. Egan. He also has the support of the textatrix's brother who would look after him should the need arise. I am satisfied that the textatrix carefully considered all these matters and that her judgment of the various people named was correct. In relation to these matters it is difficult to say that there was any failure of moral duty on her part. Certainly there was no failure of affection or concern.

What the textatrix did not realise, when making her Will, was that she herself was shortly to die of cancer. She clearly contemplated that her father might outlive her but I doubt if she gave full consideration to what might happen to her son in that eventuality. The practical provisions dealing with the welfare of her son are all based on the assumption that

her father would predecease her or die immediately afterwards. In the events which have happened no financial provision whatsoever has been made for the child.

The hazards of this situation are illustrated by the evidence given by the grandfather in these proceedings. He was asked if he himself had made a Will and he said that he had leaving everything to his son (the second named Defendant). He had he said, only one son left. He had made no provision for his grandson.

It appears to me that this is the kind of situation which the textatrix failed to advert to or provide for. I accept that the father is a man of substance and that he is supporting and intends to continue to support, his son. I accept also that the Egans are looking after the infant Plaintiff very well and that they intend to continue to do so. I also accept that if anything were to go wrong, the first named Defendant would provide for his nephew the infant Plaintiff. Nevertheless, in the events which have happened, the textatrix has made no financial provision at all for her only child. One is therefore driven to the conclusion that she failed, not through lack of affection but through lack of prudent forethought, to make proper provision for her son in accordance with her duty under Section 117 of the

Act.

Under these circumstances the duty falls on this Court to make such provision for the infant Plaintiff out of the textatrix's estate as the Court considers just. In doing this the Court should, in the circumstances of this case, respect, if practicable the textatrix's wishes and judgment and the moral duty which she felt to her father.

Under these circumstances I think that the Will should stand in its present form but that one third of the estate should be assigned to trustees to hold and accumulate both capital and income for the benefit of the infant Plaintiff until he reaches the age of twenty-one. I think it would be proper to approach the trustees named by the textatrix in paragraph 4 of her Will and to request them, if willing, to act as trustees of the new trust. I think also that they should have all the powers which the textatrix granted under paragraph 4 of her Will, but they should act on the assumption that the person primarily charged with the support and maintenance of the infant Plaintiff is his father, and that their primary duty is simply to hold and accumulate the trust fund for the benefit of the infant Plaintiff. In the unlikely event of the father failing to support or maintain his son Mrs. Egan or the infant Plaintiff's guardian for the time being, would have a right to apply to the trustees for assistance in the

manner which the textatrix contemplated in the second paragraph of paragraph 4 of her Will.

I would be grateful for the assistance of the parties legal advisers in preparing an appropriate Deed of Trust in accordance with the principles contained in this Judgment.

15/7/84