CPD Focus – STEP Law Society Joint Seminar

"Wills, Trusts and the Voice of the Child"

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Introduction

In this lecture, I concentrate on the provisions of Sections 63, 98 and 117 of the Succession Act, 1965 (1965 Act). I also deal with some practical problems concerning the Guardianship of Infants Act, 1964 and some recent developments concerning Family Law that affects trusts. However, high net worth clients often have estates that straddle different jurisdictions and different laws and taxation need to be considered.

Part IX of the 1965 Act defines the right of individuals to a testator's estate such as a spouse or children. It is important to bear in mind that claims by third parties should not be overlooked e.g. a party maintains that a Will made by the deceased is inconsistent with a Contract between him and the deceased.

Practitioners should also be live to the possibilities of ADR based solutions such as mediation of their client's problems but in this regard great care should be taken in relation to minor beneficiaries and any settlement would need to be ruled by a Court.

Probate Litigation

Probate litigation is divided into non-contentious applications and contentious applications. Contentious applications can be brought in the High or Circuit Court but non-contentious probate applications can be brought only in the Circuit Court.

As probate matters are concerned with equity, there is no jurisdiction in the District Court to deal with probate or succession matters. In the Circuit Court there is unlimited jurisdiction to deal with personal estate but in relation to real estate the PLV valuation of €254 still applies.

Contentious Applications brought in the Circuit Court are by way of:-

i. Testamentary Civil Bill if the validity of a Will is in issue.

ii. Equity Civil Bill in all other cases.

In the High Court contentious applications are brought by way of:-

i. Special Summons in appropriate cases.

ii. Plenary Summons.

An action pursuant to S117 of the Succession Act is brought by way of Special Summons (Equity Civil Bill).

Where a Special Summons is issued it is given a return date by the Central Office before the Master of the High Court. If the Defendant resides outside the jurisdiction it will be necessary to seek leave to issue and serve the summons pursuant to the RSC Order 11 (unless there are solicitors who are prepared to accept service/proceedings).

Proceedings by way of Special Summons proceed by way of Affidavit of Evidence.

The matter remains with the Masters Court until all Affidavits have been filed and served. The Master's jurisdiction in respect of Special Summons is administrative only. Once the Affidavits have been filed and the Master is satisfied that the documentation is in order the proceedings will be sent forward to the Judge's List.

In order for a case to be transferred into the Judge's List the paperwork before the Master comprises:-

i. An original Special Summons duly endorsed as to service.
ii. Notice of Entry of Appearance or Affidavit of Service of the Summons and Grounding Affidavit.
iii. Certified copies of all Affidavits.

Proceedings in Camera

All proceedings under Part IX of the 1965 Act are to be heard in camera[1].

Discovery

All discovery applications in the High Court are heard before the Master of the High Court so even though the proceedings are usually before the High Court an Interlocutory Motion for Discovery will be heard before the Master. In this regard Order 31 Rule 12(1) of the Superior Courts provides for two conditions to be met by an applicant seeking an Order for Discovery.

Firstly, the documents sought must be **relevant** and **secondly** these documents must be **necessary**. Pleadings are vital in determining relevancy. From a practice point of view it is important that an applicant who seeks discovery must serve the respondent with a letter specifying "the precise categories of documents required and.... the reasons why each category of document is required". These changes which were brought about by Statutory Instrument Number 233 of 1999 in effect means that an applicant must consider 1) what documents are required and 2) why they are required.

Practitioners will be aware that the present Master of the High Court, Edmund Honohan SC has since 2001 written a large number of decisions regarding documents which he will consider to be discoverable and not discoverable.

Oral Evidence

Section 117 proceedings commence by way of Special Summons and Grounding Affidavit and can proceed to trial on the basis of affidavits alone. However, if you wish to cross-examine an applicant, a Notice to Cross Examine should be served and the matter can proceed by way of oral hearing.

[1] S119 Succession Act, 1965

Circuit Court

It is important that proceedings are brought in the circuit where the deceased had at the time of his death a fixed place of abode (S6(4) of the Succession Act 1965).

Practice Note

Because S117 actions must be brought within 6 months many practitioners lodge a caveat to prevent a Grant of Probate issuing and therefore to prevent the Statute of Limitation applying. Although often used it is strictly speaking an abuse of process. This was not the intention of caveats and it is important to bear in mind that a Probate Judge could award costs against a person lodging a caveat personally if it was not properly done.

S117 of the Succession Act

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.*

[S117 of the Act of 1965 is hereby amended by the insertion of the following subsection after subsection (1)]

a) *An application made under this section by virtue of Part V of the Status of Children Act 1987, shall be considered in accordance with subsection (2) irrespective of whether the testator executed his will before or after the commencement of the said Part V.*

b) *Nothing in paragraph (a) shall be construed as conferring a right to apply under this section in respect of a testator who dies before the commencement of the said Part V.*

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

3) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.

4) Rules of court shall provide for the conduct of proceedings under this section in 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 six months from the first taking out of representation of the deceased's estate.

Time Limit

i. A S117 action must be commenced within **6 months** of the first raising of representation to the Estate of the deceased. There is no extension of any time limits under S117 in the case of a disability. (S117 (6) of the 1965 Act as amended by the Family Law Divorce Act 1996). The time limit goes to the jurisdiction of the court and there is no provision for its extension.

ii. Dicta of Kenny J in **FM v TAM**[2]. There is no duty to inform a beneficiary of the provisions of S117. This obviously is a gap which may have constitutional repercussions under Article 40(3) of the Constitution. In respect of vulnerable

[2] (1970) 106 ILTR

children, a child with a disability is therefore dependent on a pro-active body or person who independently will protect the child.

Testator

S117 applies only where a person dies wholly or partly testate and does not apply to cases of intestacy. This is particularly unfortunate in the case of a child, say a minor child suffering from a physical or mental disability. However, the section does apply if the will is wholly inoperative at the date of death (RG v PSG)[3]).

Applications can only be made by and on behalf of a child of a testator and since 14 June 1998 non marital children are also potential claimants[4]. A child does not include a grand-child.

Moral Duty

In FM v TAM[5] Kenny J stated "*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 on*

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.

e) whether the testator has already in his lifetime made proper provision for the child".

These considerations are consistently followed by the courts.

[3] 20 November 1981 High Court
[4] See S31 Status of Children Act 1987
[5] 1970 – 106 ILTR 82

Objective Test

The test is an objective one (though the court may take into account the opinion of the testator). The court must be of the opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means. Therefore, each case will depend on its own circumstances. The court will not interfere with the legal right share of a surviving spouse nor with any devise or bequest or share on intestacy of a parent of the child.

Surviving Spouse

Where the surviving spouse is a parent of the child and the entire estate is left to the surviving spouse, the court will not interfere[6]. On the other hand non-marital children can claim as opposed to marital children who can't claim. This is an anomaly that may need to be addressed.

Proper Provision

This needs to be looked at in all the circumstances of the case. "Proper Provision" is a criterion that is used in family law, separation and divorce cases. Different children have different needs and this particularly applies to children with a disability.

Looking at all the needs of the children is a difficult area for solicitors drafting wills and that is why attendances are important. If a testator is treating a child differently to others it is important to record the reasons why this is being done. Questions concerning children's health, ages and disabilities are important.

It is important to state that the moral duty of a testator to make proper provision for his children is not absolute. A duty must be proved[7]. The duty may be discharged by inter-vivos gifts or settlements made during the lifetime of the testator in favour of the child or by providing the child with a high standard of education or in some other way.

[6] S117(3)
[7] Re IAC (1990) 2IR 143

The subjective opinion of the testator may be taken into account but it is not conclusive. As stated it is an objective test.

In **EB v SS**[8] the testatrix made substantial provision for all her children after the death of her husband. In her will, the bulk of her estate which was substantial was left to charity. One of her children squandered his inheritance due to problems with addiction. He was in poor financial circumstances when he brought the S117 proceedings. The testatrix had taken the view that she had made proper provision for the children. The decision of the majority of the Supreme Court agreed and stated "*thus the clearly expressed wish of the testatrix in this case to treat all her children equally, although not a decisive factor, is not entirely irrelevant"*. He also stated "*the court, in applications of this nature, cannot disregard the fact that parents must be presumed to know their children better than anyone else"*. There is a strong dissenting judgement from Barron J.

In **Re ABC deceased**[9] the testator created discretionary trusts by his will of which the Plaintiffs and Defendants were beneficiaries. The three children who instituted S117 proceedings were all from the deceased's first marriage. The daughters were in general terms in reasonable healthy financial situations and the court appeared to have little difficulty finding that the testator had discharged his moral duty towards both of his daughters. In that regard the claim under S117 didn't succeed. However, in regards to the son, who had an unfortunate history of various failures and business enterprises and was living in rented accommodation and in receipt of assistance from Saint Vincent De Paul, the court stated that the duty to the son was "*in my view also discharged by the creation of a discretionary trust by the Deceased's will not least because it was set in place, coincidentally or otherwise, the various apparatus and structure which was appropriate to meet the special needs which the Deceased was clearly aware"* the son had.

On the matter of discretionary trusts in more general terms the Judge commented "*while the facts of the present case have permitted the court to reach a view that the*

[8] Eb v SS (1998) 4IR 527
[9] Re ABC deceased, XC and Ors v RT and Ors Kearns J (2003) 2IR2 50

setting up of a discretionary trust in this instance did, for the various reasons stated, complete the discharge of the testators moral duty, the facts of all the cases may also yield up different conclusions".

From a cost point of view, it is interesting to note that the defendants were entitled to their full costs out of the estate but the Plaintiff's were only entitled to recover 75% of their costs.

In **W v W**, the court concluded that it was entitled to have regard to the amount the applicant would inherit from her mother's estate in considering whether or not there had been a failure in the moral duty of the deceased father towards the applicant.

In **KC v CF**[10] the deceased, a widow had 11 children so she devised all her property between two sons. One had pre-deceased his mother, a bachelor intestate and accordingly the remaining son became solely entitled to her estate. The net value of her estate was IR£750,000. Two daughters made a claim under S117. One daughter was unmarried and had received no education after the age of 12. She lived with her mother and looked after her. She hadn't any employment and was in receipt of social welfare. She was put out of the house by the surviving son. During her lifetime she did received £10,000 along with the other unmarried children.

The other Plaintiff received schooling up to the age of 15 but was unemployed since and was residing in a corporation dwelling house and was in arrears of rent. Her husband was unemployed and they were living on social welfare benefits.

The Defendant son who was married with four children was a casual trader. He stated that he had given an undertaking to his mother to divide the residue of the money between the 11 children and after taking the house he proposed to do that. Both of the Plaintiff's stated they weren't aware of this agreement.

The court held that no trust had existed and that the deceased did not make any proper provision for the Plaintiff's. The court was satisfied that both Plaintiffs were in want

[10] KC v CF and MC High Court 16 December 2003 – Carroll J

and without means. The court awarded the first named Plaintiff €200,000 and the second named Plaintiff €100,000 out of the estate. The reason for the difference was that the first named Plaintiff would be allowed to provide herself with reasonable accommodation.

Some practical aspects to consider S117 proceedings.

1. S117 application that varies a testamentary disposition under Will can carry taxation consequences particularly in relation to inheritance tax and stamp duty. From a Revenue point of view taxation consequences will flow if settlement is in the form of some family arrangement. Therefore a settlement should be ruled by the court and reduced to writing and accepted on the basis that proceedings were struck out.

2. As executors are obliged to preserve and protect estates, if an executor wishes to issue S117 proceedings they should renounce their rights. If an executor is intermeddling the consent of the court (non-contentious probate list) is required.

3. If an executor resides outside the jurisdiction he must obtain leave of the court to issue and serve the proceedings (RSC Order 11) unless of course the executors have solicitors who have agreed to accept service of proceedings and there is no necessity to utilise the provision RSC Order 11.

4. If there is no executor, an application may be necessary under S27 (4) of the Succession Act to appoint an administrator.

Costs

S117 (5) states "costs in the proceedings should be at the discretion of the court". This is in contrast to Order 99 RSC which provides in applications that costs "follow the event unless the court for special cause otherwise directs.

The historic view in relation to S117 applications are that costs of the applicant will be allowed even if unsuccessful provided the case is stateable (as opposed to frivolous or vexatious). This gives a degree of comfort initiating proceedings.

However, in recent times High Court Judges have been concerned with hearings which have been unduly lengthened by the fact the parties had raised issues upon which it was not successful. This particularly applies in the commercial law list[11] and indeed the new rules (S12 of 2008) of the Superior Courts which give recognition to Calderbank letters giving the Courts powers to make cost orders at different stages of the course and this may yet be applied in the case of probate litigation.

Alternative actions to S117

Albert Keating in an article "The Moral Duty and New Model Constructive Trusts"[12] suggests that there is a trend nowadays of having an alternative to S117 actions by enforcing "new model" constructive trusts. This arises whenever justice and good conscience is required to do so. This would apply where for example where a child is induced by a testator to believe that by e.g. working a farm you will ultimately become the owner of it thereby causing him to shape his upbringing, training and life accordingly and the testator or his estate may be compelled by equity to hold the farm in trust for the child. This type of constructive trust was initiated by **Hussey v Palmer**[13]. This moral duty which is not a legal duty is similar to what a testator owes to his children. It is a circumstance in which the court can take into account in assessing the quantum of what is proper provision for children under a S117 action but it also has the advantage that if you miss the time for a S117 action you could still take this type of court action. In practice because of the age and capacity of testators, you will often find that wills are challenged based on capacity and undue influence. Care should be taken in relation to framing these court proceedings that you don't end up with too many horses that cancel each other out.

[11] Veolia Water UK Plc v Fingal County Council (2007) IR
[12] Conveyancying and Property Law Journal Vol 12 No 3
[13] (1972) 3 ALL ER 744 Lord Denning

In relation to constructive trusts which operate by law and come into effect irrespective of the intentions of the parties (as opposed to resulting parties) they are frequently cited for non-marital co-habiting couples disputes. While Ennis v Butterley[14] states that co-habitation is not itself 'consideration', the courts particularly in the Circuit Court tend to use constructive trusts to come to an equitable solution to non-marital property disputes. In PV v MD[15] the proceeds of a property were purchased by the Plaintiff. There was no substantial contribution by the Defendant. The house was registered in joint names and it was the intention of the un-married couple to live and share their lives. The mortgage was paid by the Defendant. According to Lynch J "I must look at the equitable way of seeing what justice has done. There is no way that they can live together or benefit together from the house. It seems to me that the Defendant is entitled to compensation for the fact that she is a joint tenant. She did become a joint owner and they shared their lives together and she made a contribution that way. That was the intention then. She was entitled to have equity in the house". Lynch J determined that the net equity value of the property amounted to IR£40,000 and taking all this into consideration the Defendant was awarded IR£15,000 i.e. 37.5%.

S63 of the Succession Act

1) Any advancement made to the child of a deceased person during his lifetime shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so made in or towards satisfaction of the share of such child in the estate of the deceased or the share which such child would have taken if living at the death of the deceased, and as between the children shall be brought into account in distributing the estate.

2) The advancement shall, for the purposes of this section only, be reckoned as part of the estate of the deceased and its value shall be reckoned as at the date of the advancement.

[14] (1997) 1 ILRM 28 Kelly J
[15] (1994) Lynch J unreported

3) If the advancement is equal to or greater than the share which the child is entitled to receive under the will or on intestacy, the child or the issue of the child shall be excluded from any such share in the estate.

4) If the advancement is less than such share, the child or the issue of the child shall be entitled to receive in satisfaction of such share so much only of the estate as, when added to the advancement, is sufficient, as nearly as can be estimated, to make up the full amount of that share.

5) The onus of proving that a child has been made an advancement shall be upon the person so asserting, unless the advancement has been expressed in writing by the deceased.

6) For the purposes of this section, "advancement" means a gift intended to make permanent provision for a child and includes advancement by way of portion or settlement, including any life or lesser interest and including property covenanted to be paid or settled. It also includes an advance or portion for the purpose of establishing a child in a profession, vocation, trade or business, a marriage portion and payments made for the education of a child to a standard higher than that provided by the deceased for any other or others of his children.

7) For the purposes of this section, personal representatives may employ a duly qualified valuer.

8) Nothing in this section shall prevent a child retaining the advancement and abandoning his right to a share under the will or on intestacy.

9) Nothing in this section shall affect any rule of law as to the satisfaction of portion debts by legacies.

10) In this section "child" includes a person to whom the deceased was in loco parentis.

Doctrine of Hotchpot

This doctrine means that children must bring into hotchpot i.e. into account at the distribution any money or property which they have received from the deceased in his lifetime by way of advancement, or upon marriage, if they are entitled to a share in the distribution of the estate.

Advancement

Advancement means a gift intended to make permanent provision for the child and includes payment for the purpose of establishing a child in his profession, vocation, trade or business[16]. Payments for maintenance or temporary assistance would not normally be considered advancements nor would payments of small sums or payment out of income.

Only applies between children

The doctrine applies only as between children. The child includes a person to whom the child was in loco parentis. The onus of proving that an advancement was made to a child lies upon the person making the assertion "unless the advancement has been expressed in writing by the deceased".

Operation of Hotchpot in practice

An advancement brought into account is not required to be repaid to the estate. If it amounts to more than a child's share under the will or intestacy, the child is excluded from the distribution. Where it amounts to less than the child's share, he is entitled to participate in the distribution to the extent necessary to satisfy his share. The value of the advancement should be taken at the date of the advancement.

[16] Taylor v Taylor (1875) LR 20 EQ 155

Contrary Intention

The statutory rule applies "subject to any contrary intention expressed or appearing form the circumstances of the case". If a testator does not wish to require Hotchpot to apply than an appropriate clause should be asserted in the Will.

"I declare that no advancement within the meaning of S63 of the Succession Act should be brought into account in the distribution of my estate".

It is also important to note that the rule is against double portions and the contrary intention may be adduced either from the terms or kind of the advancement and a gift by will or from evidence of the deceased's actual intention.

S98 of the Succession Act

Where a person, being a child or other issue of the testator to whom any property is given (whether by a devise or bequest or by the exercise by will of any power of appointment, and whether as a gift to that person as an individual or as a member of a class) for any estate or interest not determinable at or before the death of that person, dies in the lifetime of the testator leaving issue, and any such issue of that person is living at the time of gifts the death of the testator, the gift shall not lapse, but shall take effect as if the death of that person had happened immediately after the death of the testator, unless a contrary intention appears from the will.

S98 is an exception to the doctrine of lapse. There is a fictional notion of survival.

Do not confuse with per stirpes rule

Under the per stirpes rule, where an intestate dies leaving children or siblings, the issue of a pre-deceased child or sibling will take a parent's share.

S98 however only applies to gifts made by the testator to his issue. If the issue of the testator pre-deceases leaving children (issue), and any such issue of that person were

living at the date of the testator, the benefit does not lapse but will go through the deceased beneficiaries estate.

The important thing to note here is that the testator's pre-deceased issue must have children. **Then the benefit doesn't lapse but it goes to the issue's estate**.

When this section is explained to testator's they are usually happy that the benefit will be preserved but are not happy that a spouse or an estranged spouse could inherit their pre-deceased child's share. Instead they would prefer a clause in the will which states "if any child of mine dies before me leaving a child or children then such child or children shall take equally the share which the parent would otherwise have taken".

Guardianship of Infants

Welfare of the Child

S3 of the Guardianship of Infants Act 1964 clearly states the dominant consideration in proceedings pertaining to its operation:-

"Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and ***paramount consideration****." (emphasis added)*

For the purposes of this Act a child/infant is defined as a person under the age of 18. The term 'welfare' is given a broad definition in S2 of the Act and comprises the religious, moral, intellectual, physical and social welfare of the child. The Irish courts, however, have adopted an expansive interpretation of this phrase so as to include other factors, as is evident from the Supreme Court judgement of Henchy J. in **MacD v MacD**[17], quoting with approval the dicta of MacDermott L.J. of the House of Lords in **J v C**:

[17] (1979) 114 ILTR 60

"[welfare connotes] a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests if the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."[18] (G v An Bord Uchtala)

The welfare of the child is not the only relevant consideration. This is evident from the judgement in Walsh J n **G v An Bord Uchtala**. However, the welfare of the child is the paramount consideration which means it is superior or the most important consideration.

What constitutes the welfare of a child?

In **OS v OS** Walsh J stated that "all the ingredients which the Act stipulates... are to be considered globally....It is the totality of the picture which might be considered....The word "welfare must be taken in its widest sense". [19]

It includes the religious welfare, moral welfare, intellectual welfare, physical welfare, social welfare and emotional welfare. The latter, emotional welfare was not given express recognition in the 1964 Act but it has been recognised by the courts[20].

Wishes of the child

S25 of the 1964 Act provides that:-
"In any proceedings to which S3 applies the court shall, as it thinks appropriate and practical have regard to the age and understanding of the child, take into account the child's wishes in the matter".

S3 is arguably now being given constitutional protection.

[18] (1970) AC 668, at 710-711
[19] (1974) 110 ILTR 57
[20] DFOS v CA (High Court) McGuinness J unreported 20 April 1999

In **F.N. –V- E.B. the C.O., H.O, and EK** Finlay Geogheghan J stated "it is well established that an individual in respect of whom a decision of importance has been taken, such as those taken by the courts to which S3 of the Act of 1964 applies, has a personal right within the meaning of Art 40.3. of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of Constitutional justice appeared to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes to have such wishes taken into account by a court in taking a decision to which s3 of the Act of 1964 applies. Hence, s25 should be construed as enacted for the purposes of inter alia giving effect to the procedural right guaranteed by Art 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964 in relation to the guardianship, custody, or upbringing of the child".

Guardianship relates to the duty of a person and to the welfare, care and upbringing of a child.

The following are the different types of guardians:-

Marital children

S6 (1) of the 1964 Act states:-

"*The father and mother of an infant should be guardians of the infant jointly*". Even in a grant of a decree of divorce the guardianship rights are not affected[21].

Non-marital children

The natural mother is automatically deemed to be guardian. The natural father can become a guardian by a number of means.

[21] S10 (2) Family Law (Divorce) Act 1996

1) Applies to the court under S6(A) of the 1964 Act to be appointed a guardian. In determining such an application the paramount consideration is the welfare of the child.

2) Subsequently marry the natural mother.

3) Reach an agreement with the natural mother to be appointed a guardian. The agreement must be given an effect through the making of a statutory declaration pursuant to S2(4) of the 1964 Act. The condition precedent in making such a declaration is that the natural father be named as such on the birth certificate.

4) Following the death of the natural mother or the guardian the natural father may be appointed a guardian[22]. However, while any person can apply to be a testamentary guardian a surviving parent may object to such appointment.

Section 8 of the 1964 Act permits any person to apply to the court to be appointed the guardian of a child. The intention here was to ensure that a child is not left without a guardian. Again, S3 of the 1964 Act i.e. the welfare of the child is the paramount consideration. This view is endorsed by Finlay Geogheghan in **FN v EB the C.O., H.O., and E.K**[23].

It is important to note that a guardian is responsible for the general upbringing of a child and is to be distinguished between rights of "custody" and "access".

In the case of unmarried fathers the Supreme Court has stated on a number of occasions that the father is not a member of a constitutional family[24]. This in effect means that a natural father cannot automatically partake in the decision making process relating to the upbringing of his child. In the case of **JKB v VB** the natural father sought to prevent the natural mother from giving their child up for adoption. The applicant father lost the case but continued to Strasbourg where it was heard before the European Court of Human Rights, which determined that the father's

[22] S7 1964 Act
[23] (2004) 4IR 311
[24] State (Nicolaou) v An Bord Uachtala (1966) IR 567 and in W'OR v EH

article 8 right to respect for private and family life had been breached[25]. This decision resulted in legislative change. The introduction of the Adoption Act 1998 now provides by means of S4 that the natural father has the right to be consulted in the adoption process.

Practice Note

Solicitors have a statutory duty to advise clients before making any application in relation to a child of the benefits of mediation and the benefits of reaching an agreement under s20 of the Guardianship of Infants Act, 1964[26].

Family Law and Trusts

Family Law Act 1995 (the 1995 Act) and the Family Law (Divorce) Act 1996 (the 1996 Act).

These Acts are applicable only in the context of marital breakdown. Apart from the Orders under the Family Home Protection Act[27], the courts have extensive powers to make property adjustment orders[28]. These applications can be made at any time of the decree for judicial separation or divorce "or at any time thereafter". Property is considered in very broad terms and includes assets of any nature. In particular they deal with transfers between spouses, any settlements, variation of the benefits for spouses whether in a pre or post nuptial settlement including a settlement made by will or codicil and the extinguishment or reduction of the interest of either of the spouses under any such settlement[29].

In addition under s18 of the 1995 Act (s22 of the 1996 Act) among the variation orders that a court can make following ancillary relief orders are Property Adjustment Orders.

[25] Keegan V Ireland
[26] As introduced by S.11 of the Children's Act, 1997
[27] See sections 5 and 9 Family Home Protection Act 1996, s6C 1995 Act & s11C 1996 Act
[28] S9 1995 Act, S16 1996 Act
[29] S9 1995 Act, S14 1996 Act

Reviewable Dispositions

A transaction made with the intention of limiting the financial or property relief of a spouse can be varied under the Family Law Acts[30]. Variations can include Freezing Orders and Injunctive Orders. The matter is particularly important in relation to transactions that occur within 3 years from the date of the disposition[31].

Proper Provision

The key concept under the Family Law Acts for ancillary relief is that of "proper provision" and the 12 criteria set out in s16 of the 1995 Act and s20 of the 1996 Act. These criteria are as follows:-

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,

(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise),

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be,

(d) the age of each of the spouses and the length of time during which the spouses lived together,

(e) any physical or mental disability of either of the spouses,

(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,

(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the

[30] S35 1995 Act, s37 1996 Act

[31] Miscellaneous Provisions Act 2008

opportunity of remunerative activity in order to look after the home or care for the family,

(h) any income or benefits to which either of the spouses is entitled by or under statute,

(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all circumstances of the case be unjust to disregard it,

(j) the accommodation needs of either of the spouses,

(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring,

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

This concept of proper provision means such provisions the Court considers proper having regard to the circumstances either exist or will be made for the spouses and any dependent members of the family. "Proper provision" is in essence a condition precedent to a divorce and although is not referred to in legislation relating to ancillary relief following judicial separation, it has emerged in practice by the Courts. As Denham J noted in the case of T –V- T[32] proper provision is not "division" of property. It is in contrast to the English notion of "equality". In each case the financial circumstances of the spouse, the financial needs and obligations, the standard of living and contributions each has made to the financial and general well being of the family will be taken into account.

Family Law Cases Concerning Trusts

JD –V-DD[33] dealt with s16 (proper provision) of the Family Law Act 1995 and s35 of the Family Law Act 1995 (reviewable dispositions).

The applicant (wife) and respondents (husband) were married in 1966 and separated in 1996. There was a family home and various trusts. During the course of the proceedings both parties swore an Affidavit of Means. However, the Affidavit of the respondent was incomplete on several matters. It failed to disclose that subsequent to

[32] 2002 3IR 335
[33] 1997 3IR

the issuing of proceedings he had transferred several monies to the Isle of Man for the purposes of establishing a trust. McGuinness J held that the court couldn't put pressure on trustees in the exercise of their discretion. It could only make Orders which dealt with property to which the beneficiary was entitled to possession. However, she felt the existence of the Trust and the potential to benefit therefrom was not to be ignored in assessing periodical or lump sum maintenance. She also held that a Trust set up in the Isle of Man was clearly a reviewable disposition under s35 of the Family Law Act 1995. It was an effort by the respondent to reduce the monies available for distribution to the applicant and an Order was made setting aside the disposition to the Trust.

In the case **S v F (1995)** McGuinness J used the power of the court to vary post nuptial settlements to order that income deriving from investing the trust money should be paid to the wife as maintenance for the children of the parties. This was in circumstances where the husband was unemployed and no formal order for maintenance could be made due to lack of means.

C.F. V J.D.F. (2005)[34]

The parties were married in 1989 and had two dependent children at the time of the application for judicial separation. The husband was a senior banker and the wife operated a beauticians business. The husband came from a farming background in Co. Wicklow and the wife had an interest in horses. They settled in Co. Wicklow and sold the family home in Donnybrook. The husbands banking business was terminated with a settlement and the wife's beautician's business ran into problems. They then ran a stud farm which was profitable. Attached to the family home was 22 acres of land which was part of a farm owned by the husbands father Mr. JF senior. Although the husband used the 22 acres for the purposes of his stud farm, the land remained in the ownership of his father. The husband from time to time assisted his father on the farm and it appeared that the father although elderly at times assisted the son. In 2001 the wife's solicitors wrote to the solicitors for the husband stating that the father held the lands jointly and /or on trust for the husband and in addition the husband was likely to

[34] 1ESC 45 Judgement of the Supreme Court 12 July 2005

be the beneficiary of lands held in his father's name. Mr JF senior was called as a witness by the wife. At the trial stage a great deal of evidence turned on the financial resources of the husband, both in this jurisdiction and the Isle of Man and the ownership of the lands. The fathers Will was produced in the course of the High Court hearing and Mr JF senior gave evidence that he had no intention of transferring the land in question to his son during his lifetime.... and even after his death he was unwilling to bequeath to his son more than a life interest. In this case the judge stated "it would perhaps, have been open to the learned trial judge... to give some weight to the future prospects of the husband in calculating the lump sum to be paid by him to the wife but it was not, in my view, open to him to include the total value of the 22 acres owned by Mr JF senior as an integral part of the value of the family home and subsequently to divide the value equally between the spouses".

C v C[35]

The parties were married in 1987 and there were 4 dependent children at the time of the application. Much of the case dealt with the valuations of the properties which was in excess of €24million. After the death of the applicant's father in March 2003, the husband and wife took up residence in the manor house. O' Higgins J concentrated largely on the income of the parties which he valued at €725,000 net of tax or any other deductions. He awarded a sum of €3million plus stamp duty and legal costs for the wife to acquire a dwelling house. He also awarded the wife a sum of €240,000 net per annum for maintenance and €20,000 for each of the dependent children. From a trust point of view what is significant is that the judge was prepared to take into account the source of the assets. He concentrated more on the income than the division of the assets "the applicant has a strong claim to the house. Firstly he is the sole owner. Secondly he has had family connections with it for a very long term. Thirdly the respondent did not contribute either directly or indirectly to the acquisition of the house as it was inherited." He further goes on to state "in the present case the assets of the parties were inherited and brought to the marriage by the applicant. The concept of one third is not in my view useful in the present case. In the present case the decision which has been reached on the basis that proper provision

[35] High Court O'Higgins J, 25 July 2005

by the respondent requires the purchase of a suitable home and a suitable and proper level of maintenance, having regard to what is proper provision for the applicant aswell. Mr Justice DeValera[36] in the case of CED v AD also referred to the importance of the source of assets.

TM v TM[37].

This is the leading case concerning trusts in Ireland. The parties were married for 35 years. There were 2 children in the marriage but neither dependent at the time of the application. The bulk of the assets were comprised in a discretionary trust known as the Repus Trust which had been established by the husband in the US following the marriage.

The question arose as to whether the lands comprised in the Trust should be considered by the court. The trust had been established by the husband in the years following the marriage. Apart from a period home the trust also comprises 750 acres which had been in the husband's family for generations.
McKechnie J noted that s9(1) of the 1995 Act gives the Court powers to vary the benefit of either the spouses or any dependent members of the family of any ante nuptial or post nuptial settlement. He held that the trust in question fell within the definition of a post nuptial settlement which would be capable of variation and directed that the trustees should be joined as notice parties to the proceedings.

Very crucially McKechnie J stated that the term "settlement" in family law proceedings has a broader meaning than under strict trust or taxation laws. This sentence is absolutely crucial. From a trust lawyer's point of view, the strict interpretation of trust law in Ireland is that there is no variation of trusts. There is new legislation promised which will probably deal with the variation of trusts but at present even the High Court has only very limited powers in normal circumstances to vary a trust. Here however McKechnie J stated that this notion of non-variation of trusts doesn't apply in family law cases "the instrument of trust was entered into after contracting and during the occurrence of a valid marriage between the husband and

[36] 13 December 2005
[37] High Court McKechnie J 2 June 2004 & Abbott J 14 March 2006

wife. The fact that the wife is not named or so referred to, but instead can only possibly have a contingent interest within the large class of beneficiaries does not interfere with this conclusion. Before any person could become a widow of the Respondent she would have to be his wife firstly".

After the preliminary hearing the substantive case came before Mr. Justice Abbott[38]. In addition to the value of the property of €11.2million the husband and wife had independent assets which were valued at €14.49million. The High Court considered contributions by both parties to the family assets but it placed emphasis on the fact that the house and lands were inherited property and the ancestral family home of the Respondent husband. The husband was very anxious to retain these ancestral house and lands. The court agreed that the main house and lands including the domain lands would be allocated to the husband and that a further house on the Estate known as "Monkstown House" together with surrounding lands would be allocated to the wife. However, the decision of this case did divide the assets roughly two thirds one third and the judge was careful to point out that if the husband couldn't accept this an Order would be made that the entire property would be sold and divided between the spouses. This case is on appeal to the Supreme Court.

English Cases

In the recent English case of **Miller v Miller** the court decided the entitlement to each party to a share in the matrimonial property is the same however long or short the marriage but with non matrimonial property i.e. property brought into the marriage or acquired by inheritance or gift, the duration of the marriage is highly relevant. In this case, the parties were married for less than 3 years and no children and the wife was awarded STG£5 million.

In the case of **Charman v Charman**[39] both parties entered the marriage with no assets. 27 years later the husband had generated wealth in the region of STG£1,031 million. The husband sought to exclude a trust of £68 million which had been created for the benefit of future generations but the court did not agree. The court held that even if the wife had consented to the creation of the trust it would be unfair for her to

[38] 14 March 2006

[39] High Court Coleridge J 27 July 2006 and Court of Appeal 24 May 2007

be excluded from the assets in the light of the size of the trust and not withstanding that he commended on his extraordinary talent and energy of the husband in amassing such enormous wealth. He awarded 37% of the assets to the wife which included the trust fund

Definition of Settlor / Trustee / Beneficiary in Trusts in "property" for the purpose of Family Law Acts:

1) **Settlor**

If a settlor's sole interest is to create a trust with a nominal sum and does no more than that, in my view then he doesn't have a right to property and doesn't have a financial interest. However, if a settlor can appoint or remove trustees then he has an interest in the affairs of the trust. If a settlor is also a beneficiary then he has an interest in the property.

2) **Trustee**

A party who is a trustee without any other rights has only a legal right in the trust assets and has no beneficial interest in the property. However, if the trustee has power to distribute in his or her own favour under the trust deed, this would amount to an interest. Particular care should be taken where a company is a trustee and where a party would have shares in that company.

3) **Beneficiary**

Where a beneficiary has a present interest or a contingent interest or a future interest then this is likely to be 'property' that would come within the remit of the Family Law Acts. If however the beneficiary has no more than a mere expectation this doesn't constitute property. However, in the case of **CF v JDF**, as McGuinness J stated "it would perhaps, be open to the learned trial judge..... to give some weight to the future prospects of the husband" in calculating the lump sum to be paid by him to the wife but it was not, in my view open to him to include the total value of the 22 acres owned by Mr. F senior as an integral part of the value of the family home and subsequently divide that value equally between the spouses.

Family Trusts created for Tax Purposes

In **TM v TM**, McKechnie J stated that the term "settlement in family proceedings has a broader meaning than under strict taxation laws". If notwithstanding the legal setup of the trust, the purpose of the trust allows in some way the party to have control over the trust property, it will be held for family law purposes for settlement to come within the remit of family law proceedings.