**03TACD2021**

**BETWEEN/**

**[APPELLANT]**

**Appellant**

**-and-**

**THE REVENUE COMMISSIONERS**

**Respondent**

## DETERMINATION

### Appeal

[**1**] This is an appeal against a refusal of a claim that a dwelling house was the sole residence of a dependent relative for relief under section 604(11) of the Taxes Consolidation Act, 1997 on the disposal of a principal private residence. A Notice of Assessment to Capital Gains Tax for the year 2015 dated 18 September 2017 shows a chargeable gain of €228,326 and tax payable of €74,928.

### Background

[**2**] The Appellant disposed of a dwelling house situate at [*redacted*] (hereinafter the '[*redacted*] property') in May 2015. The Appellant acquired the [*redacted*] property in February 1990. The Appellant occupied the [*redacted*] property as his only or main residence from February 1990 to September 2000. The Notice of Assessment to Capital Gains Tax dated 18 September 2017 computed principal private residence relief under section 604 of the Taxes Consolidation Act, 1997 on a period of ownership of 303 months

and a period of occupation of 140 months (inclusive of the last twelve months of the period of ownership). The computation of the capital gains tax is:

| | € | € |
|---|---|---|
| Disposal Proceeds (67.5%) | 641,661 | |
| Incidental Costs | (10,895) | 630,766 |
| Acquisition Cost | 152,981 | |
| Incidental Costs | 53,351 | (206,332) |
| Gain | | 424,434 |
| Principal Private Residence Relief (€424,434 x 140/303) | | (196,108) |
| Chargeable Gain | | 228,326 |
| Annual Exemption | | (1,270) |
| Net amount chargeable to tax | | 227,056 |
| Capital Gains Tax | | @ 33% |
| Tax Payable | | 74,928 |

**Legislation**

[**3**] Section 604 (11) of the Taxes Consolidation Act, 1997 provides:

"*(11) (a) In this subsection "dependent relative", in relation to an individual, means a relative of the individual, or of the wife or husband of the individual, who is incapacitated by old age or infirmity from maintaining himself or herself, or a person, whether or not he or she is so incapacitated, and –*

*(i) who is the widowed father or widowed mother of the individual or of the wife or husband of the individual, or*

*(ii) who is the father or mother of the individual or of the wife or husband of the individual and is a surviving civil partner who has not subsequently married or entered into another civil partnership.*

*(b) Where as respects a gain accruing to an individual on the disposal of, or of an interest in, a dwelling house or part of a dwelling house which is, or has at any time in his or her period of ownership been, the sole residence of a dependent relative of the individual, provided rent-free and without any other consideration, the individual so claims, such relief shall be given in respect of it and of its garden or grounds as would be given under this section if the dwelling house (or part of the dwelling house) had been the individual's only or main residence in the period of residence by the dependent relative, and shall be so given in addition to any relief available under this section apart from this subsection; but no more than one dwelling house (or part of a dwelling house) may qualify for relief as being the residence of a dependent relative of the claimant at any one time.*

*(c) Relief under paragraph (b) shall also be given where all other conditions of this section have been met but the residence concerned has been the sole residence of a dependent relative of the civil partner of the individual.*"

**Submissions on behalf of the Appellant**

[**4**] The Appellant submits that the dwelling house was the sole residence of a dependent relative for the period from September 2000 to May 2015 and consequently, relief should be granted under section 604(11) in respect of that period. The Appellant submits the dependent relative is his son, [*redacted*].

[**5**] The Appellant resided at the [*redacted*] property with his former partner and their two children, [*redacted*] and [*redacted*], from February 1990 to September 2000. [*redacted*] was born on [*redacted*] 1991. [*redacted*] is the younger of the two children. The Appellant vacated the [*redacted*] property in September 2000 following a breakdown of

the relationship with his former partner. The breakdown of the relationship was acrimonious. At the hearing, the Appellant gave evidence that while his two children would have travelled to Ireland to visit the Appellant in the years subsequent to him vacating the [*redacted*] property, his relationship with his two children became more distant over time. The Appellant gave evidence that the last contact he had with [*redacted*] was February 2007.

[**6**] In response to a question from the Appeal Commissioner regarding the level of engagement or interaction between the Appellant and [*redacted*] since September 2000, the Appellant gave the following evidence – "*From September 2000 onwards he was a frequent visitor to Ireland and I visited the UK but was not allowed in the property. So I would turn up outside the front door, knock on the door and ask to see him and his sister. As the years went by the hostility grew with his mother and he adopted a firm position alongside her. So I would drive or fly over and having made the journey I may come away meeting nobody. So by the time he got to 15 in 2007, that was the last time I saw him. We didn't have any harsh words with each other but from that point onwards there was no contact at all except he joined his mother in the legal action in 2010*."

[**7**] The Appellant gave evidence that he instructed a firm of solicitors in or around November 2010 to correspond with his former partner regarding the [*redacted*] property as the Appellant presumed [*redacted*] had finished his secondary education at that time as he was over the age of 18 years. In response to that correspondence, the Appellant received the following documents in December 2010 from a firm of solicitors instructed by his former partner:

(i) A letter from [*redacted*] NHS ([*redacted*] Child and Adolescent Mental Health Services) describing an assessment by [*redacted*], a Clinical Psychologist, on 1 March 2001 and an assessment by [*redacted*], an Associate Specialist in Child and Adolescent Psychiatry, on 15 March 2001.

(ii) A letter from Dr [*redacted*], [*redacted*] dated 9 March 2010.

(iii) A letter from [*redacted*] dated 30 September 2010.

(iv) A letter from [*redacted*], [*redacted*] NHS (Children and Young People's Development Service) dated 26 November 2010.

[**8**] In response to a question from the Appeal Commissioner regarding the context of the instructions in November 2010, the Appellant gave the following evidence – "*I took advice in the summer because I was getting no information from the family home. My solicitor wrote a letter that would capture the attention of his mother and said please make contact about the future of the house. She responded with a forthright manner and provided a lot of paperwork, of which these reports are part of the paperwork. They gave me an insight into their lives and determined in my mind that the best action would be, and I had a duty of providing for his education right through the third level*." In response to a further question from the Appeal Commissioner on whether the Appellant sought to procure his own information on the medical position of [*redacted*] in light of the documents provided by his former partner, the Appellant gave the following evidence – "*No, no, I accepted – he would not deal with me as a person. He wasn't communicating with me. In fact I couldn't gather further information, I wouldn't have got his cooperation should I have wanted to get medical examination carried out*."

[**9**] The Appellant gave evidence that it was on receiving the above documents that he became aware that [*redacted*] had been diagnosed with Asperger's Syndrome in 2001. Although the Appellant knew, from his time residing at the [*redacted*] property, that [*redacted*] developmental progress was different, the Appellant had no knowledge of the diagnosis of Asperger's Syndrome until December 2010.

[**10**] At the hearing, the Appellant stated that his former partner received carer's allowance, that [*redacted*] received disability living allowance and that [*redacted*] qualified for disabled students' allowance. The Appellant stated that he had no direct knowledge of these matters, as the source of his information on [*redacted*] was entirely derived from the

four documents received in December 2010. The Appellant presented material regarding carer's allowance, disability living allowance and disabled students' allowance including:

(i) Printouts from www.gov.uk dated June 2016 titled 'Disability Living Allowance (DLA) for children', 'Disability Living Allowance (DLA) for adults' and 'Carer's Allowance'.
(ii) Printout of a brochure from Student Finance England titled 'Extra help – Disabled Students' Allowances 2015/16'.

The Appellant submits that the eligibility criteria described in the above material demonstrates that [*redacted*] had a disability to a significant degree as otherwise he would not have been entitled to the allowances. The Appellant submits that the foregoing is a further indication that [*redacted*] was disabled and therefore a dependent relative.

[**11**] The Appellant submits that the merits of his appeal should be considered against the background of the constraints on him in procuring any further information, medical or otherwise, on [*redacted*]. The Appellant submits that he is '*a victim of PAS (parental alienation syndrome) as he* [redacted] *was completely turned against me as a young person and that continues to this day*.' The Appellant refers to e-mail communications between the Appellant and [*redacted*], the secondary school attended by [*redacted*], to demonstrate the constraints he encountered. In 2008, the Appellant sought information about [*redacted*] from the secondary school including information on his career options. The response from the secondary school included the following:

"*Whilst I have every sympathy with your requests for information about [redacted] and his future plans, I am bound by the law in this country that requires me to act in accordance with a young person's wishes (he is now over 16) and with the Data Protection Act.*

*I had therefore to raise your questions with [redacted] and, I am afraid he has asked that I do not respond to them*."

The Appellant referred to the judgment of ***Hanrahan -v- Merck Sharp and Dohme (Ireland) Limited*** [1988] ILRM 629 to support his position that it is unfair for a person to have to prove something which is beyond his reach.

[**12**] As regards the online content presented by the Revenue Commissioners, the Appellant submits that no reliance can be placed on the information as the information was downloaded subsequent to the delivery of his tax return, and in any event, the information is self-promotion content generated by [*redacted*] which cannot be verified. The Appellant submits that '*one cannot accept everything you read on the internet as the truth, including curriculum vitae uploaded to Linkedin*'.

[**13**] The Appellant submits that [*redacted*] was a dependent relative within the meaning of section 604(11) as he was incapacitated by his Asperger's Syndrome from maintaining himself. [*redacted*] resided at the [*redacted*] property his entire life (until the disposal of the dwelling house in May 2015), even when [*redacted*] was over the age of 18 years. The Appellant submits that 'maintaining' in section 604(11) should be construed as meaning 'supporting, looking after, caring for, nurturing' given the dictionary definition of 'maintain' being '*support (life, a condition etc) by work, nourishment, expenditure etc*'. It should not be confined to being able to secure paid employment. The Appellant submits that 'relative' in section 604(11) should be widely construed to include a child, which construction is supported by the absence of an age restriction in section 604(11). The Appellant submits that he '*went far beyond ordinary child maintenance and should not be punished by the disallowance of dependent relative relief*.' The Appellant submits the four documents received by him in December 2010 prove that [*redacted*] was incapacitated by his Asperger's Syndrome from maintaining himself.

**Submissions on behalf of the Revenue Commissioners**

[**14**] The Revenue Commissioners submit that the Appellant has not shown that the capital gains tax is not payable. The Revenue Commissioners acknowledge that [*redacted*] was diagnosed with Asperger's Syndrome. However, the Revenue Commissioners submit that it does not necessarily follow from his diagnosis that [*redacted*] was (i) incapacitated by infirmity and (ii) by reason of that incapacity [*redacted*] could not maintain himself. The Revenue Commissioners submit that the documents do not show that [*redacted*] was incapacitated by his Asperger's Syndrome from maintaining himself. There are shortcomings in the evidential value of the documents, however, to the extent that information can be gleaned from the documents, it can be seen that [*redacted*] progressed well in terms of his education, secured a place at university, learned skills to travel independently and have friends.

[**15**] The Revenue Commissioners presented online content from LinkedIn and Facebook which bears the name [*redacted*]. The 'About' section of the public LinkedIn profile describes '*[redacted]*.' The LinkedIn profile refers to [*redacted*] and [*redacted*]. Under [*redacted*] it states '[*redacted*]*'* There is a reference to being a [*redacted*] at [*redacted*] under 'Volunteer Experience'. The entries on the LinkedIn profile include:

| | |
|---|---|
| [*redacted*] | [*redacted*] |
| [*redacted*] | [*redacted*] |
| [*redacted*] | [*redacted*] |
| [*redacted*] | [*redacted*] |
| [*redacted*] | [*redacted*] |

The Facebook content shows an update to a profile picture on [*redacted*] 2016 and a comment from [*redacted*] under a picture '*I'm married bro!*'.

[**16**] The Revenue Commissioners submit that the burden of proof to show entitlement to relief falls on the Appellant and, in that regard, refer to the judgment of Charleton J. in ***Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners*** [2010] IEHC 49. The Revenue Commissioners submit that the burden of proof on the Appellant may be justified on the basis that only the Appellant has access to the full facts relating to his personal tax situation. The burden of proof is not altered because the Appellant may be experiencing difficulties in obtaining information. It is not a matter for the Revenue Commissioners to provide evidence. The Appellant is subject to tax on a self-assessment basis and the responsibility to establish the tax is not payable rests on the Appellant. The Revenue Commissioners referred to the judgment of Gilligan J. in ***T.J. -v- Criminal Assets Bureau*** [2008] IEHC 168 wherein he stated:

"*The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court… There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment*

*can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant*."

[**17**] The Revenue Commissioners submit that if tax exemptions or reliefs are involved, then it is incumbent on the Appellant to demonstrate that he falls within the exemption or relief. The Revenue Commissioners referred to the judgment of Kennedy C.J. in ***Revenue Commissioners -v- Doorley*** [1933] IR 750 wherein he stated:

"*If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable*."

[**18**] The Revenue Commissioners submit that the Appellant must establish, on the balance of probabilities, and coming within the letter of the relief, that [*redacted*] was incapacitated by infirmity from maintaining himself for the period from September 2000 to May 2015. The Revenue Commissioners submit that [*redacted*] is not incapacitated by infirmity by reason of being under the age of 18 years. Furthermore, as a child under the age of 18 years, the Appellant is required to maintain [*redacted*]. The Revenue Commissioners referred to the UK judgment of ***Eglen (Inspector of Taxes) -v- Butcher*** [1988] STC 782 which involved a claim by a father for dependent relative allowance for his two daughters, who were under the age of 18 years, on the ground that each daughter was 'incapacitated by infirmity from maintaining herself.' Morritt J. stated:

"*To my mind both the state of being incapacitated and infirmity connote some departure from normal physical and mental ability, whether due to congenital defect or due to illness, accident or disease. Happily both the taxpayer's daughters are healthy children who enjoy the normal physical and mental abilities of their respective ages. Whilst the section recognises incapacity from old age it does not in terms recognise incapacity from youth. Can youth as such be described as and included in infirmity? In my judgment it cannot. To my mind it would not be in accordance with the ordinary meaning of the word to describe a normal healthy child as infirm. The third meaning given by the Oxford English Dictionary, namely: 'A special form or variety of bodily (or mental) weakness; an illness, disease; now, esp., a failing in one or other of the faculties or senses' conveys the normal meaning of the word and is in my judgment the sense in which it was used by Parliament in s16(1)(a) of the 1970 Act*."

[**19**] The Revenue Commissioners submit 'maintaining' has a financial element but can be more than financial. The capacity of [*redacted*] to secure employment is a relevant factor when considering whether [*redacted*] was incapacitated by infirmity from maintaining himself.

[**20**] The Revenue Commissioners submit that the Appellant has adduced no evidence to demonstrate that [*redacted*], by reason of his Asperger's Syndrome, was incapacitated from maintaining himself. The Appellant has no direct contemporaneous knowledge of [*redacted*] abilities or his day-to-day activities. The Revenue Commissioners submit that the four documents relied on by the Appellant do not indicate that [*redacted*] was incapacitated by reason of infirmity from maintaining himself. It is submitted that the Appellant has failed to discharge the burden of proof that he is entitled to relief under section 604(11) on the grounds that [*redacted*] is a dependent relative.

**Analysis and Findings**

[**21**] For relief under section 604(11) it must be shown that a relative is incapacitated by old age or infirmity from maintaining himself or herself. A diagnosis of Asperger's Syndrome does not equate to an entitlement to relief under section 604(11). While Asperger's Syndrome may be construed as an 'infirmity', it is a requirement for relief under section 604(11) to show that the relative was incapacitated by Asperger's Syndrome from maintaining himself or herself.

[**22**] The Appellant presented information from the website of Autism Ireland which states that Asperger's Syndrome is seen as part of the autistic spectrum and is a social learning disability. It states that Asperger's Syndrome is not a disease or health problem; it is a lifelong condition. It further states that with proper support persons with Asperger's Syndrome can lead full and productive lives, attend mainstream schools, have successful careers and have relationships.

[**23**] The Appellant submits that he has proven that [*redacted*] was incapacitated by Asperger's Syndrome from maintaining himself from the information in the four documents he received in December 2010. The Appellant came into possession of these documents in response to an instruction from the Appellant to a firm of solicitors to correspond with his former partner regarding the [*redacted*] property. Given the reliance by the Appellant on the four documents, I will proceed to consider the content of the four documents and the other material submitted in the appeal.

[**24**] The letter [*redacted*] NHS summarises the background to the assessment of [*redacted*] in 2001 in the following terms:

*"[redacted] has received a number of assessments since he was first referred for speech and language therapy at [redacted] school in 1995. Of major relevance to this assessment is the excellent report by psychologist [redacted] in November 1998 when [redacted] was*

*6.11 years. [redacted] summarised the previous assessments, which coupled with her own, led her to suggest a diagnosis of Asperger's Syndrome. This would need formal ratification by a multi-disciplinary team such as this one.*

*[redacted] currently attends [redacted]. At his review in February 2001 there was a general sense of him making progress and succeeding to attain targets set. His main difficulties remain in the area of social communication e.g. his unusual pattern of communication, his tendency to misinterpret cues, his communication difficulties with peers and his clumsy and gauche coordination. Thus a referral for this assessment of his social communication difficulties was made.*

*It was considered that [redacted] was well placed at [redacted]: the education was geared towards facilitating the learning of pupils such as [redacted], and that his developmental and educational needs were being well met."*

The assessment concludes:

"*There was sufficient evidence from the HBS Assessment, Psychological Assessment and previous reports for us to feel confident in making a diagnosis of Asperger's Syndrome*."

[**25**] The letter from Dr [*redacted*] dated 9 March 2010 states that the medical practitioner reviewed documentation for the purpose of enabling [*redacted*] mother to apply for disability benefit for [*redacted*] while he was at university. The medical practitioner states he had not seen [*redacted*] very much and that [*redacted*] interaction with the medical practice had been quite limited. The medical practitioner refers to the Asperger's Syndrome diagnosis, which he describes as a condition which is '*long term and does not seem to fluctuate*'. The medical practitioner refers to the training and care given to [*redacted*] which has allowed [*redacted*] to develop coping mechanisms leading to an improved ability to perform. The medical practitioner states he understands that [*redacted*] is '*able to walk and use computers normally*'.

[**26**] The letter from [*redacted*] dated 30 September 2010 states that [*redacted*] is eligible for disabled students' allowance for Asperger's Syndrome. The letter refers to 2010/2011 and the requirement for [*redacted*] to undertake a Study Needs Assessment. The letter states '*When we receive a copy of your Study Needs Assessment report we will send you a DSAs Notification of Entitlement letter*.'

[**27**] The letter from [*redacted*] NHS (Children and Young People's Development Service) dated 26 November 2010 is a letter from [*redacted*] who is described as a Participation Officer for Disabled Children and Young People. The letter states that '*[redacted] is a young adult who has Asperger's Syndrome and associated difficulties. He is in receipt of Disability Living Allowance*.' The letter states the writer has known [*redacted*] for over four years, firstly as his Transition Worker and subsequently as Participation Officer. The letter states the writer is '*very concerned about the impact on him of the current situation he and his mother are facing regarding the threat of having to leave their house in December*.' The letter refers to the close and mutually supportive relationship between [*redacted*] and his mother. It refers to [*redacted*] having learned the skills to travel independently on bus and train routes and having friends in the local area. The letter concludes:

"*Within the last year, [redacted] has experienced a number of significant changes and transitions in his life; namely the end of support from children's services, leaving the specialist and structured environment of school and starting a course at [redacted], of which he is in his first term. [redacted] has managed to cope with these changes, due to the long-term preparation and planning involved, but coping with them has still been a significant challenge for him because of his Asperger's Syndrome.*

*University is also a considerable challenge for [redacted] due to the emphasis on individual study and self-organisation as opposed to the highly structured environment at his specialist school. [redacted] has been awarded the highest rate of Disabled Student's*

*Allowance, which highlights his need for the maximum support in order to successfully access the course.*

*I believe that moving out of his home and the related anxiety and distress, will cause considerable disruption to [redacted] studying and performance on the course at such a crucial early stage and could potentially put his place and therefore career aspirations in jeopardy*."

[**28**] In the material submitted by the Appellant, there is a document which shows the distribution of the sale proceeds of the [*redacted*] property as 67.5% to the Appellant and 32.5% to his former partner. This document is headed '[*redacted*] Court' and bears claim number [*redacted*]. The Appellant is described as claimant. The Appellant's former partner and [*redacted*] are described as first defendant and second defendant respectively. In the capital gains tax computation submitted on behalf of the Appellant, it states that the court awarded equitable title to the former partner of 32.5% and refers to the costs of 'defending title' of €53,351 (Stg£38,725), which were allowed as a deduction. This document includes the following matters directed at [*redacted*] (as second defendant):

"*AND UPON the First Defendant undertaking to take all reasonable steps to procure the signature of the Second Defendant to the consent order within 7 days of the date of this agreement and to, by her solicitors, deliver the same to the Claimant's solicitors*."

"*It is agreed that the First and Second Defendant shall give vacant possession of the Property upon completion, and in default First Defendant shall compensate the Claimant for any losses that he shall suffer as a consequence*."

[**29**] In the material submitted by the Appellant, there is an e-mail dated 9 October 2002 from the Appellant to a firm of solicitors seeking advice and a response dated 16 October 2002. In the e-mail from the Appellant it refers to utility and mortgage payments made by the Appellant as child support. The actions specified by the Appellant to be considered

include agreeing child support and agreeing property ownership/sale. The e-mail states '*Aim to keep contact with children, put child support on proper footing, safeguard title to property. I have no plans to sell property*.' In the e-mail from the firm of solicitors it states '*Your former partner is able to make claims against you under Schedule 1 of the Children Act 1989 on behalf of the children. These claims can be for both capital and maintenance*.' The e-mail states that child maintenance for his two children would be assessed at 20% of the Appellant's net income. The Appellant was advised to offer 20% of his net income as child maintenance. Under a heading 'Contact' it is stated:

"*I note from your e-mail that you have never been married to the mother of your children. Unless you have entered into a Parental Responsibility agreement with their mother, you will not have parental responsibility for your children. This means that you are not legally recognised as their father and are therefore, amongst other things, unable to give consent for medical/dental treatment and have no say in their education and are not entitled to receive school reports etc.*

*It is therefore important that we address the issue of parental responsibility. If your former partner is not willing to enter into a parental responsibility agreement you can make an application to the Court. Provided the Court is satisfied that you have a genuine commitment to the children you will be granted parental responsibility. The applications to the Court however can take time and can be expensive and it is therefore best to try and reach agreement if at all possible.*

*If you are not able to agree contact with your former partner you can make an application to the Court for both direct (spending time with the children) and indirect (letters/telephone calls etc) contact with the children*."

The Appellant gave evidence that he did not make an application to Court to secure parental responsibility of his children and/or contact with his children. The Appellant gave evidence

that he did not offer 20% of his net income as child maintenance but continued to discharge the mortgage and other outgoings on the [*redacted*] property.

[**30**] The submission on behalf of the Appellant that the merits of his appeal should be considered against a background of the constraints on him in procuring any further information, medical or otherwise, on [*redacted*], should be balanced with the legal advice on the availability of court applications to safeguard the position of the Appellant with regard to his children. The reliance on ***Hanrahan -v- Merck Sharp and Dohme (Ireland) Limited*** [1988] ILRM 629 is misplaced. In the context of a discussion on the onus of proof in a claim of nuisance, Henchy J. stated:

"*The ordinary rule is that a person who alleges a particular tort must, in order to succeed, prove (save where there are admissions) all the necessary ingredients of that tort and it is not for the defendant to disprove anything. Such exceptions as have been allowed to that general rule seem to be confined to cases where a particular element of the tort lies or is deemed to lie, pre-eminently within the defendants' knowledge, in which case the onus of proof as to that matter passes to the defendant. Thus, in the tort of negligence, where damage has been caused to the plaintiff in circumstances in which such damage would not usually be caused without negligence on the part of the defendant, the rule of res ipsa loquitur will allow the act relied on to be evidence of negligence in the absence of proof by the defendant that it occurred without want of due care on his part. The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof*."

[**31**] The position in appeals before the Appeal Commissioners is that the burden of proof rests on the Appellant who must prove, on the balance of probabilities, that the relevant tax is not payable. In the High Court judgment of ***Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners*** [2010] IEHC 49 (at paragraph

22) Charleton J. stated: "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*". The Appellant is the person with access to the facts and documents relating to his tax affairs. The taxation system is developed on the premise of self-assessment. In appeals before the Appeal Commissioners, the Appellant must present evidence and produce documents in support of the appeal in order to meet the burden of proof.

[**32**] The Appellant submits that his former partner and [*redacted*] received financial allowances from the UK government by reason of [*redacted*] having Asperger's Syndrome and that the eligibility criteria for these allowances supports his position that [*redacted*] was incapacitated by his Asperger's Syndrome from maintaining himself. The evidence relied on by the Appellant is sourced in the four documents at paragraph 7 above. For example, the letter from Dr [*redacted*] refers to [*redacted*] mother applying for disability benefit. The letter from [*redacted*] refers to [*redacted*] being eligible for disabled students' allowances. The letter from [*redacted*] refers to [*redacted*] being in receipt of disability living allowance and being awarded the highest rate of disabled students' allowance. There is no evidence from the former partner and/or [*redacted*] on the facts and circumstances pertaining to any allowances. In any event, the fact that the former partner and/or [*redacted*] may have met the eligibility criteria for any allowances in the UK does not mean the requirements in section 604(11) have been satisfied.

[**33**] There is no statutory definition of 'maintaining'. I am satisfied that in construing 'maintaining' in section 604(11) it is not confined to financial circumstances and whether a person can achieve a position of paid employment. The considerations may, depending on the circumstances, include being able to assume household responsibilities, manage a job, manage daily routine, manage personal care, manage general health, travel independently and engage in activities.

[**34**] It is the Appellant who must prove, on the balance of probabilities, that [*redacted*] was incapacitated by his Asperger's Syndrome from maintaining himself. The Appellant must bring himself within the relief in section 604(11). The evidence shows that the Appellant vacated the [*redacted*] property in September 2000, the Appellant did not make a court application for parental responsibility, the Appellant has had no contact with [*redacted*] since February 2007 and the Appellant only became aware that [*redacted*] had been diagnosed with Asperger's Syndrome in December 2010. The Appellant stated that he did not know how [*redacted*] was coping or managing day-to-day since February 2007. The Appellant rests his claim for relief under section 604(11) on the information from the four documents he received in December 2010. There is no evidence that [*redacted*] was incapacitated by his Asperger's Syndrome from maintaining himself. To the extent that evidential value may be drawn from the four documents, the overall impact from the documents is that the support and assistance given to [*redacted*] over the years has enabled [*redacted*] to make progress in his learning at primary and secondary school, attend university, have career aspirations, travel independently and have friendships. To the extent that evidential value may be drawn from the online content, it is clear from the documents presented by the Appellant that [*redacted*] did attend university, therefore, it is reasonable to conclude that [*redacted*] did graduate from [*redacted*] University with a [*redacted*] (2:1). The LinkedIn profile shows various [*redacted*] type roles within the same company since November 2013.

[**35**] Based on a review of the facts and a consideration of the evidence, materials and submissions of the parties, and having regard to the nature and extent of the evidence, I find the Appellant has not discharged the burden of proof that [*redacted*] was incapacitated by his Asperger's Syndrome from maintaining himself to be a 'dependent relative' within meaning of section 604(11).

## Determination

[**36**] For the reasons outlined above, I determine that the Appellant is not entitled to relief under section 604(11) of the Taxes Consolidation Act, 1997. The Notice of Assessment to Capital Gains Tax for the year 2015 dated 18 September 2017 shall stand. This appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act, 1997.

**FIONA McLAFFERTY**
**APPEAL COMMISSIONER**

**3 NOVEMBER 2020**