Neutral Citation No: [2018] NICh 31 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **BUR10628** ***ICOS Ref:*** **16/63595** ***Delivered:*** **30/04/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE ESTATE OF ARTHUR LOUGHRAN (DECEASED)

BETWEEN:

EAMON LOUGHRAN
AS THE EXECUTOR OF THE ESTATE OF
ARTHUR LOUGHRAN DECEASED

Plaintiff;

-and-

(1) OLIVER JOHN LOUGHRAN
(2) PATRICK LOUGHRAN

Defendants.

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BURGESS J

Introduction

[1] Mr Arthur Loughran (the deceased) died on 6 September 2013. By his Will (the Will) dated 14 November 2012 the deceased appointed the plaintiff, Mr Eamon Loughran, one of his sons, as his executor. The Will made a number of bequests.

[2] On 16 October 2013, Mr Oliver John Loughran (Oliver), another son, lodged a Caveat with the Chancery Office (Probate) that no grant in respect of the deceased should be sealed without notice to him, asserting he had an interest in the estate of the deceased. The Will made no provision for Oliver to receive any benefit from the estate.

[3] It is an understatement to say that the provisions of the Will caused considerable friction between certain members of the family, who believed at different times that the deceased either did not have testamentary capacity at the time he made the Will, or that he, the deceased, had been subjected to undue

pressure and influence by another son, Patrick, to whom a substantial part of the estate of the deceased had been bequeathed.

[4] In the face of such disputes the plaintiff issued a writ of summons (2015/63595) on 1 July 2015 seeking probate of the Will in Solemn Form.

[5] In the absence of the Grant of Probate of the Will the plaintiff, in seeking to discharge his duties as the named executor, embarked on satellite proceedings under writ dated 1 July 2016 (2016/58541). I do not need to rehearse the course of those proceedings for the purposes of this judgment. However, there were subsequently two further legal claims raised, the one by Oliver claiming an interest by way of propriety estoppel over land of the deceased at Enagh (the Enagh Lands), with which I shall deal below.

[6] The court proceeded during the hearing of this matter by first establishing the position relating to the validity of the Will, before proceeding to deal with the other claims.

The will

[7] The Will was the latest of four Wills made by the deceased commencing on 19 April 1985, some 27 years prior to the making of the Will. The court had the benefit of a number of statements signed by various members of the family to substantiate the claims of the lack of testamentary capacity and undue pressure on the part of Patrick. However, the claim relating to a lack of testamentary capacity was subsequently abandoned, no doubt informed by expert reports from Dr Stephen Best MD. BCh. MRC Psych. and from Dr K B Dynan MD FRCP (which report in turn was informed by access to the statements). At a joint meeting, duly minuted, the doctors ruled out any deficiency on the part of the deceased that would have given grounds for determining a lack of testamentary capacity on the part of the deceased at the relevant time.

Undue influence

[8] In *Craig v Lamoureux* [1920] AC 349 the House of Lords considered the facts to be established before a Will could be set aside as having been obtained by undue influence. Viscount Haldane said:

> "As was said in the House of Lords when *Boyce v Rossborough* [1856] 6 HLC 2, 49, was decided, in order to set aside the Will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with hypothesis of its having been obtained by undue influence. It must be shown they are inconsistent with a contrary hypothesis.

> Undue influence, in order to render a Will void, must be an inference that can justifiably be described by a person looking at the matter judicially to have caused the execution of the paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean … It is also important in this connection to bear in mind that which was laid down by Sir James Hannen in *Windgrove v Windgrove* [1885] 11 PD 81 and quoted with approval by Lord McNaughton in delivering the judgment of this Board in *Baudains v Richardson* [1906] AC 169, it is not insufficient to establish that a person has the power unduly to overbear the Will of the testator. It must be shown that in the particular case the power was exercised, and it was by means of the exercise of that power that the Will was obtained."

[9] In *Hall v Hall* LR 1 P&D Sir J P Wilde stated:

> "Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgement of the testator, will constitute undue influence, although no force is either used or threatened."

[10] In *Edwards v Edwards* [2007] Ch D 3 Levenson J held that there is no presumption of undue influence and that it is a question of fact whether undue influence has affected the execution of a Will. Moreover, the burden of proof is high, and it falls on the person challenging the Will to prove undue influence. Levenson J stated that:

> "It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis."

[11] The court, for the purposes of its determination of this aspect of the case, has considered carefully the contents of the various statements made by the members of the family. The report of Dr Best summed up these allegations when he referred to "intimidation and pressurising" the deceased on the part of Patrick, with Patrick criticising them, the other members of the family, in front of the deceased. It is alleged that this resulted in the deceased "greatly changing" his wishes in the provisions of the Will and indeed in the earlier will of May 2009. For the purposes of my determination, I did not require the makers of the statements to give evidence but rather took their assertions at their height.

[12] The court then heard evidence from a number of witnesses namely:

(a) Mr Conall Corrigan, the solicitor who drew up the Will and was one of the witnesses to its execution by the deceased. Mr Corrigan had been the deceased's solicitor for many years, acting for him in various transactions, including the making of previous Wills. Mr Corrigan produced detailed notes as to the steps taken by him to ensure there was no impediment on the part of the deceased to expressing his wishes as to the disposition of his property. This included seeking a contemporaneous report dated 14 November 2012 from Dr Adrian Mulholland, the deceased's general practitioner, to which I will come.

Mr Corrigan was cross-examined. His evidence was clear and precise, addressing the core issue of the voluntary nature of the deceased's wishes as expressed in the Will. I am totally satisfied that in the discharge of his duties in the making of the Will Mr Corrigan acted in a meticulous and highly professional manner. He knew the deceased well over a long period of time, and was able to assess his mental state on the day the Will was signed by the deceased. His evidence alone would displace any allegation of undue pressure on the part of Patrick, at or before his attendance on the deceased on 14 November 2012.

(b) However, the court also the benefit of the evidence of Dr Mulholland, whose report dated 14 November 2012 stated that:

> "I have examined Mr Arthur Loughran this morning and confirm that he has the capacity to make/amend his Will."

In his oral evidence Dr Mulholland stated that in his examination of the Mr Loughran that day there was no indication of any pressure being asserted on him and indeed that the deceased was someone who "knew his own mind." In addition to the attendance and examination that particular day (an examination carried out with the deceased on his own) Dr Mulholland stated he had seen the deceased on many occasions over the previous three years and had got to know him and his wife extremely well. His opinion therefore was not based solely on his knowledge of him on the day the deceased made his Will.

(c) Evidence was given by Mrs Mary Hunter, the second witness of the Will who confirmed her signing at the same time and in the presence of both the deceased and Mr Corrigan, the other witness to the Will.

(d) Oliver Loughran gave evidence. This included evidence relating to the claims of undue pressure, reflecting some of the issue raised in the statements by

other members of the family to which reference has been made. It also included evidence in relation to his claim in respect of the Enagh Lands, and I will return to this latter aspect of his evidence later. Oliver confirmed that his late father was a person well respected in the community and someone whose help was sought by many people. He was also regarded as a man who would keep his word. However, the thrust of his evidence in relation to Patrick was that he, Patrick, sought to exclude other members of the family, and that he did not seem happy that other members of the family would be in the house. As stated, this reflects the statements of some other members of the family. However, in relation to other members of the family being in the house the evidence was clear that other members did assist with the deceased and, before her death, his wife, seemly on a regular basis. He was cross-examined from detailed Care Records in respect of the deceased from the Southern Health and Social Services Trust for a period from late 2011 until the time of his death. It is evident that Patrick was seen as the main carer of his parents, and that in turn Patrick himself required support. What is conspicuous from reading the assessments, many signed by the deceased, is that the deceased wished to live independently at home and as conspicuously is the absence of any recorded complaint whether from the deceased or any member of the family in particular as regards any of the alleged overbearing attitude or failure to help on the part of Patrick – whether that be to the Trust or to the doctor.

[13] I have considered the four Wills to ascertain the changing bequests. In doing so I have also had regard to various gifts to some of the children of the deceased in the period since the first of the wills in 1985 until the date of the Will in November 2012. These gifts could well explain why changes would be made at a later date. Having considered the various Wills, I note as follows:

- The house and the home farm were always the subject of bequest to Patrick since the first Will in 1985. Indeed in 2009 three acres were removed from the home farm and bequeathed to a grandson of the deceased, a bequest which survived to be included in the Will.

- Other small farms were in earlier days the subject of bequests to another son of the deceased, Anthony. However, part of these lands were always bequeathed to Anthony from and including the 1985 Will, any changes I believe reflecting gifts of land to another son inter vivos.

- The Enagh Lands were mentioned for the first time in the Will and were bequeathed to Patrick.

- In no Will was any bequest ever made to Oliver, so this is not a case where Oliver can state that he has been divested by the provisions of later Wills, including the Will.

- In the Will, provision is made for two daughters of the deceased. No previous provision had been made for them and to that extent it reduced the entitlement of Patrick.

- Whereas up to and including 2009 the residue of the estate went to the deceased's wife – including in the Will a right of residence in the house for her lifetime - while the right of residence survived, the residue, reduced as I have said by other gifts including two daughters, was bequeathed to Patrick, but expressed in terms that the money was to effect improvements to the house, assuming those improvements had not been carried out during the deceased's lifetime.

[14] I do not believe there is any evidence of a fundamental shift in the provisions of the Will compared to that of 2009 and indeed, reflecting lifetime gifts, when compared with earlier wills. The 2009 will and the Will reduced earlier bequests of the home farm by provision for the grandson, and the Will made financial provision for two of the daughters of the deceased. The main change of any relevance to this particular case is the reference for the first time to the Enagh Lands, but while I will refer to this in the context of Oliver's claim over these lands on the basis of proprietary estoppel, the Will certainly does not remove any previous specific bequest of this land, even in 2009.

[15] Applying the legal tests to the evidence of Mr Corrigan, the solicitor, and that of the general practitioner, and considering the allegations and their lack of specificity, and the absence in any record of complaint in the Care Records or elsewhere and considering the actual changes to the Will compared to the 2009 will and indeed earlier wills, I find that the complaint in relation to undue pressure or influence fails.

[16] I indicated during the course of the hearing my conclusion on this particular aspect of the case, promising to articulate the reasons for that in this judgment. The court then proceeded to declare that the Will had been proved in solemn form.

Oliver's claim

[17] I am grateful for the written submissions of counsel and the extensive authorities cited as to the legal principles involved in the doctrine of proprietary estoppel. Having considered all of these authorities I do not believe it is necessary for me to set them out but rather to identify three necessary elements upon which I believe counsel are agreed, namely:

(a) A representation or assurance was given.

(b) An act of detrimental reliance was taken on that representation or assurance.

(c) An unconscionable denial of the plaintiff's right, that is it would be unconscionable for the representation or the assurance not to be kept.

I refer to the case of *Mulholland v Kane* [2009] NICh 9 where Mr Justice Deeny rehearsed many of the prior authorities.

(a) Representation or assurance

[18] Evidence was given by a number of the family members as to their views as to whether the deceased would have made such a representation to Oliver. Unfortunately, the level of antipathy on the part of certain members of the family (and I repeat certain members not all) to others drives the court to look for some objective evidence or circumstance to make its determination. One thing certain to the court from all of the evidence that it has heard is that the deceased was a generous person and was clearly family orientated. He looked to help members of his family particularly granting pieces of land to certain of the children, without payment, in order to establish their family homes. I am also satisfied that he was essential a private man who would have had private conversations with different members of the family at different times, without those conversations being known to other members of the family. Just as he would not have discussed all aspects of his affairs with his family, given his private nature I do not believe that he would have seen it necessary to explain to other members of the family why he was making the gifts that he was making.

[19] Much of the background of other members of the family to whom gifts were made is not dissimilar to that of Oliver, except perhaps in degree. But that degree is slight. There is no evidence that any of the other siblings involved themselves in the work in and around the farm over periods of time any more or less than Oliver. No payment was sought from any of the siblings in respect of the transactions under which they obtained land from the deceased. I do not believe that the question of payment as an element in why gifts were made ever crossed the mind of the deceased. These were gifts that were made as I have said from the very nature of the deceased and his close relationship with his children. Therefore, I have concluded that the motivation of the deceased should not be related to any level of involvement on the part of Oliver in the farm affairs, any more than the other gifts were based on any involvement of others in the work of the farm.

[20] I therefore am satisfied that in or about 1980, as stated by Oliver, and very much in line with the timescale of other gifts then being made, that a representation was made to him that the lands of Enagh were to be given to him. I should perhaps at this point however record that I have no evidence before me as to whether that representation was repeated at any time other than perhaps at or about the time of the application for planning permission in 2008, but certainly no further representation was alleged to have been made after that date.

[21] What the court does know is that no transfer was ever made to Oliver of the Enagh Lands to give effect to the gift: no provision was made in the wills of the deceased up to and including the will of 2009: and that in the Will in 2012 the deceased made a specific request of the Enagh Lands to Patrick. Therefore, as far as the mind of deceased was concerned, while he may well have made a representation in 1980 and even if it was repeated in 2008, as far as the deceased was concerned he felt it appropriate to change his mind and make the provision in the Will whereby Oliver would not receive the land. That then requires the court to consider the other two elements, namely whether Oliver acted to his detriment on the representation he claims was made, and whether it would be unconscionable to release the estate of the deceased from that promise or representation that was made.

[22] I have carefully considered whether Oliver has satisfied me that he has acted to his detriment since the date of the representations made by his father-and has done so in a manner that 'the items of detriment relied on have been specifically alleged and proved' – see *Jones v Watkins* [1987] EWCA. The context is that the representation was to be fulfilled in the future, that is after his father's death. That, in the event, was decades later, and indeed could of course have been longer. Perhaps naturally Oliver took no steps in relation to the land over that time, over and above some work. However, I have discounted such work as in the case of those who were beneficiaries of the deceased's largesse during his lifetime.

[23] It is accepted that Oliver made a planning application, the details of which are unknown, and in any case was withdrawn. Whilst fees were incurred, the application was clearly speculative and if refused would have meant that the Enagh Lands would have been unavailable as a residence. The fact is that Oliver went about his life as regards his family and work in a way totally unconnected with any aspect of providing a house on the Enagh Lands. No other specific act or omission has been shown to have been linked to the representation, let alone one which involved a detriment to Oliver.

[24] I repeat myself when addressing the personality of the deceased in considering any sense of him being capable of acting in an unconscionable manner. He made no transfer to Oliver during his lifetime. He made no specific request of the Enagh Lands in any testamentary disposition until he executed the Will. Indeed, the absence of any specific disposition under the terms of the Will would have resulted in Patrick obtaining the Enagh Lands as part of the residuary estate. Making the Lands the subject of a specific bequest is evidence of a positive decision on the part of the deceased, and in doing so he clearly did not see himself bound by the terms of any previous representation he may have made many years earlier. A decision to classify that decision as unconscionable is to fly in the face of everything we know about the deceased, particularly as regards his devotion to his family.

[25] I have therefore concluded that whatever the terms of any representation made by the deceased, Oliver took no specific, detrimental act or acts and the decision of the deceased regarding the Lands was not an unconscionable denial of any right of Oliver. In those circumstances I dismiss the application that Oliver has established any interest in the Enagh lands.