Neutral Citation No: [2022] NICh 18	*Ref:* **HUM11987**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **23/11/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF THE ESTATE OF TERENCE BENEDICT McQUAID (DECEASED)

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Between:

CONRAD McQUAID

Plaintiff

and

BRIEGE McQUAID AND PATRICK MALLON AS EXECUTORS OF THE ESTATE OF TERENCE BENEDICT McQUAID DECEASED

Defendants

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The Plaintiff appeared in person
Patrick Lyttle KC and Rory McNamee (instructed by Mallon & Mallon) for the Defendants

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HUMPHREYS J

Introduction

[1] The plaintiff in this action is the eldest son of the late Terence Benedict McQuaid ('the deceased') who died on 30 July 2018. The defendants are the named executors of a Will purportedly executed by the deceased on 17 July 2018 ('the disputed Will').

[2] In these proceedings, the plaintiff seeks a declaration that the disputed Will is invalid on two discrete grounds:

(i) The deceased lacked the necessary capacity at the time of execution; and

(ii) The deceased was subject to undue influence in the said execution.

[3] The plaintiff has also pleaded a case seeking relief under the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 but it was directed by Huddleston J that the issues of capacity and undue influence should be tried first.

[4] In their counterclaim, the defendants seek an order admitting the disputed Will to proof in solemn form.

The Disputed Will

[5] The disputed Will is signed by the deceased and witnessed by Jim Hughes, an accountant, and Patrick Mallon, the second defendant and a solicitor in Dungannon. It reads as follows:

> "This is the last will and testament of me Terence McQuaid of Mullaghmore Road, Dungannon in the County of Tyrone and I hereby revoke any previous testamentary dispositions at any time heretofore made by me. I appoint my wife Briege McQuaid and my Solicitor Patrick Mallon to be the Executors hereof. I direct that Patrick Mallon be paid for any work carried out by him in the administration of my estate.
>
> I leave, devise and bequeath everything that I own real as well as personal and wheresoever situate to my dear wife Briege absolutely."

[6] The plaintiff's pleaded case is that at the date of execution of the disputed Will the deceased was an in patient at Craigavon Area Hospital receiving treatment for urosepsis occurring as a result of advanced metastatic bladder carcinoma. As a result, the deceased had been recorded as being confused but no medical opinion had been sought in relation to his capacity and understanding.

The Legal Principles

[7] Recently, in *McGarry v Murphy* [2020] NICh 15, McBride J reviewed the authorities on the issue of capacity and commented:

> "… to have testamentary capacity a testatrix must be able to comprehend the following matters:-
>
> (i) The effect of his wishes being carried out at his death, though it is not necessary that he should view

his Will with the eye of a lawyer and comprehend its provisions in their legal form.

(ii) The extent of the property of which he is disposing. It is not necessary that he knows the precise value of his estate or its components just that he be able to appreciate its approximate value and the relative worth of the assets it comprises.

(iii) The nature of the claims on him. He must be able to recall the several persons who may be fitting objects of his bounty and understand their relationship to himself and their claims upon him so he can decide whether or not to give each of them any part of his estate by his Will."

[para 65]

[8] The learned judge also considered the so-called 'golden rule' which arises from the judgment of Templeman J in *Re Simpson* [1977] 127 NLJ 487:

> "In the case of an aged testator or a testatrix who has suffered a serious illness there is one golden rule which should always be observed … the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator …"

[9] On the analysis of McBride J at para [72]:

> "I consider however that this so called "golden rule" is not a rule of universal application and therefore need not be slavishly followed in all cases for the following reasons. Firstly, the rule is not a rule, it is merely guidance. Secondly, failure to follow the rule does not automatically invalidate the will; nor does compliance guarantee validity – See *Sharp v Adam* [2006] EWCA Civ 449. Thirdly, the golden rule does not define "aged." We live in an age when there are many nonagenarians who continue to act as leaders, mentors and advisors. Most solicitors would find it very tricky if not downright insulting to require such a client to undertake a medical examination when it is clear that they have capacity. I consider that the duty of a solicitor instructed to make a will is not to follow a "golden rule"; rather, his duty is to take reasonable steps to satisfy himself that the testatrix has testamentary capacity. This duty does not dictate that

> a medical report is required in all cases of an elderly testatrix. What is required is that a solicitor must exercise his or her judgement in all cases. What is reasonable in any particular situation will depend upon all the circumstances including the age and health of the testatrix; the solicitor's knowledge of and familiarity with the testatrix; the testatrix's presentation to the solicitor, and whether there are any "red flags" suggesting a possible challenge to capacity. Red flags cases include situations where the testatrix is aged over 80 years and is either in receipt of a care package or has had recent hospital admissions or other medical attention; the testatrix is vulnerable because for example she has recently been bereaved; the testatrix is making significant changes to her will; the testatrix's Will fails to make any or reasonable provision for someone who might bring a claim such as a family member; the testatrix is not an existing client of the firm; or the solicitor has some concerns about the testatrix's presentation or otherwise anticipates a challenge to the Will. In circumstances where there are any red flags a solicitor would be prudent to exercise more caution. In such cases, he may consider that the only way he can be satisfied that the testator has testamentary capacity is by obtaining a medical report. In cases where a client is elderly and not an existing client of the firm the need to obtain a medical report will usually be considered necessary to confirm testamentary capacity not least because it is now well recognised that some disorders including dementia are not always readily apparent to a non-medically trained person and may not therefore be detected during a one off consultation to take instructions for a will."

[10] The key issue is therefore whether a testator has the necessary capacity and the duty of a solicitor instructed to draft a will is to take reasonable steps to satisfy himself of this.

[11] The jurisprudence also reveals that evidence in relation to capacity may be forthcoming from medical experts, both those who treated a testator and those instructed to review notes and records after death, and also from family members, friends and professionals who knew the deceased and had spent time with him. There is no hierarchy of such evidence. In any case it is a matter for the trial judge to consider and give due weight to any evidence presented on the issue and determine whether, at the relevant time, the deceased was possessed of the requisite capacity.

The Expert Evidence on Capacity

[12] The court had the benefit of detailed expert reports from Consultant Psychiatrists Dr Barbara English and Dr James Anderson, both of whom had carried out a review of the medical notes and records, and other documentation, and furnished opinions on the issue of capacity. Neither doctor had met or assessed the deceased during his lifetime.

[13] Dr English gave evidence that the medical history revealed the deceased, who was aged 73, was admitted to hospital on 12 June 2018. He was suffering from bladder cancer and it was confirmed that there had been metastatic spread. During this stay in hospital he received treatment for an acute kidney injury, hyponatremia and refeeding syndrome. He was discharged on 3 July 2018 but readmitted on 8 July suffering from intermittent confusion and suprapubic pain. He was diagnosed with urosepsis and treated with intravenous antibiotics.

[14] Dr English referred to the following entries on the medical records:

- 12.6.18 increasing confused
- 13.6.18 confused and wants to leave the ward
- 13.7.18 appears confused on the middle of the night contacted the police 5x via his phone and daughter…? hallucinations that somebody wants to kill him. Assisted back to bed a couple of times
- 15.7.18 patient confused and agitated
- 16.7.18 antibiotics were changed
- 17.7.18 (0210 hours) son stated that he was confused
- 17.7.18 (1650 hours) now states feeling as well as he had before.

[15] Discussions took place between 18 and 20 July regarding discharge to palliative care and ultimately the deceased was discharged home on 23 July and he died a week later.

[16] Dr English noted that no formal cognitive assessment of the deceased took place during either of his periods as an in patient in hospital. In her opinion, the deceased "clearly met the golden rule." She stated that there was no basis to say that the deceased lacked testamentary capacity but that a formal assessment ought to have been undertaken by a suitably qualified medical practitioner.

[17] At the meeting of experts which took place on 4 January 2022, Dr English stated that she had not had sight of the attendance note prepared by the solicitor

Mr Mallon and relied upon by Dr Anderson in his report. Under cross examination, Dr English was unable to state why she had not asked for this document which was considered relevant by the other psychiatrist instructed in the case.

[18] Dr English was also questioned about her reference to and use of notes and records. In particular, counsel asked her about a nursing note of 17 July 2018, timed at 1530 hours, which states:

> "Patient feeling better today."

[19] This was not a surprise to Dr English since the note had been specifically referenced by Dr Anderson at the experts' meeting. However, her evidence was that this entry was "not particularly relevant" since it constituted a subjective expression rather than an assessment. She maintained this position even when it was emphasised that the disputed Will was executed within an hour of the record being entered.

[20] Dr Anderson's opinion was that the deceased had experienced intermittent episodes of confusion as a result of the severe infection he was suffering from. There is no suggestion in the medical records that he had any signs of dementia. He concludes:

> "the change in intravenous antibiotic and antifungal treatment brought a rapid improvement in his condition with improvement in wellbeing and report in the medical record that he was feeling as well as he had been before on the afternoon in question."

[21] Dr Anderson agreed that, ideally, a formal assessment would have been carried out in relation to testamentary capacity. However, having considered in particular the detail set out in the solicitor's attendance note, he concludes that the deceased did have testamentary capacity at the time of execution of the disputed Will.

[22] It is difficult to understand why Dr English did not seek and obtain a copy of the solicitor's attendance note and take it into account in forming her opinion on the question upon which she was asked to advise. It was an inexplicable error, particularly in light of the weight which was placed upon it by Dr Anderson.

[23] In *Fitzpatrick v DPP* [1997] IEHC 180, McCracken J stated:

> "It is my strongly held view that where a witness purports to give evidence in a professional capacity as an expert witness, he owes a duty to ascertain all the surrounding facts and to give that evidence in the context of those facts, whether or not they support the

> proposition which he is being asked to put forward or not."

[24] It is important that expert witnesses, fulfilling their primary obligation to the court, are both cognisant of and compliant with this aspect of their duties.

The Evidence of Family Members

[25] The court heard evidence from the deceased's daughter Rebecca McQuaid, the fifth eldest of his six children. She stated that back in 2002 her father had given her £20,000 but some of her other siblings had received much greater sums over the years. It was her evidence that in 2016 her father had told her that everything would be balanced out in his will and he was not going to leave his money to her mother as she was "easily manipulated."

[26] Ms McQuaid also testified that she spent considerable time with her father during the period of his illness, having travelled from her home in London for three or four days per week. She was with her father on Sunday 15 July 2018 before returning to London, and was present again from 19 to 23 July when he was discharged.

[27] In relation to his mental state, Ms McQuaid said her father was as "sharp as a tack" until his admission to hospital. Following that time he never recovered his mental acumen and, she believed, was not in a fit state to make a will.

[28] Under cross examination, Ms McQuaid stated that she wanted all the children to be treated fairly, and for everything to be balanced. She alleged that since the death of her father, her mother had been "coerced." She accepted that she was aware prior to his death that her father had made a will but had raised no concern at that time in relation to his capacity to do so. Equally, she accepted that all the siblings had received a letter from Mr Mallon in October 2018 outlining the terms of the 17 July 2018 will and had not raised any issue at this stage either.

[29] It became evident that Ms McQuaid only raised the question of the capacity of the deceased once she had become aware of her mother's intentions in relation to the estate in July 2020. She then sought her own legal advice in relation to having the disputed Will set aside.

[30] Ms McQuaid was also cross examined about a threat which she had made, shortly before the trial, to one of her siblings, by text, about actions she would take if her sibling did not "tell the truth about the will." This behaviour was nothing short of shameful and reflected the true nature of the character of the witness. When presented with the evidence, Ms McQuaid's response was to allege that her sibling had hidden her father's will.

[31] Having listened carefully to her evidence, and observed her demeanour in the witness box whilst under examination, I reject all the evidence given by Ms McQuaid. It was quite apparent to the court that she was motivated solely by her own personal financial gain and not by any desire to tell the truth. In particular, I draw this conclusion from:

(i) The timing of her first assertion that her father lacked capacity; and

(ii) The frankly appalling content of the text which she sent to her sibling.

[32] The plaintiff also called Shane McAteer, the former husband of the deceased's daughter Alexandra. He had been in business with the deceased, dealing in property both north and south of the border. He gave evidence that he had visited the deceased in hospital twice, and found him "weak" and "not himself."

[33] The deceased's daughter Bronwyn O'Donnell also gave evidence on behalf of the plaintiff. She is the second oldest of the children. She had visited her father most days in hospital, with the exception of 14-19 July when she was on holiday. On 29 June her father had told her that he was going to write a will, some would think it fair and others would not. She did not know what his intentions were at this time.

[34] Ms O'Donnell stated that on 12 July she found her father to be sharp, alert and chatty. She had no concern in relation to his faculties or his capacity to make a will. When she returned from holiday on 19 July, her father was pleased to see her and able to enjoy conversation about the events of the holiday.

[35] The defendants called the deceased's brother Kelly McQuaid to give evidence. He testified that he visited his brother on an almost daily basis and had raised with him the issue of making a will. As a result of this conversation, he placed a call with the deceased's accountant Jim Hughes and gave the phone to the deceased. The witness left the room whilst the phone conversation took place and when he returned the deceased indicated that Mr Hughes was going to come to the hospital that evening. The next day he asked his brother if the job had been done but the reply was that Mr Hughes needed to have a solicitor with him and the two of them were coming that evening. The following day, 18 July, the deceased confirmed that the will had been made and shared a joke in relation to Kelly McQuaid's potential inheritance.

[36] Mr McQuaid gave evidence that whilst he was in discomfort, the deceased had his wits about him and knew perfectly well what he was doing in relation to the will.

[37] The fourth eldest child, Alexandra McAteer, gave evidence that she had visited her father on a daily basis in hospital and was in his company on both 17 and 18 July. She was aware that Mr Mallon was coming to have his will prepared and executed and this caused her no concern whatsoever.

[38] On 17 July she had travelled to Castleblayney to collect a relic of Padre Pio which she brought back to the hospital for prayers. Her father was able to give her directions from the hospital to Monaghan. She stated that he was unwell and weak but not confused at all.

[39] Following the prayers, Mr Hughes and Mr Mallon arrived and Ms McQuaid left the room for about 20 minutes whilst the will was made. That evening her father was unsettled.

The Evidence of the Testamentary Witnesses

[40] Jim Hughes had been the deceased's accountant since 2013. He had advised him on a number of occasions over the years in relation to the making of a will but, to the best of his knowledge, this had not occurred.

[41] On 16 July 2018 he received a call from Kelly McQuaid's phone and spoke to the deceased. He asked Mr Hughes to come to the hospital to discuss the making of a will. Mr Hughes duly attended that evening and a discussion ensued about the liability for inheritance tax and how it could be avoided. It was confirmed that if all assets were left to Briege McQuaid this would attract the spousal exemption but would just be pushing the issue of inheritance tax down the line. Despite this advice, the deceased indicated that he wished to leave everything to his wife. The conversation also concerned two licensed premises which the deceased owned in Dublin and which were leased to his son-in-law Shane McAteer. The deceased stated that he would prefer short leases of three years' duration rather than the seven years which had been proposed. Mr Hughes explained that it would be necessary for a solicitor to be involved to draft the will and it was agreed that contact would be made with Mr Mallon.

[42] The following morning Mr Hughes contacted Mr Mallon and arrangements put in place for the pair to attend the hospital that afternoon. They arrived around 3.40 pm and Briege and Alexandra McQuaid were with the deceased. They both left the room and a discussion followed about assets and tax liabilities. Following that, Mr Hughes left the room for about 10 or 15 minutes and returned when requested to do so by Mr Mallon. The will was then executed and witnessed.

[43] Mr Hughes gave evidence that he had no concerns whatsoever about the deceased's capacity. He was fully aware what he was doing and had there been any doubt, he would not have witnessed the will.

[44] Patrick Mallon explained to the court that he has been a practising solicitor for over 35 years and has been regularly involved in probate matters. He has prepared many hundreds of wills. He had known Terry McQuaid for over 40 years and had been his solicitor for over 20 of those years. He regarded the deceased as a good friend, a man of honesty and integrity who enjoyed his work.

[45] Prior to 2018, he had spoken to the deceased on a number of occasions about making a will. He usually stated that he did not want to pay any tax and was going to leave everything to his wife Briege but no further steps had been taken.

[46] On the morning of 17 July Mr Mallon received a call from Mr Hughes wanting him to attend Craigavon hospital to make the will. Arrangements were made that Mr Hughes would drive after 3pm. In knowledge of what the deceased's wishes were, Mr Mallon had a short will typed which provided that all his estate was to be left to his wife.

[47] On arrival, pleasantries were exchanged and then Briege and Alexandra left the room. A discussion followed about inheritance tax and the spousal exemption and the deceased indicated that was what he wanted to do. The pubs in Dublin were mentioned and then Mr Hughes left the room. In the private discussion between the deceased and his solicitor, the extent of the estate was discussed and his instructions confirmed. The deceased was shown a copy of the draft will and its contents were read to him. Mr Hughes returned to the room and the will was executed and witnessed. It was again read to him and the deceased stated that it was exactly what he wanted.

[48] The deceased explained that he had had a conversation with his wife about where he would like the various properties to go amongst his family members. He was aware that this was no more than a wish list and was not legally binding

[49] That evening Mr Mallon dictated an attendance note in relation to the making of the will and had this typed up.

[50] His evidence was that he, as an experienced solicitor, had no reason whatsoever to doubt the deceased's testamentary capacity and did not consider that he ought to contact medical staff for an opinion.

Consideration

[51] With the exception of Rebecca McQuaid, I am satisfied that all of the witnesses were honest and gave their evidence to the best of their recollection and ability. It will be apparent that the only evidence before the court which cast any doubt on the testamentary capacity of the deceased was:

(i) The evidence of Rebecca McQuaid; and

(ii) Some entries in the medical notes and records.

[52] I have rejected the evidence of Ms McQuaid in its entirety for the reasons outlined. In relation to the medical notes, I am satisfied on the basis of the evidence of Dr Anderson that the episodes of confusion related to the urinary infection from

which the deceased was suffering. I am also satisfied that there was a marked improvement in his condition brought about as a result of the change in medication.

[53] I have no doubt that the deceased enjoyed testamentary capacity when the disputed Will was executed on 17 July 2018. This conclusion is founded on the evidence which the court has received from the remaining family members and from Mr Hughes and Mr Mallon. The deceased's brother and two of his daughters, all regular visitors to him in hospital, had no reason whatsoever to doubt his capacity. Mr Hughes, an experienced accountant, familiar with his client and his affairs would not have taken the steps he did, including witnessing the will unless he was sure that the deceased was fully aware of the importance of the steps which he was taking. Mr Mallon was fully cognisant of the duties placed on a solicitor when dealing with the affairs of an elderly or unwell client. He had also known the deceased most of his life and regarded him as a close friend. I reject any claim made by the plaintiff that Mr Mallon conducted himself in any way which could be described as unprofessional. On the contrary, I am entirely persuaded by his evidence that the deceased had the requisite testamentary capacity at the time the disputed Will was executed by him.

[54] I have therefore concluded that the deceased fully understood:

(i) The effect of his wishes being carried out at his death;

(ii) The extent of his estate; and

(iii) The nature of the claims on him.

[55] I have also found that, in the circumstances, Mr Mallon took all reasonable steps to satisfy himself that the deceased had the requisite testamentary capacity. This is particularly so in light of the long and established relationship between the pair. Whilst the deceased was clearly unwell and hospitalised, there were no other 'red flags' as alluded to by McBride J in *McGarry v Murphy* on the facts of this case. There was no requirement therefore for Mr Mallon to seek any medical opinion and no breach of the so-called 'golden rule.'

[56] I am also satisfied, on the evidence, that the deceased knew and approved of the contents of the disputed Will at the time of execution.

Undue Influence

[57] In the context of the making of a will, a claim of undue influence requires it to be proven, on the balance of probabilities, that the will of the testator was overborne at the time of execution. No presumption of undue influence can be relied upon. Such an allegation, if it is to be made out, requires evidence of actual coercion – see *Re Edwards* [2007] EWHC 1119 (Ch.).

[58] In this case, not one shred of evidence which could conceivably have supported this proposition was adduced. The plaintiff's case in this regard was hopelessly misconceived.

Conclusion

[59] For the reasons outlined I therefore dismiss the plaintiff's claim in relation to the validity of the disputed Will, remove the caveat and admit the will dated 17 July 2018 to proof in solemn form.

[60] I will hear the parties on the question of costs and in relation to directions for the determination of the outstanding claims.