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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL OFFICE

BETWEEN:

PATRICK McCULLAGH, KATHLEEN MORRIS, MARY BROWN AND MARGARET KELLY

Plaintiffs;

and

PATRICK FAHY EXECUTOR OF THE ESTATE OF JOHN FRANCIS McCULLAGH DECEASED AND GERALD NICHOLAS

Defendants.

COGHLIN J

[1] The deceased in this case was John Francis McCullagh, who was born on 1 October 1918 and who died on 2 October 1992. The plaintiffs are a number of relatives of the deceased who seek an order revoking Probate of a Will alleged to have been made by the deceased on 25 September 1990 which was granted to the first defendant, as executor of the deceased's estate, on 12 October 1993 under the terms of which the second defendant was the sole beneficiary.

[2] In the event of such relief being granted, the plaintiffs also seek a declaration setting aside the transfer by the deceased to the second defendant of the deceased's lands comprised in folio number 22455 County Tyrone together with a share in the deceased's lands in folio number 22457 County Tyrone.

[3] The plaintiffs seek both the revocation of Probate of the deceased's Will and the setting aside of the said transfer made by the deceased upon the grounds that, at the time of both transactions, the deceased was of unsound mind and/or acting as a result of duress and undue influence exercised upon him by the second named defendant.

[4] The evidence may be conveniently divided into three general areas:

A. Relatives and acquaintances of the deceased

[5] Raymond Kelly, a nephew of the deceased, gave evidence on behalf of the plaintiffs. Raymond Kelly conceded that he would not have had "… much love for" the second named defendant and he said that when he questioned the deceased as to whether he had done any "deals" with Gerald Nicholas his response had been that he would have "… nothing to do with that thief". However, in cross-examination, Raymond Kelly agreed that, from 1989 onwards, the second named defendant had provided the deceased with company, meals and friendship and that he had helped him on his farm as well as taking him to market, the bank and the church. Raymond Kelly was appointed controller of the deceased's affairs in June of 1992 and he conceded that when Master Hall authorised the second named defendant to dispose of the deceased's sheep he had not raised any doubt about the trustworthiness of the second named defendant.

[6] Kathleen Kelly, Raymond Kelly's wife, agreed with her husband that the deceased's attitude appeared to change during 1990 when he seemed to become very concerned about "people" who were stealing his sheep and his turf. It seems that he acquired a fierce Alsatian dog for protection. After his admission to hospital in July 1990 the deceased went to stay with his sister, Margaret Kelly, where he was visited by Kathleen Kelly who assisted to dress his ulcer. Kathleen said that the relatives were "not happy" that the deceased should go to stay with Mr and Mrs Nicholas who had arrived to collect him on the day of discharge. The deceased stayed with his sister Margaret for approximately 10 days and, according to Kathleen Kelly, during this period he "did not appear to know where he was". He seemed to believe that he was in his own home, expressing a desire to visit the outside toilet, and wanting to go upstairs, despite the fact that his sister's house was a bungalow. After approximately 10 days the deceased left his sister's house and went to stay with Mr and Mrs Nicholas. According to Kathleen Kelly, the deceased had not made any complaint about staying with his sister nor had he informed any of the relatives that he intended to leave. Kathleen Kelly believes that Mr and Mrs Nicholas "lifted" the deceased in their car.

[7] Patrick McCullagh, a brother of the deceased who was 87 years of age at the date of the hearing, manifested a marked hostility towards the second named defendant maintaining that when his brother was drinking the second named defendant was "… stealing anything he could get his hands on". Patrick McCullagh maintained that he knew that the second named defendant was "… a man I could never trust from the first time I saw him."

[8] A somewhat different picture of Mr Nicholas was painted by Michael McCullagh, a cousin of the deceased, who was born in December 1913. Michael McCullagh lives about a quarter of a mile from Mr Nicholas and about 300 yards from the deceased. He described the deceased as being a good farmer who appeared to lose interest and to "give up" when his drinking became worse. Michael McCullagh had known Mr Nicholas all his life and was aware that he helped the deceased about the farm. Michael McCullagh's attitude was that the land belonged to the deceased and he "could do what he liked with it".

[9] Peter McCullagh, who carries on business as a publican/farmer/estate agent in the Plumbridge area knew the deceased whom he considered to be "a character" with a rather "strange outlook on life". He said that the deceased took "an occasional drink" and that if he had consumed too much he would have driven the deceased home. Peter McCullagh was not aware of the deceased having a "drink problem". He described an incident in 1984/86 when he was working on a roof from a ladder and the deceased asked him, successively, to bale his hay, let his ground and sell his ground. I do not think that this incident, in itself, was of any great significance other than, perhaps, as an illustration of the deceased being "a character".

[10] Father Brown, a nephew of the deceased, also gave evidence on behalf of the plaintiffs. Father Brown was ordained in 1970 and, in August 1971, he went to Nigeria where he spent the next 28/29 years, returning home to Carrickmore every other year. Father Brown stated that, of all of his uncles, he was closest to the deceased with whom he had a very good relationship. He described the deceased as being a quiet, shy individual who was not very assertive and who preferred not to express overt disagreement. Father Brown said that when he returned to Northern Ireland in June/July 1990 he learned that the deceased had not been well and he described how, during the course of a visit, the deceased appeared to be harbouring considerable hostility towards the second named defendant. According to Father Brown, the deceased vehemently denied transferring his lands to Mr Nicholas saying that such an arrangement would be like "cutting his own throat". Father Brown said that there was a bad relationship between the McCullaghs and the Nicholas families.

[11] I regret to say that I considered Father Brown to be a thoroughly unimpressive witness whose demeanour, both in and outside the witness box, manifested partisan support for the plaintiffs' cause. Father Brown emphasised the importance of the rural tradition of disposing of lands by will to family members and I gained the clear impression that, upon his return from Nigeria, he was affronted to discover that the deceased appeared to be following a different course. He became aware that the deceased had been regularly visiting the Nicholas farm and, upon occasions, had been staying overnight. Father Brown apparently arranged with the deceased's GP, Dr

Hicks, for the deceased to be seen by a psychiatrist and he was also the source of the history recorded in the nursing care plan at the Tyrone hospital, to which the deceased was admitted on 23 July 1990, to the effect that the deceased had been a "very heavy drinker for years." By contrast, in evidence Father Brown said that he was not aware that the deceased had taken a lot of alcohol and, while he had heard stories, he had no evidence of overindulgence. Father Brown went to Mr Fahy's office in Omagh to inquire whether the deceased had transferred his property to Nicholas and, upon learning that this was the case, he then went to the hospital where he taxed the deceased with what he had done. This was apparently done in the presence of Leonard Kelly, the nephew in whose favour the deceased had originally made a will which he had subsequently torn up as a result of an argument. Father Brown subsequently visited the Ulster Bank in Gortin to inquire about the deceased's account and made arrangements for the deceased to go to the office of Mr Patrick Roche, Solicitor, for the purpose of revoking the transfer. At some stage Father Brown took possession of the deceased's motor vehicle ostensibly because some of the deceased's machinery had been "given to Nicholas". There seems no doubt that the deceased was very angry about the removal of his vehicle by Father Brown and while Mr Nicholas confirmed that Father Brown had telephoned to say that he had the vehicle and that it was not stolen it is right to say that it was never returned to the possession of the deceased.

[12] In an affidavit sworn on 28 September 1990 the deceased referred to an earlier affidavit which he had sworn "… under severe pressure from a nephew who wished to have me try to cancel the said transfer" and Father Brown agreed that he was the nephew, although he denied exerting any such pressure. Despite the fact that Father Brown appears to have been instrumental in organising the complaint which the plaintiffs eventually made against Patrick Roche, I considered it to be of considerable significance that Patrick Roche, who was himself called as a witness by the plaintiffs, said that, when he saw the deceased in November 1990 he asked him about Father Brown because he was worried about the deceased being subject to undue influence by Father Brown. Patrick Roche had the impression that the deceased himself was concerned about being "dominated" by Father Brown.

B. The medical evidence

[13] On 23 April 1990 the deceased was admitted, as an emergency, to the ENT Department of the Tyrone County Hospital suffering from a severe nosebleed. On admission he was noted to be orientated in place and person although not in time and it was also recorded that he was receiving Librium as medication. He was noted to be "slightly confused" on the evening of 23 April and the nursing notes recorded that he was a "poor historian" who "lives alone, but looked after by his cousin". He was again noted to be

confused, at times "pleasantly", on the evenings of 24, 25 and 26 and, on discharge on 27 April it was noted that he remained "disoriented at times."

[14] When the deceased was admitted to the medical department of the Tyrone County Hospital on 23 July 1990 for treatment for his ulcers he was noted to be "orientated in place and person not in time" and the record shows that he was receiving Librium. The hospital received a history from Father Brown that the deceased had been "a very heavy drinker for years" and that he was confused and prone to wandering. Father Brown told the hospital that he had made arrangements with the deceased's GP, Dr Hicks, for the deceased to be examined by a psychiatrist. The nursing notes record that the deceased's leg was swollen and inflamed and that he was restless and confused. It appears from a nursing note of 26 July 1990 that the deceased's family were actively seeking to arrange for him to be admitted to residential accommodation. There are a number of references to the deceased being confused and to his receipt of Librium. The deceased was discharged on 31 July 1990 and it was noted that he was "going home to stay with sister and nephew in the meantime". He remained on 10mgs of Librium at night.

[15] Dr Hicks, the deceased's GP, gave evidence and confirmed that, despite the history given to the hospital by Father Brown, he had not been aware that the deceased suffered any significant problem with alcohol abuse nor had the deceased ever presented at the surgery with psychiatric problems. Dr Hicks stated that on 22 August 1990 he had referred the deceased for assessment to Dr Rea, Consultant Psychiatrist, as a result of contact with Father Brown and family concern about the transfer of the deceased's land. I do not think that it was without significance that, in the course of his referral note, Dr Hicks did not specify any medical reason for referral but observed that "I would appreciate your advice on this difficult situation as I am GP to both parties and unable to resolve the difficulties for John *(a)* to his future and his place in the community *(b)* to his land and its ultimate destination." In cross-examination Dr Hicks conceded that the information about the deceased being confused and tending to wander came from the family and that this referral note had been stimulated by the family's complaints about the way in which the deceased was disposing of his land.

[16] Dr Rea, Consultant Psychiatrist, visited the deceased at the home of the second named defendant on 5 October 1990 for the purpose of carrying out a psychiatric assessment in response to the referral from Dr Hicks. Dr Rea received a history from Mr Nicholas that the deceased had not been prone to episodes of wandering, that he was not forgetful and that he had a good appetite and was able to look after himself and assist Mr Nicholas about the farm. She saw the deceased for approximately 20 minutes by himself during which she interviewed him and conducted some tests. According to Dr Rea, the deceased appeared to be "very happy" living with Mr Nicholas with whom he had moved in when he found it "too lonely on his own". The

deceased was orientated in person and place and was able to give the day and month but not the year. Overall on the Information/Orientation sub-test of the CAPE the deceased scored 11 out of 12 which Dr Rea considered to be a good score. The deceased was able to describe the family members to whom he could leave his land and said that he wished to leave the farm to Mr Nicholas as he was "… the only person who had helped him." Dr Rea came to the conclusion that the deceased did not have any significant cognitive impairment or psychiatric illness and that, under the right circumstances, he had the capacity to make a Will. Her only reservation about the deceased's testamentary capacity was a concern that he was somewhat vulnerable and that, if pressurised, he might be made to sign documents that he did not fully understand. Dr Rea accepted that this would also have been the condition of the deceased 10 days prior to her examination. The deceased himself told Dr Rea that he had not signed a Will although Mr Nicholas said that he had made a Will and, more recently, a relative, who was a priest, had taken him to another solicitor where he had signed another document.

[17] On 21 January 1991 again on referral by Dr Hicks, the deceased was admitted as a voluntary patient to Gransha Hospital for assessment of his mental state. He was again seen by Dr Rea who carried out an examination and interview and, upon this occasion, concluded that the deceased was incapable of managing his own affairs. In concluding her report of the 4 March 1991 Dr Rea noted that:

> "He is unable to live independently now and will either need care from relatives or care in a Residential Home. At present there is disagreement among relatives with regard to his placement in the future. Mr Gerard Nicholas has offered to look after him in his own home but Mrs Kathleen Morris would prefer him to go into a Residential Home. Mr McCullagh, himself, refuses residential care and would like to return to live with Mr Nicholas."

[18] The notes disclose that a meeting took place on 19 February 1991 at which Dr Rea, Mr and Mrs Kelly and the second named defendant were present for the purpose of discussing the deceased's future placement. These notes record that Mr Nicholas spoke privately to Dr Rea indicating that he probably would not look after the deceased if the other relatives got the land but would have to discuss it with his wife. He said that he would have preferred the situation to have been left as it was because he felt that the deceased had been happy living with his family.

C. The legal evidence

[19] The McCullagh family solicitor was Mr John J Roche of Newtownstewart who subsequently died and was succeeded by his son Mr Patrick Roche.

[20] Patrick Roche first encountered the deceased when he came to his office in January 1990. No appointment had been made and to use his own words the deceased simply "came in off the street." The interview lasted less than 5 minutes and Patrick Roche found the deceased to be very incoherent to the extent that he seemed to be talking gibberish. This opinion must be seen in the context of the deceased's speech habits which were recorded in the psychiatric investigation notes on 29 January 1991 in the following terms:

> "Talks quickly, low tone, difficult to make out, poor grammar, talks at length, relevant, coherent if attended to closely."

[21] Patrick Roche told the deceased to leave and he accepted that the deceased "was not best pleased." A short time later the deceased returned to the office and instructed Patrick Roche that he wished to revoke the Will that he had made in favour of Leonard Kelly. At this stage the deceased made his wishes absolutely clear and Patrick Roche had no doubt about his capacity.

[22] In company with Father Brown, the deceased contacted John Roche on 7 August 1990 when the affidavit revoking the instrument of transfer was sworn.

[23] On 13 November 1990 the second named defendant phoned Patrick Roche to make an appointment for the deceased to see him and the deceased attended on the same day. Patrick Roche arranged for a typist to be present and a transcript of the interview was prepared. The transcript was put in evidence and Mr Patrick Roche conceded that, apart from the transcript, he had no specific recollection of anything that was said during the course of the interview. Mr Patrick Roche agreed that the deceased was not physically infirm at the time but he appeared mixed up, contradicted his statements and seemed to be "terribly confused" overall, Patrick Roche thought that the deceased was "worse than he was in January". He agreed that, in November 1990, he believed the deceased and the second named defendant to have been on good terms, that they were working together and that the deceased was happy with his life.

[24] Mr Patrick Fahy, Solicitor, gave evidence on behalf of the defendants and confirmed that he had first seen the deceased in January 1990 when he had taken instructions in relation to the transfer. The deceased had been brought to Mr Fahy's office by the first named defendant but Mr Nicholas left the room before any relevant discussions took place. Mr Fahy spoke to the deceased about the distinction between the affect of a transfer and a Will

made in favour of Mr Nicholas and Mr Fahy's recollection was that, at that time, the deceased was "forthright and open and knew what he wanted to do". Mr Fahy had no trouble in understanding the deceased but he accepted that the deceased had not given him a reason for the transfer of the lands to the second defendant and that it was clear that the result would be a "handsome" benefit for the second named defendant. Mr Fahy was satisfied that, when the deceased left his office in February he was aware that he had executed a transfer of his lands. When the deceased returned to Mr Fahy on 25 September 1990 to make a Will the appointment was made by the second named defendant but Mr Fahy rejected the suggestion that there was any reason to believe that, at any time, the second named defendant exercised undue influence over the deceased. On 25 September 1990, as well as preparing and arranging for the deceased's Will to be executed Mr Fahy also arranged for the deceased to sign an affidavit, ultimately dated 28 September 1990, confirming the original transfer of the lands to the second named defendant and confirming that the revocation signed in the presence of John Roche Solicitor on 7 August 1990, had been produced as a result of "severe pressure from a nephew" this nephew being Father Brown. Again, in September 1990, Mr Fahy maintained that he had no difficulty in understanding or taking instructions from the deceased. His manuscript instructions confirmed that the deceased appreciated that he had signed over his lands to Mr Nicholas, that he was now living with the Nicholas family and was "very happy".

The evidential issue

[25] During January/February 1990 Patrick J Roche entered into correspondence with McNally & Company, Solicitors, Magherafelt with whom the deceased had attended. McNally & Co were inquiring about the whereabouts of the deeds relating to the deceased's lands and, in addition to correspondence, Patrick J Roche spoke to a Mr McGeown of McNally & Co on the telephone at 10.30am on 27 February 1990. Patrick J Roche made a manuscript note of the content of this conversation on a letter, dated 19 February 1990, which his firm had received from McNally & Co. At the time that the note was made Patrick J Roche believed that Mr McGeown was acting as the deceased's solicitor and accordingly in my view must have known that the information which he imparted was subject to professional privilege. Patrick J Roche later incorporated the contents of this note in his instructions to counsel and Mr McNulty QC, on behalf on the plaintiffs, sought to admit the instructions, incorporating the note, into evidence.

[26] In submitting that the note of the conversation with Mr McGeown should be admitted in evidence Mr McNulty QC relied upon Webster v James Chapman & Co (a firm) & Others [1989] 3 All ER 939 arguing that the court should conduct the discretionary balancing exercise set out in the judgment of Scott J at 946-947. In opposing Mr McNulty QC's application Mr Thompson

QC emphasised that Webster v James Chapman & Co was a case concerned with "legal product" privilege and that the more relevant authority, in these circumstances, dealing with legal professional privilege, was the case of Guinness Peat Properties Limited v Fitzroy Robinson Partnership (a firm) [1987] 2 All ER 716.

[27] In Webster v James Chapman & Co Scott J set out his approach in the following terms at pages 946/947:

> "Nothing in these judgments, in my view, detracts from the analysis of the principles underlying Calcraft v Guest and Lord Ashburton v Pape to which I have already referred. If a document has been disclosed, be it by trickery, accident or otherwise, the benefit and protection of legal privilege will have been lost. Secondary evidence of the document will have come into the possession of the other side to the litigation. The question then will be what protection the court should provide given that the document which will have come into the possession of the other side will be confidential and that use of it will be unauthorised. If the document was obviously confidential and had been obtained by trick or by fraud, it is not difficult to see that the balance would be struck in favour of the party entitled to the confidential document. If the document had come into the possession of the other side not through trick or fraud but due to a mistake or carelessness on the part of the party entitled to the document or by his advisors, the balance would be very different from the balance in a fraud case.
>
> Suppose a case where the privileged document has come into the possession of the other side because of carelessness on the part of the party entitled to keep the document confidential and has been read by the other party, or by one of his legal advisors, without realising that a mistake has been made. In such a case the future conduct of the litigation by the other party would often be inhibited or made difficult where he to be required to undertake not to shut out from his mind the contents of the document. It seems to me that it would be thoroughly unfair that the carelessness of one

> party should be allowed to put the other party at a disadvantage.
>
> I do not think that this branch of the law is one where any firm rules as to how the balance should come down should be stated. It must be highly relevant to consider the manner in which the privilege document has come into the possession of the other side. It must be highly relevant to consider the issues in the action and the relevance of the document to those issues. It must be highly relevant to consider whether, under Rules of the Supreme Court, the document ought in one way or another to have been disclosed anyway. All circumstances will have to be taken into account, as it seems to me in deciding how the balance should be struck."

[28] In Webster v James Chapman & Co the dispute related to an engineer's report which had been prepared on behalf of the plaintiff and which was, consequently, appropriately described by Mr Thompson QC as "legal product". In Derby & Company Limited & Others v Weldon & Others (No 8) [1990] 3 All ER 762 Vinelott J, at first instance, at page 772, accepted the view that such a balancing exercise should not be performed where legal professional privilege attached. While the Court of Appeal differed from Vinelott J in respect of certain specific documents, Dillon LJ dealt with the question of the "balancing exercise" in the following very robust terms at page 783:

> "Counsel submits that there should be a balancing exercise in respect of document E. Document E records certain advice given by the plaintiff's solicitors at a time a compromise agreement was entered into which the plaintiffs are claiming to have set aside in the action on grounds of fraud. I see no reason why any such balancing exercise should be carried out. The court does not, so far as privilege documents are concerned, weigh the privilege and consider whether the privilege should outweigh the importance that the document should be before the court at the trial, or the importance that possession of the document and the ability to use it might have for the advocate; and, again, where the privilege is being restored because the inspection was obtained by fraud or by taking advantage of a known mistake,

> there is to my mind no logic at all in qualifying the restoration of the status quo by reference to the importance of the document. `You have taken advantage of an obvious mistake to obtain copies of documents; we will order you to return all the ones that are unimportant but you can keep the ones that are important' would be a nonsensical attitude for the court to adopt."

[29] In the circumstances, it seems to me that these observations of Dillon LJ in Derby & Co Limited v Weldon are applicable and, accordingly, it is not open to me to carry out the suggested balancing exercise.

[30] Subsequent to the hearing the Court of Appeal in England and Wales gave judgement in Al Fayed v Commissioner of Police of the Metropolis(Times 17 June 2002) In that case Lord Justice Clarke reviewed the relevant authorities and helpfully set out the relevant principles. I heard further argument in relation to this decision on 20 September 2002. Both parties took the view that the Al Fayed decision was of no real relevance to the factual situation in this case in which Patrick J Roche accepted that he believed Mr McGeown to be acting as the deceased's solicitor when he imparted the relevant information. Accordingly I reject the application to admit this evidence.

Conclusions

(1) **Testamentary Capacity**

In Banks v Goodfellow [1870] LR 5 QB 549 Cockburn CJ observed, at pages 565:

> "It is essential … that a testator shall understand the nature of his act and its affects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made."

[31] It is important to bear in mind that the law does not call for a perfectly balanced mind nor is a Will to be condemned because a testator was eccentric or foolish or moved by capricious, frivolous, mean or even bad motives. In

this case the plaintiffs assert that the alleged lack of testamentary capacity on the part of the deceased was caused by senile dementia and, in such circumstances, it is particularly important to recall that persons suffering from such a condition may alternate between periods of confusion and lucidity.

[32] On the face of it the Will of 25 September 1990 appears rational in that the deceased was the godfather and second cousin of the second named defendant ,who was also a neighbour who had treated the deceased virtually as one of his family for some time prior to his death. The instructions for this Will, taken by Mr Fahy, recorded that the deceased was living with the second named defendant's family, that he was very happy and that, to use the deceased's expression they were "all one". These instructions also recorded the deceased's dissatisfaction with the way in which he had been treated by other members of his family. The second named defendant said that the deceased told him that his earlier Will had benefited Leonard Kelly but that he wanted to change this document because his relationship with Leonard Kelly had deteriorated. The deceased alleged that Leonard Kelly had sold his lambs but had not furnished him with an account and that Leonard Kelly had not permitted him adequate use of a trailer which he and the deceased had jointly purchased nor had he recouped the deceased his share of the VAT. In the course of giving his evidence, Father Brown confirmed that there had been a disagreement between the deceased and Leonard Kelly in 1989 and that one of the elements had been the deceased's displeasure at what he felt was Leonard Kelly's monopolisation of a jointly purchased trailer. Whatever may have been his first impression of the deceased, Patrick Roche was quite satisfied that the deceased knew perfectly well what he was doing when he returned in January 1990 for the purpose of revoking the May 1970 Will in favour of Leonard Kelly.

[33] Patrick Fahy, Solicitor, had no doubts about the capacity of the deceased during his attendances upon him in January, February and September 1990. Mr Fahy had three occasions upon which to assess the deceased's capacity in circumstances in which he was alerted to the possibility of a challenge.

[34] Dr Hicks, the deceased's GP, accepted that the deceased had never presented at his surgery with any mental problems nor was he aware of any suggestion of alcohol abuse. He agreed that his decision to refer the deceased to Dr Rea was stimulated by complaints from Father Brown and other members of the family relating to the transfer of the deceased's lands. In my opinion the confusion manifested by the deceased during his admission to hospital in July 1990 is likely to have been a result of his sudden admission, the inflammation of his leg and the Librium which was being prescribed. In view of the number of visits that the deceased made to different solicitors and the pressure to which he was subjected by Father Brown, in particular, I do

not consider that the inconsistent references as to whether or not a will had been made constituted evidence of a lack of testamentary capacity.

[35] There is no doubt that the deceased was diagnosed by Dr Rea in February 1991 as suffering from senile dementia and no longer capable of managing his own affairs. However, when Dr Rea saw the deceased at the second named defendant's house on 5 October 1990, some 10 days after he had made the Will with Mr Fahy, she considered that he did have a testamentary capacity although she had some reservation about his vulnerability to pressure if required to sign documents that he "did not fully understand". She considered that it was probable that he would have been in a similar condition 10 days prior to her examination. She confirmed that the deceased was able to talk about his affairs, that he knew the names of those whom he could benefit and that he gave very positive answers to all the questions that she asked. He was fully orientated in time place and person but did not know the year. He achieved a very good score in the memory impairment test that she administered.

[36] Where, as in this case, the Will sought to be established is rational on the face of it there is a presumption that the testator had testamentary capacity and persons challenging such a Will must rebut this presumption by evidence to the contrary (Sutton v Sadler [1857] 3 CB (NS) 87; Symes v Green [1859] 1 SW & TR 401 at 402). It must be established on a balance of probabilities that the testator had testamentary capacity at the time when he executed the Will and, while the evidential burden of proof may shift from one party to another, the legal, or persuasive, burden remains upon the party or parties propounding the Will. Applying these principles to the evidence as a whole I have come to the conclusion that, on the balance of probabilities, the deceased did have testamentary capacity when making the Will of 25 September 1995.

[37] ***(2)*** **Undue influence**

The legal burden of proof of undue influence always lies upon the party by which it is alleged, in this case, the plaintiffs. This is not a case in which the facts suggest that by no stretch of the imagination would the deceased have executed either the Will or the transfer unless undue influence had been applied by the second defendant- see Glanville v Glanville EWHC 2002 1271 (Ch). Legally, undue influence is tantamount to coercion, going well beyond ordinary persuasion or the exercise of ordinary influence by one person upon another. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that undue influence arises. It is not enough to establish that a person has the power unduly to overbear the will of the testator, it is also necessary to prove that, in a particular case, the power was exercised and that it was by means of the exercise of the power that the impugned will has been produced

(Wingrove v Wingrove 11 BD 81). Nor is it sufficient merely to show that the circumstances attending the execution of the Will were consistent with its having been obtained by undue influence. Persuasion and advice do not amount to undue influence as long as the free volition of the testator to accept or reject is not invaded, and it is quite possible to exercise persuasion upon a testator or to make appeals to his feelings of gratitude for past services without amounting to undue influence (Parfitt v Lawless LR 2 P & D 462; Hall v Hall LR 1 P & D 481). On the other hand, where the Will of a testator is very feeble, relatively light pressure may amount to coercion, although it would have little enough effect upon a person in possession of more robust mental health. Persuasion or advice is legitimate but coercion is not: "A testator may be led but not driven." In Craig v Lamoureux [1920] AC 349 Viscount Haldane said, at 357:

> "As was said in the House of Lords when Boyse 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 the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but some thing else which he did not really mean……."

[38] In this case the petitioners have not produced any evidence of threats, inducements or improper conduct on the part of the second named defendant and Mr McNulty QC based himself upon the submission that undue influence should be inferred from the circumstances namely, the gift of his entire assets by an elderly man to a younger neighbour, the fact that the second named defendant had taken the deceased to his appointments with solicitors and the fact that the deceased reposed considerable confidence and trust in the second named defendant volunteering to him details of his business affairs and permitting him to sign cheques on his behalf for heating oil and compensatory grant applications relating to sheep etc. Dr Rea recalled the deceased as being "a mild man" whom she thought was vulnerable to undue pressure and there is no doubt that the deceased did attend John Roche Solicitor on 7 August 1990 signing a deed which purported to revoke the earlier transfer and that, subsequently, in September 1990 he executed a document at Patrick Fahy's office which purported to revoke the revocation. However, it seems to me that the attendance with Mr John Roche Solicitor was probably produced by significant pressure being applied to the deceased

by Father Brown on behalf of the relatives, pressure which the deceased undoubtedly resented and which may well have been a factor in the subsequent making of the Will of the 25 September 1990. In her manuscript note of the meeting at the hospital on 19 February 1991 Dr Rea recorded that the second named defendant had stated that he had looked after the deceased quite adequately but that he went on to say, privately, that he would probably not look after the deceased if the other relatives got the land. She noted that he went on to say that he would have to discuss this with his wife and would have preferred the situation to have been left as it was since he felt that the deceased had been happy. In the course of giving evidence the second named defendant said that he did not recall making these remarks but I am satisfied that he did and I have taken them into account.

[39] Taking into account all the evidence, I am not satisfied that the plaintiffs have discharged the burden of establishing that the Will of 25 September 1990 was made as a consequence of undue influence exercised upon the testator by the second named defendant. Indeed, it seems to me more likely, on a balance of probabilities, that this Will was made as a consequence of the deceased's desire to "tidy up" his affairs by benefiting the second named defendant in return for the assistance, companionship and friendship which he had provided and resentment at the interference and pressures to which he had been subjected as a result of the activities of Father Brown.

[40] Accordingly, the plaintiffs' claim will be dismissed.