

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

JOHN DONAGHEY AND ANNE DONAGHEY AS SOLE EXECUTORS  
OF THE WILL OF MARY DONAGHEY DECEASED

Plaintiffs;

and

JOSEPH McGLONE

Defendant.

NICHOLSON LJ

[1] This is an action brought by the plaintiffs as sole executors of the Will of Mary Donaghey of 19 Church Street, Dromore, Co Tyrone who died on 9 May 2003. The defendant had issued a caveat in the estate of the deceased on 14 November 2003; the plaintiffs issued a Warning to the defendant on 8 December 2003; the defendant entered an Appearance to the plaintiffs' Warning on 5 January 2004.

[2] In the action the issue between the parties has been whether the deceased was of sound mind, memory and understanding and knew and approved of the contents of the Will on 19 April 2003 when the Will was made and executed by her in the presence of a solicitor, Ms Bronwyn Montague and Staff Nurse Molly Hanna at Belvoir Park Hospital, Belfast. The plaintiffs seek an order from the court pronouncing for the Will in solemn form of law.

[3] Mary Donaghey was born on 1 June 1946 and her career as a teacher ended in June 1996 when she retired as Head of the Arts Department at St John's School, Dromore, Co Tyrone. She never married and was an only child, living alone in the family home at 19 Church Street after her parents died.

[4] The court was provided with extensive medical records stretching back over many years. These included her general practitioner's medical notes and records and hospital records from Craigavon Area Hospital, the Erne Hospital, Tyrone County Hospital and Belvoir Park Hospital. The court's attention was directed to all relevant entries.

[5] She was seen at Tyrone County Clinic on 24 April 1996 with a history of recurrent bouts of depression since her early thirties. Her most severe bout had been in 1992, precipitated by the death of her father in 1991, and by her mother suffering a number of minor strokes. She sold her own house in the mid-1990s and moved into her mother's house whom she cared for until her mother's death in 1997. She was discharged from out-patient psychiatric treatment in August 2000 to the care of her own doctor. I am satisfied that her depressive illness had no effect on her testamentary capacity.

[6] Ms Donaghey suffered from abdominal problems for a year or more before her death. She was treated at the Erne Hospital. A diagnosis of Crohn's disease was made and she was operated on at that hospital for a right hemicolectomy in June 2002. A further diagnosis of retroperitoneal fibrosis causing left hydronephrosis was made. She was subsequently operated on at Craigavon Area Hospital and underwent a cystoscopy and insertion of a left JJ stent in October 2002. At this stage suspicions which had already been aroused that her condition was malignant were firmly expressed. She underwent a laparotomy at the beginning of December 2002 but made a good recovery and was discharged home on 13 December 2002. Diagnosis of her condition proved difficult. A carcinoma was suspected but it was thought that there might simply be a benign variant of retro-peritoneal fibrosis. At all times then and thereafter Ms Donaghey was kept fully informed of the medical concerns about her health. She clearly understood these concerns. Arrangements were made for her to have chemotherapy at Belvoir Park Hospital. She was admitted to Tyrone County Hospital on 10 April 2003 where she had a CT brain scan which was clear and transferred to Belvoir Park Hospital for radiotherapy. She had a CT brain scan there which was also clear. The site of the primary disease was never identified but it is clear that her brain was undamaged and that the main problems were in the lumbosacral spine and lower part of her body.

[7] I am satisfied from the evidence of Dr Houston, Consultant Oncologist at Belvoir Park Hospital, and Staff Nurse Hanna who was a member of the team of nurses who looked after Ms Donaghey at the hospital that on 18 April 2002 she was capable of making a Will. She had asked for a Ms McSorley, a solicitor in the firm of Messrs James McNulty & Co who had previously dealt with her affairs, and the staff were aware that a solicitor was expected and that Ms Donaghey was expecting to see a solicitor with a view to making a Will. The Staff Nurse and Dr Houston were taken through all the hospital notes and records and satisfied me that Ms Donaghey was capable of making

a Will, was able to understand what she was doing and was able to execute a Will in the full knowledge of the contents of the Will and of its effects.

[8] As it happened, Ms McSorley was unavailable and Mr James Montague, senior partner in the firm of James McNulty & Co, arranged for his daughter, Bronwyn, then a solicitor in practice with the firm of Messrs McKinty & Wright, to call with Ms Donaghey on the morning of 18 April 2002. Staff Nurse Hanna recalled the arrival of Ms McNulty at the nursing office of the ward in which Ms Donaghey was a patient. She was aware that Ms Donaghey had indicated that she wanted to see a solicitor. She knew that Ms Donaghey was very keen to get her affairs in order. Ms Donaghey had sat out in a chair earlier that morning and was then put back in bed. Mrs Hanna went with Ms Montague to the room where Ms Donaghey was. That morning she had found Ms Donaghey was communicating a lot better than previously, was more talkative and independent. She spoke to Ms Donaghey, explained to her that Ms Montague was a solicitor and then left the room so that Ms Donaghey and Ms Montague could be alone together.

Later that morning she was asked by Ms Montague to witness Ms Donaghey's Will. She was present when Ms Donaghey signed the Will which was witnessed by Ms Montague and herself in each others' presence in the room. The next day Ms Donaghey was ill but stable. The anxiety which she had had about putting her affairs in order had been put to rest and she was happier now that she had dealt with the Will.

In cross-examination she stated that Ms Donaghey was terminally ill when she arrived at the hospital, the toxicity from which she was suffering had to be resolved and was resolved by the morning of 18 April, as the records showed. Ms Donaghey knew all the nurses by name, communicated very intelligently to the nurses and physiotherapist and understood the nature and purpose of the treatment that she was receiving.

She was a very interesting lady to talk to, had had a very interesting past life. Mrs Hanna had been interested in art at school and had hope to go to University to study art history. Ms Donaghey, as an art teacher, had something in common with her and talked a lot about her former pupils. Mrs Hanna got Ms Donaghey's consent before allowing Ms Montague into the room. She was aware that Ms Donaghey was going to make a Will. If she had not been fit to make a Will, she would not have allowed a solicitor to see her.

[9] I do not consider it necessary to set out Dr Houston's evidence. He described Ms Donaghey as a striking lady, remembered discussing her treatment with her. She gave an informed consent to the radiotherapy which was commenced on 18 April. There was nothing in his evidence to the court

which gave me cause for concern as to her testamentary capacity on 18 April 2002.

[10] Ms Bronwyn Montague qualified as a solicitor in 1999. She had been apprenticed to her father's firm, was working with Messrs McKinty and Wright, Solicitors, at the time when she prepared the Will for Ms Donaghey. She described in detail what occurred at the hospital, making use of an attendance note which she made later that day. She did not know Ms Donaghey and introduced herself as the daughter of Jim Montague. Ms Donaghey mentioned that she knew her mother, Anne Marie, who had taught as a substitute teacher at St John's School, Dromore, when Ms Donaghey was head of the Art Department. Ms Montague had not been aware that Ms Donaghey taught at St John's. They talked about a mutual friend, Grainne McGlone, who had been a school teacher in the grammar school to which Ms Montague went and became head teacher. Ms Montague had no difficulty in hearing what Ms Donaghey was saying. She herself did not know John or Anne Donaghey who became the beneficiaries of Ms Donaghey's Will. Ms Donaghey had no difficulty in understanding what Ms Montague was saying to her. At an appropriate time Ms Montague said that she understood that Ms Donaghey had indicated that she wished to make a Will. Ms Donaghey indicated that she did and had been expecting someone. She was asked if she had given thought to what she wanted to do and replied that she had thought a good deal about it. She indicated that she wished to give her house to her cousin John Donaghey. She stated that a mortgage on the house had been cleared. Ms Montague raised the question of the contents of the house with her and she said that she was not quite sure what to do about the contents. A formula was agreed as to how this should be dealt with. She confirmed that she had monies in a bank account at the Ulster Bank, Dromore and indicated that she wished John and Ann Donaghey to be the beneficiaries. She stated that she wished them to be the executors of her Will. There was a discussion about a car in which she indicated that she had had a car but did not have a car now. She began to tire. Ms Montague offered her a drink of water which she took. Ms Montague suggested that she would let her rest for a while and would come back.

Ms Montague left the room for about 20 minutes. She telephoned her father by prior arrangement, as I am satisfied from his evidence and her attendance note. She told him what had happened and they discussed the precise wording of the clause about the contents of the house.

She then went to the end of the corridor, sat down and prepared the draft Will. She went back into Ms Donaghey's room, asked her if she was feeling better, read through the draft slowly with her, let her see it for herself by handing it over to her. She directed Ms Donaghey's attention to the main clauses in the Will. Ms Donaghey expressed no reservations about any part of the Will. Ms Montague went out of the room, found Mrs Hanna and brought

her into the room, indicated to Ms Donaghey where she should sign the Will and then she and Mrs Hanna signed the Will as witnesses.

In cross-examination she said that the note of the attendance which she had made, containing the words "They were the only ones", referred to the fact that Mr and Mrs John Donaghey were the only ones who bothered about Ms Donaghey, according to the testator. She was clear in her own mind that Ms Donaghey was competent to make her Will.

[11] Mr James Montague gave evidence that he had been a solicitor since 1969. Mr John Donaghey was not a client of his firm. In cross-examination he said that a car formed part of Ms Donaghey's estate and that Mr and Mrs John Donaghey lived at 13 O'Neill Terrace, not 13 Church Street, Dromore as stated in the Will.

[12] I accepted the evidence of Ms Montague in its entirety, as I did in so far as Mrs Hanna and Dr Houston were concerned. Ms Donaghey made a mistake about the car and about Mr and Mrs John Donaghey's address. But I attach no weight to these mistakes. They were named as her next-of-kin with the correct address both at Tyrone County Hospital and Belvoir Park Hospital. I am satisfied that she was fully capable of making a Will and had full knowledge and understanding of the contents of the Will, intending them to be the beneficiaries under the Will. I pronounce for the Will in solemn form.