

## THE HIGH COURT

[2011 No. 8319 P]

## IN THE MATTER OF CELINE MURPHY DECEASED WHO DIED ON THE 15TH DAY OF MARCH 2011

## BETWEEN

MAGELLA RIPPINGTON, SHAUN RIPPINGTON AND EDEL BANAHAN

PLAINTIFFS

AND

MICHAEL COX AND MARY BUTLER

DEFENDANTS

**JUDGMENT of Mr. Justice Noonan delivered the 30th day of July, 2015.****The Testatrix**

1. Celine Murphy was born on the 2nd of April, 1960 and died on the 15th of March, 2011 at the age of 50. She was unmarried and had no children. Ms. Murphy resided with her elderly mother, Mrs. Catherine Murphy at "Genazzano", Old Naas Road, Kingswood, Clondalkin, Dublin 22. She predeceased her mother by ten days, the latter having died on the 25th of March, 2011. Mrs. Catherine Murphy was admitted to a nursing home in 2010 and thereafter Ms. Murphy resided alone. She had three siblings, Majella Rippington, the first named plaintiff (Mrs. Rippington), Edel Banahan, the third named plaintiff (Mrs. Banahan) and Andrew Murphy. The second named plaintiff (Mr. Rippington) is the husband of Mrs. Rippington and the executor of the estate of Mrs. Catherine Murphy. Ms. Murphy was a hairdresser and was employed for over 30 years at the David Marshall hair salon in Dublin. She also had private clients she visited in their homes.

2. In the event of Ms. Murphy having died intestate, Mrs. Catherine Murphy would have succeeded to her estate as her daughter's sole next of kin. Under the terms of Mrs. Catherine Murphy's will, her estate falls to be divided equally between her four children.

3. In mid 2010, Ms. Murphy was diagnosed with cervical cancer and she initially came under the care of Dr. Osama Salib, consultant radiation oncologist, at St. Luke's Hospital in Dublin in July, 2010. In early August, 2010, Ms. Murphy was electively admitted to St. Luke's for a course of radiotherapy treatment lasting for some six to seven weeks. Thereafter she was discharged but kept under regular review by Dr. Salib. Ms. Murphy underwent a PET scan on the 22nd of December, 2010 which unfortunately revealed that her cancer had spread and metastasised to her liver, rendering it untreatable. Dr. Salib advised Ms. Murphy of these findings and that he could do nothing further for her as she was now a candidate for palliative care. Although his evidence was that he did not explicitly use the word "terminal" in discussing Ms. Murphy's diagnosis with her, he had no doubt that she fully understood its import.

4. Accordingly, on the 12th of January, 2011, Dr. Salib transferred Ms. Murphy's care to Dr. David Fennelly, consultant medical oncologist at St. Vincent's Private Hospital in Dublin. Dr. Fennelly had previously been involved in Ms. Murphy's care when she was a patient at St. Luke's and underwent a course of chemotherapy at his direction concomitant with the radiotherapy treatment.

5. In February, 2011, Ms. Murphy commenced a course of palliative chemotherapy to which she responded poorly. She became sufficiently symptomatic to require admission on the 8th of February, 2011 and a blood transfusion. This improved her symptoms and she was discharged. However, she again developed fatigue, generalised weakness and very severe diarrhoea leading to her final admission to St. Vincent's Private on the 9th of March, 2011 where she remained until her death six days later.

**The Defendants**

6. The second named defendant (Mrs. Butler) lives at Tuckmilltown, Straffin, County Kildare. This is a relatively short distance away from Ms. Murphy's home in Kingswood and the travel time by car between the two has been established by the engineering evidence to be approximately twelve to thirteen minutes when traffic conditions are favourable and speed limits observed.

7. Mrs. Butler's evidence, which I accept entirely, was that she first met the late Ms. Murphy in 1989. She was able to recall this date because it was not long after the birth of her daughter Michaela in January, 1989. Her sister, Mrs. Ramsayer, was a private client of Ms. Murphy's and introduced Mrs. Butler to Ms. Murphy. I am satisfied from the evidence that Mrs. Butler and Ms. Murphy became close personal friends and saw each other on a very regular, sometimes daily, basis. They were frequent visitors to each other's houses and enjoyed many social outings together.

8. The first defendant, who styles himself a Tridentine Bishop, is also a close personal friend of Mrs. Butler. His evidence was that he was first introduced to Ms. Murphy by Mrs. Butler around the year 2000. He met her on a number of subsequent occasions socially with Mrs. Butler and Ms. Murphy cut his hair on a few occasions. He thought of her as a friend although she was not involved with his church or religious beliefs.

**The Events of the 8th of March, 2011**

9. The 8th of March, 2011 was Shrove or "Pancake" Tuesday. Tuesday was Ms. Murphy's day off work at the hair salon and she used her day off to visit private clients. On that morning, Ms. Murphy had an appointment to visit the Smith family in Dunboyne, County Meath. Ms. Barbara Smith who was present in the family home on that date had particular reason to remember it because unfortunately it was the day her father died. On that day, Ms. Smith travelled with her husband Walter to visit her parents at the family home in Dunboyne. It was intended that Ms. Murphy would cut everyone's hair. Ms. Murphy's sister, Aileen, had been a client in the David Marshall salon and introduced Ms. Murphy to Ms. Smith. Ms. Smith had known Ms. Murphy for some twelve or thirteen years not only on a professional basis but as a friend. They played golf together on occasion and attended social events. Ms. Murphy often stayed for dinner when she visited. She was a guest at Ms. Smith's wedding. Ms. Murphy routinely attended at the Smith house in Dunboyne to cut hair every six to eight weeks.

10. Ms. Smith said that Ms. Murphy frequently spoke about Mrs. Butler whom she described as a great friend and a very nice person.

11. Ms. Smith's evidence was that Ms. Murphy arrived at the Smith house between 9.30 and 10 am. Ms. Smith's father was in bed and was feeling unwell but came down briefly to the kitchen before returning to bed. Ms. Murphy then proceeded to provide haircuts first to Ms. Smith's mother, then her husband Walter and finally Ms. Smith herself. Mr. Smith senior was due to have a haircut but was not well enough on the day.

12. Ms. Smith said that Ms. Murphy was in good form and there was great banter and "craic" particularly with her husband Walter. Ms. Smith was aware that Ms. Murphy had cancer and that her illness had affected the circulation in her fingers particularly badly. Her hands were bandaged. While Ms. Murphy was present, Ms. Smith's mother brought her father to hospital. She said that Ms. Murphy left the house around 2 to 2.15 pm. She arrived and left driving her own car. Ms. Smith was fairly certain about the times involved because her mother returned from the hospital at 2.30 pm and they received news that Mr. Smith senior died at 2.45 pm.

13. Thereafter, it would appear that Ms. Murphy travelled home to Kingswood as the telephone records admitted in evidence show that a call was made from the landline in Kingswood at 17.24 to Mrs. Rippington and the call lasted 53 seconds. Mrs. Rippington claimed that the deceased told her that her car collided with the ditch on the drive home.

14. Evidence was given by Ms. Joanna Butler, Mrs. Butler's daughter. She said that she knew Ms. Murphy all her life and she was a very frequent visitor to their house. Ms. Joanna Butler was herself diagnosed with cervical cancer in April, 2010 and she said that Ms. Murphy, who had the same diagnosis, was extremely supportive to her through a very difficult time in her life. Ms. Joanna Butler was present in the Butler home in Straffan on the 8th of March, 2011 where she was recovering after her recent discharge from hospital following a bout of illness. Her mother had left with her uncle Michael Goonan to travel to Dublin while Joanna Butler was still in bed. Sometime between 2 and 3 pm, the first defendant arrived at the house for a social visit. He was not expected but it was not at all unusual for him to appear unannounced. Joanna Butler made tea and she sat and chatted with the first defendant at the kitchen table.

15. Her evidence was that sometime later, probably between 5 and 6 pm, Ms. Murphy arrived unannounced at the house. She came into the kitchen and all three sat at the kitchen table. Joanna Butler put the kettle on to make some more tea. Ms. Murphy asked her how she was. She said that Ms. Murphy was somewhat tired from her own illness and treatment but otherwise there was nothing unusual about their conversation and as she described Ms. Murphy "she was the Celine I knew".

16. Joanna Butler said that after they were sitting at the kitchen table for about 15 minutes, Ms. Murphy took an envelope out of her handbag and took a document out of the envelope, saying as she did "this is my last will." Ms. Butler was somewhat taken aback by this, being unaware of Ms. Murphy's prognosis, as Ms. Murphy had always appeared to be positive about her illness. In producing the document, Ms. Murphy explained that she could be run over by a bus at any time and she asked Michael Cox and Joanna Butler to witness her signature on the will.

17. Ms. Murphy produced a pen from her bag and signed the will at the kitchen table in the presence of both Michael Cox and Joanna Butler who were also seated at the table at the same time. Having signed the will, Ms. Butler said that Ms. Murphy handed the will to Michael Cox who read it, looked at it and signed it. He then passed it to Joanna Butler who signed it but did not read it. The document was not read out loud by anyone and Joanna Butler said she was unaware of its contents. Ms. Butler's evidence was that while she was signing the document as a witness, Michael Cox said to Ms. Murphy that it needed to be dated so Ms. Butler handed the document back to Ms. Murphy together with the pen and Ms. Murphy dated it after everyone had signed it.

18. Ms. Butler further said that Ms. Murphy had plasters on her fingers but appeared to have no particular difficulty in signing the will. After the will had been signed and dated, Ms. Murphy put it back in the envelope and handed it to Michael Cox saying:

"Can you keep it for three weeks if anything ever happens to me."

Ms. Murphy further said to both Michael Cox and Joanna Butler

"Don't tell anybody about that."

She then handed the envelope to Michael Cox who left it on the kitchen table in front of him. Ms. Murphy then proceeded to finish her tea and leave. Joanna Butler said that Ms. Murphy drove away in her car sometime between 6 and 7 pm although she could not be exact about the time. Her impression was that Ms. Murphy was present in the house for more than half an hour. She said that Michael Cox left shortly after Ms. Murphy bringing the envelope with him. Not long after that, Mrs. Butler arrived home, probably around 7.20 to 7.30 pm. Joanna Butler said that she told her mother that Ms. Murphy had called and asked that Mrs. Butler drop up and visit her. She said nothing to her mother about the will because Ms. Murphy had asked her not to.

19. The first defendant gave evidence which confirmed that of Joanna Butler. He thought he arrived at the house a little later, perhaps between 3 and 3.30 pm and thought that Ms. Murphy arrived some time around 5.30 pm. He emphasised that he could not be particularly accurate about the precise times involved. He confirmed that Ms. Murphy produced an envelope and a document from it saying "this is my last will" and asked him and Joanna Butler to witness her signature. He said that she signed the document in his presence and in Joanna Butler's presence while they were all sitting around the kitchen table. He then looked at it and read it and appended his signature as a witness. Joanna Butler then signed it. Ms. Murphy put the will back in the envelope and handed it to him requesting him not to do anything with it for three weeks if something happened to her. She left shortly after that, the first defendant thought sometime between 6 and 7 pm but he could not be sure. He himself left the house to travel home, approximately 15 minutes after Ms. Murphy left. Although uncertain, he felt that Ms. Murphy was present in the Butler house for something between half and three quarters of an hour.

20. The telephone records put in evidence indicate that Mrs. Rippington made a telephone call from her mobile telephone to the landline at Kingswood at 18.42 and the call lasted 8 minutes and 48 seconds. Thus, it was suggested by the plaintiffs that the maximum period for which Ms. Murphy was absent from her house on the evening of the 8th of March, 2011 was 77 minutes, taking account of the fact that the earlier telephone call at 17.24 was just short of one minute in duration.

21. All of the evidence of journey times and telephone calls was led by the plaintiffs in an effort to demonstrate that Ms. Murphy could not have been present in the Butler house at the time alleged by the defendants. If one were to assume that Ms. Murphy left the house immediately after the earlier telephone call and arrived back immediately before the later one, the evidence of Mr. Brian Cole, chartered engineer, was that taking the quickest route between the two houses and adhering to the speed limit, the round trip took him 22 minutes and 48 seconds. Allowing about a minute or a minute and a half for getting in and out of the car and

leaving/entering the house, that suggests an overall journey time of in or around 25 minutes. Subtracting that from the available 77 minutes leaves a period of 52 minutes during which it is at least theoretically possible that the deceased could have been present in the Butler house between approximately 17.38 and 18.30.

22. This is entirely consistent with the evidence given by Joanna Butler and Michael Cox, which I accept without reservation. Therefore, far from disproving the defendants' evidence with regard to the execution of the will, it merely serves to confirm it.

23. Mrs. Rippington in evidence said that she called to see Ms. Murphy around 7 pm that evening and stayed for one hour. Ms. Murphy said that she nearly did not make it home referring to the collision with the ditch. She parked the car unusually close to the door of the house. She was very fatigued and asked her sister if this was "hitting the floor". She said she wanted to go to bed and asked Mrs. Rippington to feed her cats as she had difficulty opening the tins of cat food due to the condition of her fingers. Ms. Murphy also asked her sister to visit their mother who was having physiotherapy treatment in Peamount Hospital. Apart from that, Mrs. Rippington did not suggest that Ms. Murphy was in any way irrational or incoherent.

24. After Mrs. Rippington left the house, Mrs. Butler arrived shortly thereafter, around 8pm, and stayed with Ms. Murphy for some time. Mr. Goonan was present also.

25. This is independently confirmed by the evidence of Mrs. Kathleen Byrne, Mrs. Rippington's cousin, whom the telephone records show was called by Ms. Murphy at 21.58 and the call duration was 7 minutes and 45 seconds. Mrs. Byrne's evidence was that Ms. Murphy told her that she was at home with Mary Butler and her brother Michael and that they were making pancakes. She invited her to come over but Mrs. Byrne declined.

### **The Will**

26. The will is written on the back of a circular type document from the ICS Building Society, with whom the deceased had an account, which is headed "Important Information Concerning Arrears on Your Account". The will is written in hand on the reverse side in blue ink in the following terms:

*"Gennazzano*

*Kingswood*

*Clondalkin*

*Dublin 22*

*Una*

*This is my last will and testament*

*I am of sound mind I leave all my*

*Posesion's my apartment at*

*8 Browns Court + money + policies +*

*Belonging to my Best Friend*

*Mary Butler who I have named*

*Next o kin I name Bishop Cox my exetor*

[signature of testatrix]

+ most. Rev. Michael Cox DD.

*Joanna Butler*

*8/3/11"*

A copy of the will is annexed to this judgment.

27. The text of the will is written in blue ink similar in colour to the ink of the signatures made with the pen produced by the deceased from her handbag at the kitchen table in the Butler house. The handwriting of the will superficially appears similar in nature to the signature of the deceased which in turn appears similar to her signature on other documents produced in evidence before the court.

28. The original will was produced in court and identified by Michael Cox and Joanna Butler as the document signed by the deceased in their presence and witnessed by their signatures appended in the presence of the deceased and each other.

### **The Medical Evidence**

29. Both Dr. Salib and Dr. Fennelly were called by the plaintiffs to give evidence. During the period when Dr. Salib was in contact with Ms. Murphy from approximately July, 2010 to January, 2011, he saw her on numerous occasions. He described her thinking as being absolutely perfect and that she was not a person capable of being misled by anybody. Her views were very clear and indeed she told him what to do from time to time. He felt she was perfectly logical and not what he would describe as a vulnerable person. Whilst he said she had concerns and anxiety, these focussed around her illness and also around the fact that she was unable to meet her financial obligations due to being out of work as a result of the illness. These obligations appear to have been to the ICS and also Clondalkin Credit Union. She was quite clear in her instructions to Dr. Salib that she did not want any member of her family told of her medical condition. He felt that the stress of her illness did not affect her ability to make decisions. She was always in control and remained independent, free from influence by any party. He said she was a strong willed person who could not be manipulated and he expected that she would have been well able to cope outside the hospital environment. She had no mental health issues as far as he was concerned. He confirmed that in the hospital admission form, the deceased had identified Mrs. Butler as her friend and the person

to be contacted by the hospital if necessary. In other hospital documents and forms, Mrs. Butler is described as the deceased's "next of kin", that information having been provided by Ms. Murphy.

30. Although the deceased had contact with the psycho-oncology department of St. Luke's Hospital, this related to the matters already described i.e. her illness and financial concerns. A number of extracts from Ms. Murphy's chart in St. Luke's Hospital was put in evidence by the plaintiffs without objection. A note from a counsellor in the psycho-oncology department made on the 19th of August, 2010 reads as follows:

*"Current concerns*

*Celine noted her major concerns were financial and family related. At our initial meeting Celine appeared stressed and angry and was on the verge of tears. She described a visit she had just had with her elder sister Majella which was very difficult. Celine noted that she perceived that Majella was out to get the house from her, wasn't interested in how Celine was, couldn't do for her what she asked (e.g. get juice) and "left" her when her nose began to bleed...*

*Impressions*

*Celine appears to be finding family relationships very challenging – particularly strong dynamics with Majella and Mother which seemed filled with anger, resentment, hurt and abandonment?*

*Celine seems to be used to quite a chaotic pace of life and noted little time with herself.*

*Little expansion of impact of diagnosis but referred to anger at sister and mother for "selfishness" that led to her cancer developing (she believes?)..."*

31. A subsequent nursing note made at 18.30 on the 10th of September, 2010 reads as follows:

*"S/B SHO this evening. Celine very clear that no information about her condition is to be given to any family member. Her friend Mary Butler (see front of notes) is her only contact. No family meeting to be arranged. Informed sister (Majella) of these events."*

32. Dr. Fennelly in evidence referred to a previous medical report furnished by him on the 30th of June, 2011 at the request of the defendant's solicitors. In this report, Dr. Fennelly referred to Ms. Murphy's terminal admission to St. Vincent's Private Hospital on the 9th of March, 2011 when she was suffering from extreme fatigue, diarrhoea and general deterioration. She was alert and oriented at that time although was clearly quite fatigued and frail. He concluded his report by saying:

*"There is no indication Celine was, at the time of her admission to hospital incompetent of making a will, clearly I was not present at the time she was making her will. However, based on knowledge of her medical illness, there would not have any obvious reasons for mental impairment at the time of making her will."*

33. In a subsequent medical report dated the 2nd of July, 2013, which appears to have been furnished at the behest of the plaintiffs, Dr. Fennelly said:

*"Her subsequent admission to St. Vincent's Private Hospital was shortly after this on 9.3.11 when she had evidence of extreme fatigue, diarrhoea and general dehydration. Her condition had been further complicated by diffuse digital emboli affecting her fingers which was causing severe pain and discomfort making it difficult for her to undertake basic physical tasks.*

*She required high doses of pain medication and significant sedation to manage the severity of her symptoms. These clearly impacted on her general condition both from a mental and physical perspective.*

*However they were required due to the extensive nature of her disease.*

*It is extremely difficult to testify as to her testament re (sic) capacity at the time of her making her will. However it was undoubtedly was (sic) influenced by the extensive nature of her disease and the extent of medication that she was taking at that time."*

34. Dr. Fennelly in his oral evidence said that at the time Ms. Murphy was admitted to hospital on the 9th of March, as a result of peripheral circulation problems her fingers had become gangrenous, blackened and painful which would have impaired her ability to write. However before her admission to hospital, her analgesics consisted of ibuprofen and paracetamol but no opiates. She also had a prescription for sleeping tablets. He confirmed however that these medications would not have impaired the deceased mentally nor would the course of chemotherapy that she had undergone. He also confirmed that when she was admitted to hospital on the 9th of March, 2011, she was not suffering from any delusions although by that stage would have some difficulty writing. I asked Dr. Fennelly about what appeared to be some inconsistency between the views expressed in his report of the 30th June, 2011 and that of the 2nd of July, 2013. In response to that, he said that it was difficult for him to comment in detail about her testamentary capacity as from a legal perspective he was somewhat unfamiliar with what the requirements of the law were. He did however appear to be of the view that whilst the deceased's post admission medication was very strong and opiate based, the type of medication she was taking before admission ought not have effected her mental capacity.

### **The Pleadings**

35. In their statement of claim, the plaintiffs seek an order condemning the said will of the deceased on three grounds, first that she did not have the capacity to make a will and was not of sound disposing mind, secondly that the will constituted an improvident and unconscionable transaction and thirdly that the will was procured by the undue influence of both defendants. A number of specific allegations are made in the statement of claim settled by junior and senior counsel. These include that the deceased had frequent occasions of memory loss and did not have legal capacity to make a will. It is further alleged that the will was not created by the deceased on the date alleged or at all. Para. 17 of the statement of claim pleads as follows:

*"17. The deceased was seriously and gravely ill on the 8/3/13 and was not in the presence of the first named defendant on the date aforesaid. Further the deceased was not in or at the first named defendant's home in Shinrone County Offaly on the date in question and furthermore was unable, because of her medical condition, to travel to the said premises."*

36. Para. 26 pleads:

"26. The first and second named defendants had placed such pressure on the deceased as to sap her free will and the said influence and pressure applied amounted to duress and undue influence such that the testator could not really dispose of her assets by way of a testamentary disposition."

37. Para. 27 pleads, *inter alia*:

"27. The said purported will was inconsistent with the deceased's previous conduct and of her clear and unambiguous expression of intention and attitude towards her relatives in the disposition of her property on her death.

#### PARTICULARS

...b. The second named defendant purported to befriend the deceased and offered to give her help counselling and assistance during the course of her illness. She offered in particular to help the deceased with her medication and the application of same if it became necessary to have it applied at home.

c. The second named defendant falsely and unconscionable (sic) represented to the deceased that she had special knowledge, skill, training and experience in dealing with care and medication of persons suffering from cervical cancer and that she would provide the said skills to the deceased during the course of her illness including the administration of chemotherapy treatment to her in her home.

d. Further the second named defendant wrongfully and unlawfully represented herself as the next of kin of the deceased to the authorities at St. Luke's Hospital and that St. Vincent's Hospital..."

38. Finally, para. 28 pleads as follows:

"28. The said actions and conduct of the first and second named defendants were carried out and calculated to exercise and did exercise, dominion and a controlling power on the deceased's exhausted and enfeebled intellect and with the intention of subjugating her to the control and manipulation of both defendants."

39. The defendants delivered a defence traversing the various allegations in the statement of claim and further counter claim for an order admitting the said will to probate in solemn form of law together with various ancillary reliefs. The defence also includes a plea to the effect that Mrs. Rippington and Mrs. Banahan have no locus standi to prosecute these proceedings. The basis for that plea is that those plaintiffs have no interest in the estate of the deceased having regard to the fact that the late Mrs. Catherine Murphy succeeded to the estate in its entirety.

#### Other Evidence

40. Mrs. Rippington represented herself at the trial and both she and her husband gave evidence. Mrs. Banahan did not attend the trial. Mrs. Rippington in her evidence sought to undermine her late sister's testamentary capacity. She suggested that the deceased suffered from anger management issues, had attended a psychologist in St. Luke's Hospital and a psychiatrist in the past. She said that Mrs. Butler was an untruthful person who was parasitic and always benefited from her relationships with people. She insisted that Mrs. Butler was not a friend of her late sister but merely an acquaintance. She had never seen Mrs. Butler in her sister's company before 2007. She said that in reality, Mrs. Butler had no time for the deceased whom she (Mrs. Butler) referred to as "a right little bitch".

41. She said that Mrs. Butler befriended the deceased only after her cancer was diagnosed and she got into Ms. Murphy's life purely for the purpose of enriching herself. She referred to two other cases where she alleged Mrs. Butler had befriended people for the purpose of enriching herself. One of those people was a lady in New York who was a cousin of Mrs. Butler's husband and whose will contained a small conditional bequest in favour of Mrs. Butler. It was unclear whether Mrs. Rippington travelled to New York herself to investigate this matter or arranged for local attorneys on her behalf to do so. She also suggested that Mrs. Butler and Michael Cox had coerced the deceased into attending a faith healer in early 2011 against her will. When cross-examined about evidence that would be given by Ms. Una McGurk, a barrister, Mrs. Rippington said that Ms. McGurk, like Mrs. Butler, was not a social friend of the deceased but was merely a client. When asked further in cross-examination about evidence that Ms. Barbara Smith would give, Mrs. Rippington said that Ms. Smith had agreed with her to say anything in evidence that Mrs. Rippington wanted her to say. She further expressed the view that her late sister had not acted of her own free will in the execution of her last will. The foregoing is but a flavour of the many allegations made by Mrs. Rippington in both her evidence and submissions against all and sundry. Ms. Una McGurk said in evidence that she first met Ms. Murphy some 6 to 8 years before her death when she was doing her hair at the David Marshall salon. She had her hair done by Ms. Murphy every week throughout the year and they became friendly and socialised together, particularly in the last year of her life. She said that the deceased often mentioned Mrs. Butler to her whom she described as her best friend and she told Ms. McGurk that she would love her to meet Mrs. Butler. The deceased relied on and trusted Mrs. Butler. Ms. Murphy had gone on a trip to Russia in 2009 where she went sky diving and had a serious accident. Around that time, she discussed various legal matters with Ms. McGurk including making a will. Ms. McGurk recommended a solicitor friend to the deceased and even made an appointment for her with the solicitor. However, in the event, she gave the appointment to Mrs. Rippington who needed to see a solicitor at that time. Ms. McGurk did not subsequently revisit the issue of making a will with the deceased and was unaware that she had in fact made one. She had no doubt that the "Una" referred to in the will was herself.

#### Relevant Legal Principles

42. In *In the matter of the estate of Brian Rhatigan*, deceased [2011] 1 I.R. 639, Laffoy J. considered the principles relevant to proof of a will in solemn form. She followed the long established authority of *Banks v. Goodfellow* [1870] L.R. 5 Q.B. 549 and held that in deciding whether a deceased possessed sound disposing mind at the date of execution of a will, three questions required consideration:

- (a) whether the deceased understood the nature of the act of making a will and its effect;
- (b) whether the deceased understood the extent of the property of which he was disposing; and
- (c) whether the deceased comprehended and appreciated the claims to which he ought to give effect.

She cited with approval the judgment of Hamilton P. in *In Re Glynn deceased* [1990] 2 I.R. 326 (at p. 330) where he said:

"Normally the legal presumption is in favour of the will of a deceased and in favour of the capacity of a testator to dispose of his property and to rebut this presumption, the clearest and most satisfactory evidence is necessary."

43. She also referred with approval (at p. 646) to the judgment of Briggs J. in *In re Key, deceased* [2010] 1 W.L.R. 2020 where he said (at p. 2040):

"The burden of proof in relation to testamentary capacity is subject to the following rules. (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less."

44. On the topic of undue influence, a very useful summary is provided in Spierin's *Succession Act, 1965 and Related Legislation: a Commentary* (4th Ed., Bloomsbury, 2011) where the author says (at para. 537):

"Onus of proof

Costello J. (as he then was) in *In re Kavanagh: Healy v. McGillicuddy and Another* [1978] I.L.R.M. 175 stated:

'No presumption of undue influence...arises in the case of wills and the burden of proving undue influence in relation to wills always rests on the person alleging.'

The above case was cited by Murphy J. in *Lambert and Another v. Lyons and Others* [2010] IEHC 29 as the law as it currently stands in Ireland.

This is also the position in England and Wales. Theobald on Wills states:

"...no presumption of undue influence arises from the existence of a confidential relationship between the donee and the testator."

Williams on Wills offers a reason for the lack of presumption in relation to wills:

"...in the case of wills, these relationships (most of them) are naturally the source and reason of the testator's bounty and no such presumption is made."

On the authorities therefore, there is no room for doubt the onus of proving undue influence rests on the person alleging it. In order to do that one must prove:

- (a) that the person alleged to exert the influence had the power or opportunity to do so;
- (b) That undue influence was in fact exerted;
- (c) That the will was the product of influence."

## Discussion

45. I have alluded above to a number of very specific pleas made by the plaintiffs in their statement of claim delivered on the 7th of December, 2011. The inter partes correspondence put before the court demonstrates that on the 19th of April, 2012, the defendant's solicitors wrote to the plaintiff's solicitors enclosing affidavits of Michael Cox and Joanna Butler dealing with the circumstances of the execution of Ms. Murphy's will. In these affidavits, the deponents swore that the will was executed at the Butler home in Straffan in the presence of the two attesting witnesses who were present together at the same time when they appended their signatures to the will. The affidavits further aver that the will was not written in the presence of the witnesses but was produced by the deceased subsequent to her arrival and that she informed the two witnesses that the document was her will. They further aver that following the execution of the will, the deceased placed it in an envelope and asked Michael Cox to keep it safe and not to release it for three weeks after her death. Joanna Butler further avers in her affidavit that she knew the deceased for many years and in her opinion, the deceased was of sound mind memory and understanding at the time of execution of the will.

46. In addition to those two documents, the defendant's solicitors enclosed medical reports from Dr. Salib and Dr. Fennelly both confirming that in their opinion, when the deceased was under their care she had the mental capacity to make a will.

47. Despite the foregoing, all of the allegations I have referred to above in the statement of claim were persisted in and not withdrawn prior to the commencement of the trial.

48. Furthermore, not a single shred of evidence was produced by the plaintiffs at the trial in support of any of these extremely serious and scandalous allegations. Indeed, more than that, not once in the course of cross-examining the defendants or any of their witnesses did Mrs. Rippington seek to suggest that they had exercised any influence over the deceased, good bad or indifferent, and specifically in relation to the making of her will. Nor did she suggest in cross-examination that the circumstances of the execution of the will were other than as stated by Michael Cox and Joanna Butler despite the clear plea that the deceased could not possibly have made a will in the circumstances alleged thus leading to the inevitable conclusion that either it was a forgery or as a minimum, the attesting witnesses had perjured themselves in their affidavits.

49. Instead, in the course of the trial, Mrs. Rippington in her evidence and submissions engaged in what can only be described as an attempt to assassinate the character of Mrs. Butler. Another example of Mrs. Rippington's failure to spare a thought for the reputation or character of others was her suggestion that Ms. Barbara Smith had apparently agreed to say anything on oath that Mrs. Rippington wanted her to say. Yet, when Ms. Smith gave evidence, which I am satisfied was absolutely truthful in every respect, Mrs. Rippington did not even trouble to put this allegation to her in cross-examination.

50. Rather than engage with the reality of this case, it seems to me that Mrs. Rippington and her co plaintiffs instead chose to indulge in a type of forensic investigation of those she regarded as undesirable contacts with her late sister that would put Sherlock Holmes in the shade. She engaged a consulting engineer to analyse journey times between Kingswood and Straffan in an effort to demonstrate that her sister could not have been there when the defendants said she was. She further requisitioned and analysed

landline and mobile telephone numbers of various persons in pursuit of the same objective. She hired and fired a variety of legal teams, most if not all of whom are the subject of complaint to professional bodies and others. She obtained extensive disclosure of all her late sister's voluminous medical notes in order to have them trawled through by an expert to see if anything could be turned up to prove that her sister did not have the mental capacity to make a will. She investigated and obtained the probate records of a woman from White Plains, New York State, a member of Mrs. Butler's husband's extended family, who left a small conditional bequest to Mrs. Butler. She investigated the probate and estates of at least two other people in this jurisdiction who were said to have been known to Mrs. Butler and favoured her in some way or other never established. The correspondence put before the court indicates a complaint by the defendant's solicitors in a letter of the 13th of March, 2012 arising from Mrs. Rippington travelling to Michael Cox's home town in County Offaly and going from door to door seeking to question and interview friends and family of Michael Cox. This allegedly also included Mrs. Rippington showing the interviewees graphic photographs of her late sister's blackened fingers and toes. She investigated the schedule and movements of a faith healer attended by the deceased in early 2011 to presumably prove some point that was unclear. She obtained correspondence from the ICS Building Society relating to her late sister's financial affairs but was unable to explain how a financial institution was persuaded to disclose documents relating to a client to a legally disinterested third party.

51. At the date of her death, Ms. Murphy owned a BMW jeep which subsequently disappeared. Despite repeated requests from the defendant's solicitors, the plaintiffs steadfastly refused to disclose the whereabouts of this vehicle. When cross-examined about this, Mrs. Rippington finally admitted that she took the vehicle, used it herself for a period of time and then proceeded to sell it. When she was asked how she managed to sell a vehicle that did not belong to her, she said that the registration certificate had her name on it as a result of her applying for a duplicate certificate to be issued in her name. She was unable, or unwilling, to explain how this had been achieved and then sought to justify it by saying that she was owed money.

52. In summary, I found Mrs. Rippington to be domineering, manipulative and an utterly unreliable witness who was prepared to say anything that she felt might serve her purpose. Insofar as any of Mrs. Rippington's evidence conflicted with that of any other witness who gave evidence in the course of the trial, I reject Mrs. Rippington's evidence.

### **Conclusions**

53. I am satisfied from the evidence that Mrs. Butler was a close and valued friend of the late Ms. Murphy for many years and she was so regarded by Ms. Murphy. This emerges not only from the evidence of independent witnesses but from the words of the deceased herself who describes Mrs. Butler in her will as her best friend. It would be idle to speculate on the nature of the relationship between the deceased and the members of her family but suffice is to say that to my mind, there is nothing irrational about the contents of the will of the deceased. The evidence of Ms. McGurk satisfies me that the deceased understood and knew the significance of a will. This is also clear from the evidence of Michael Cox and Joanna Butler regarding their interaction with the deceased on the 8th of March, 2011. The deceased herself declared the document to be her will, was aware that she was required to sign it in the presence of two witnesses and was further aware that the witnesses needed to subscribe to her signature. Further, the terms of the will itself indicate clearly that the deceased was aware of her property and estate. She also understood the desirability of placing the will in the custody of someone who could publish it after her death, which she undoubtedly anticipated in the light of her terminal diagnosis.

54. Because the will contains no attestation clause, due execution cannot be presumed but I am satisfied from the evidence of the attesting witnesses that the will was in fact duly executed in accordance with the requirements of s. 78 of the Succession Act 1965.

55. Since I have determined that the will was duly executed and appears rational on its face, I must presume that the deceased had the requisite capacity to make it. Even in the absence of that presumption, the evidence of the deceased's capacity on the 8th of March, 2011 is all one way. There is an almost continuous catalogue of her movements and interaction with others from 9.30 am until after 10 pm that evening. Nothing in that evidence, indeed that of Mrs. Rippington herself, suggests that the deceased was other than completely lucid, rational and coherent at all times during that day. That evidence includes the account of Ms. Smith who had the opportunity to observe the deceased on a one to one basis over a four to five hour period. The same emerges from the evidence of Michael Cox and Joanna Butler who were alone with the deceased in the kitchen of the Butler house for 30 to 45 minutes. The same can be said of the evidence of Mrs. Butler who spent several hours with the deceased that evening and finally the evidence of Mrs. Byrne who spoke to the deceased for almost eight minutes at around 10 pm.

56. The evidence of Dr. Fennelly regarding the deceased's mental state the next day puts the matter beyond any doubt.

57. For these reasons, I must dismiss the plaintiff's claim and will admit the will to probate in solemn form of law.