THE HIGH COURT

CIRCUIT COURT

EASTERN CIRCUIT COUNTY OF WEXFORD

[2017/14 CAT]

BETWEEN

JOSEPH BUCKLEY, TERESA DOYLE, WILLIAM BUCKLEY

AND ELIZABETH BUCKLEY

PLAINTIFFS/RESPONDENTS

AND

RICHARD COOPER JUNIOR

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Meenan delivered on the 3rd day of May, 2019

Introduction

1. This is an appeal from an order of the Circuit Court, dated 27 January 2017, where the court found that Mr. Michael Buckley ("the deceased") was not of sound disposing mind on the date of execution, 15 March 2011, to make his will and that the purported will was condemned. The Circuit Court further found that the deceased did not have the mental capacity required under s. 77 of the Succession Act 1965 ("the Act of 1965") to render his will valid. It follows from the order of the Circuit Court that the deceased died intestate.

2. The plaintiffs (the respondents in the appeal) are siblings of the deceased.

3. The defendant (the appellant in the appeal) is a nephew of the deceased and resides at Cloheden, Caim, Enniscorthy, County Wexford.

The Deceased

4. The deceased was born on 5 March 1935 and for much of his life he farmed some 54.8 acres and lived in a dwelling house at Caim, Enniscorthy, County Wexford (both the said lands and dwelling house are hereinafter referred to as "the property"). The deceased inherited the property on the death of his mother. He never married, had no issue and lived on his own for many years prior to his death.

5. Towards the end of 2010 the deceased's health began to deteriorate with his initial health problems being urological in nature. He was, however, also suffering from weight loss and general poor health. Further medical investigations revealed him to be suffering from cancer of the bowel with secondary occurrences in the liver and lungs. The prognosis was very poor and it became clear that in February / March 2011 that the deceased was terminally ill.

6. The deceased's cancer caused a bowel obstruction and a transverse loop colostomy was carried out on 10 March 2011 to alleviate this. The Court notes, with surprise, that there is a dispute as to the date on which this operation was carried out. It would appear that this stems from the inadequate state of the medical records. At that stage, the treatment being provided to the defendant was solely palliative in nature.

7. The deceased was unable to eat in the days following the operation and was maintained via intravenous feeding. His pain management was controlled with, inter alia, OxyContin, which is an opioid medication. The nursing notes for the days between 14 – 18 March 2011 indicate a stabilisation, albeit at a low level, in the condition of the deceased. Following a further deterioration on 19 March the deceased died on 20 March 2011.

8. The deceased's will, the subject matter of the within proceedings, was made on 15 March 2011 in the presence of Mr. Jason Dunne, Solicitor of John A. Sinnott and Co., and Mr. Anthony Nolan, Accounts Manager for the same firm. The circumstances under which the will was made and the mental capacity of the deceased will be examined in some detail in the course of this judgment.

9. Under the terms of said will, the deceased left the property, in effect his only asset, to the defendant.

The claim

10. On 30 January 2012 the plaintiffs issued a Succession Law Civil Bill wherein they claim that at the time when the will was made, namely 15 March 2011, the deceased lacked the requisite mental capacity to properly and legally dispose of the property. Furthermore, the plaintiffs allege that the defendant and his family "monopolised visiting hours during the last few weeks of the deceased's life in an effort to exert pressure and influence him, in his weakened state, into disposing of his property to the defendant, and the purported will was obtained by undue influence."

11. The defendant maintains, in his defence, that at the time of execution of the will the deceased had testamentary capacity and denies that the deceased was at the material time under any undue or improper influence. The defendant is consequently seeking an order admitting the will of 15 March 2011 to proof in solemn form of law.

Applicable legal principles

12. Section 77(1) of the Act of 1965 provides:

> "To be valid a will shall be made by a person who —
>
> (a) …

(b) is of sound disposing mind."

13. The test for determining whether a person was "of sound disposing mind" when making a will was set out by Cockburn C.J. in in Banks v. Goodfellow [1870] LR. 5 QB 549 at p. 565 wherein he stated: -

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; 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 the mind had been sound, would not have been made."

14. As to where the burden lies when trying to prove that a deceased was of sound disposing mind, I refer to the judgment of Laffoy J. in *Rhatigan: Scally v Rhatigan* [2011] 1 I.R. 639 wherein at p. 646 she stated: -

> "[22.] On the issue of the burden of proof counsel for the defendant also referred the Court to a recent decision of the High Court of England and Wales, In *re Key, decd.* [2010] EWHC 408 (Ch), 2010 1 WLR 2020 and, in particular, to the following passage in the judgment of Briggs J., at p. 2040:
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> > '[97] 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 nonetheless...'"

15. When considering evidence in relation to testamentary capacity, the Court should have regard to the *golden rule*. In this regard, I refer again to the judgment of Laffoy J. in *Rhatigan* at p. 646-647 where she states: -

> "[24.] By reference to the judgment of Briggs J. In *re Key, decd*. [2010] EWHC 408 (Ch), [2010] 1WLR, 2020, counsel for the defendant submitted that the Court should have regard to what was referred to as the golden rule in that case. In his judgment Briggs J. stated, at pp. 2022 and 2023: -
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> > '[7] The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings ...'
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> [25.] However Briggs J. went on to say at p. 2023: -
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> > 'Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope.'
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> [26.] Those observations, in my view, reflect the law in this jurisdiction. Irrespective of whether the *golden rule* or best practice was followed in a particular case, it is a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities, whether a testator was of sound disposing mind when the testamentary document which is being propounded was executed."

16. I refer also to the decision of the Supreme Court *In re Glynn deceased* [1990] 2 I.R. 326 wherein McCarthy J. stated at p. 340: -

> "A duly attested will carries a presumption of due execution and testamentary capacity."

He continued: -

> "It is a fundamental matter of public policy that a testator's wishes should be carried out, however, at times, bizarre, eccentric or whimsical they may appear to be. One man's whimsy is another man's logic."

17. The other aspect of the plaintiff's claim is an allegation that the defendant and his family exerted "undue influence" on the deceased prior to his death. The onus of proving undue influence rests on the person(s) alleging it occurred, as per Noonan J. in *Rippington v. Cox* [2015] IEHC 516. To establish undue influence it is necessary to prove that:

(i) The person alleged to have exerted the undue influence had the power or opportunity to do so;

(ii) That undue influence was actually exerted;

(iii) That the will was the product of such influence.

18. It is now necessary to consider the evidence that was given to the Court and to apply the legal principles set out above.

Undue influence

19. Various family members, called as witnesses both on behalf of the plaintiffs and the defendant, gave evidence as to the character of the deceased. As referred to earlier, the deceased inherited the property from his mother, who favoured him over other siblings, never married and continued to live alone. It was clear to the Court that working the property was the deceased's life work and evidence was given to the Court as to how members of the family, the defendant in particular, provided assistance to the deceased in this regard. It is of note however that the deceased remained in charge of the farm. After leaving school, the defendant continued his education by studying farming and farming methods. The deceased was more comfortable with traditional farming methods. As such, it was inevitable that there would be some clashes between the two as to what were the best farming methods to be adopted.

20. In late 2010 and early 2011, when the health of the deceased deteriorated and he required hospitalisation, some members of the family took on a carer role by ensuring that the deceased had the necessities for his stay in hospital, attending medical appointments

and liaising with the various doctors. The person who appears to have taken on the bulk of this responsibility was Mrs. Sheila Cooper, sister of the deceased and mother of the defendant. Mr. Dick Cooper, husband to Mrs. Sheila Cooper and father to the defendant, also appears to have adopted a position of responsibility. There is no evidence before the Court that the role taken on by Mr. and Mrs. Cooper was to the exclusion of anybody else.

21. It was pleaded that the defendant and his family "monopolised visiting hours" with the deceased. The evidence, however, falls well short of establishing this as a fact. In any event, in the period between 10 – 11 March 2011, the date of the deceased's transverse loop colostomy, visiting in the hospital was significantly restricted by hospital authorities owing to fears surrounding infection.

22. There was evidence given about a physical altercation said to have occurred between the deceased and the defendant. It appears that this altercation related to financial difficulties which the defendant was experiencing at the time. I think that it is probable that the financial crash which was, at that time, causing difficulties to many families in the country was also affecting the defendant. While the disagreement, whatever precisely it may have been, may have reached the point of a physical confrontation with the deceased I cannot see that such would be a basis for making a claim of undue influence.

23. There was evidence given as to conversations that took place amongst family members when the health of the deceased began to seriously deteriorate as to what was going to happen the property upon his death. In particular, there was evidence before the Court of words spoken at a social event in the home of a family member on 25 – 26 February 2011 which amounted to speculation as to who would inherit the property. I do not think it surprising that such conversations would take place given the importance of the property, both to the deceased and the wider family, and the fact that the deceased had no immediate family of his own.

24. The arrangements for the drafting of the deceased's will were organised by Mrs. Sheila Cooper with the initial arrangement being for the deceased to be seen by a Mr. John Mernagh, Solicitor. Having been made aware that the deceased had undergone a major operation in the preceding days, Mr. Mernagh attended the deceased in the hospital on 12 March 2011 and found him to be in a condition whereby he was, in Mr. Mernagh's opinion, unfit to give instructions for the drawing up of a will. After the departure of Mr. Mernagh, Mr. Dick Cooper made arrangements for Mr. Jason Dunne, Solicitor, to attend with the deceased. Without more, I do not see that these arrangements which the parents of the defendant made to enable the deceased to draw up his will could be considered to be acts of undue influence.

25. Finally, the second named plaintiff, another sister of the deceased, advanced no evidence to substantiate a claim for undue influence.

26. By reason of the foregoing, I reach the conclusion that the evidence given by the plaintiffs fell considerably short of establishing any claim that the will made by the deceased on 15 March 2011 was the product of undue influence.

Testamentary capacity

27. As noted above, there is confusion as to whether the operation which the deceased underwent was conducted on 10 or 11 March 2011. In any event, the deceased was visited by Mr. Mernagh on 12 March 2011 for the purposes of drawing up a will. In his evidence, Mr. Mernagh detailed to the Court that at no stage during his attendance did the deceased engage with him and provided no response to any questions that were put to him. He formed the opinion that the deceased was completely incapable of giving instructions to enable a will to be drawn up. I fully accept the evidence of Mr. Mernagh to the effect that on 12 March 2011 the deceased did not have the requisite mental capacity.

28. On 15 March 2011, following on from a telephone call from Mr. Dick Cooper, Messrs. Dunne and Nolan attended the deceased sometime after 16:00. Though the deceased had been a long-standing client of John A. Sinnot & Co., he was unknown to Mr. Dunne.

29. Mr. Dunne was, of course, fully aware of the requirement that the deceased have the testamentary capacity to give instructions to draw up his will and sign same. It should also be noted that Mr. Dunne is an author of various publications concerning inheritance, succession and the making of wills.

30. Mr. Dunne in his evidence gave a detailed account of his attendance with the deceased on 15 March 2011. He said the deceased was lying almost flat and had very limited movement. Mr. Dunne had with him a document titled "*instruction sheet for will John A. Sinnott & Co.*" This document is in the form of a questionnaire setting out the various matters that should be raised when a person wishes to make a will. As Mr. Dunne had no prior involvement with the deceased he was relying on the accuracy of the information being given to him. The deceased, correctly, gave his date of birth, bank account details and information on the family and working life of the beneficiary (the defendant) including information as to how he lived on a site which the deceased had sold to him. Mr. Dunne gave evidence that he advised the deceased concerning possible Capital Acquisition Tax implications for the defendant. According to Mr. Dunne the deceased understood the tax implications and reiterated his desire that the property be left to the defendant. He maintains that the deceased further directed that any residue (in the event of the defendant pre-deceasing the deceased) be left to Mrs. Sheila Cooper.

31. The "*instruction sheet for a will*" had a section entitled "*testator's mental capacity*". Mr. Dunne recorded "yes" as being the answer to the following questions:

1. Does the testator understand that he is making a will, i.e. disposing of property on death?

2. Does the testator understand the nature and extent of his property/estate?

3. Has the testator considered those persons who might be expected to benefit from his estate and decided whether or not to benefit them?

32. Mr. Nolan, who accompanied Mr. Dunne, gave evidence of a conversation which he had with the deceased whilst the will was being drawn up. This conversation concerned the recent election of a new government and an earthquake in Japan.

33. After he prepared the will, Mr. Dunne read it over to the deceased and asked him whether he approved of the contents. Before the deceased signed the will, Mr. Dunne asked whether any person had put him (the deceased) under pressure either to make a will or to leave the property to the defendant. The deceased answered "no" to both. The deceased signed the will in the presence of two witnesses, Mr. Jason Dunne and Mr. Anthony Nolan, both of whom also signed the document.

34. Mr. Dunne gave evidence what while he was writing up his note of the attendance he had a conversation with the deceased

about the hospital food.

35. Mr. Dunne's note of the attendance was typed up the following day, 16 March 2011.

36. I am satisfied that the evidence given by Mr. Dunne to this Court is both truthful and accurate. Mr. Dunne was fully aware of the legal requirement that the deceased have testamentary capacity and I am satisfied Mr. Dunne acted professionally in reaching his conclusion that the deceased did have such capacity. Further, given that Mr. Dunne had no prior professional involvement with the deceased, he was relying on the deceased for the accuracy of the answers to the various questions.

37. There were however two matters which may indicate a lack of testamentary capacity on the part of the deceased. Firstly, the deceased gave an inaccurate answer to the size of the property in acres. Secondly, the deceased's signature on the will can only be described as being a scrawl or a scribble. As for the deceased's mistake as to the acreage of the property, this was clearly an important error given how central the property was to the life of the deceased. However, given the accuracy of the other information provided and recorded by Mr. Dunne, I do not believe that this mistake was of such an order as to establish a lack of testamentary capacity.

38. As for the signature, I am of the opinion that this was, as explained by Mr. Dunne, as a result of the deceased being physically weak and writing whilst lying on his back with the document being held above him. Such does not indicate a lack of testamentary capacity.

39. Mr. Dunne was criticised by the plaintiffs for not observing the *golden rule*. With regards to this criticism, while it may have been preferable for Mr. Dunne to have obtained an opinion on the deceased's capacity from a medical practitioner prior to drawing up the will, the fact that he did not do so does not mean that the Court is not in a position to decide, on the basis of the evidence available to it, that the deceased had the requisite mental capacity.

40. Both the plaintiff and the defendant called expert medical evidence on the issue of capacity. This evidence relied to a significant extent on the deceased's medical records. Particular attention was paid to the type, dosage and effects of the pain medication being given to the deceased in the context of his weak physical condition.

41. On 15 March 2011 the deceased was prescribed OxyContin at 04:15, Oxynorm 5mg at 06:30 (a faster acting pain killer) and Tramadol (100mg) at 17:30. An analysis of the effects of these drugs and the time over which they are effective were given to the Court by Professor Peter Passmore, Professor of Aging and Geriatric Medicine, on behalf of the defendant. Professor Passmore, though accepting that the painkillers being given to the plaintiff can affect cognitive function, concluded that the levels of these drugs in the deceased's blood would have been very low in or around 16:15 when he was giving instructions as to the contents of will. Professor Passmore was of the opinion that, notwithstanding the nature and type of painkillers involved, the deceased did have testamentary capacity on the evening of 15 March 2011.

42. This view was not shared by Dr. Derek Forde, on behalf of the plaintiffs. Having examined the relevant medical records Dr. Forde noted that the deceased was dehydrated, suffering from potassium imbalance and had elevated urea, which would be indicative of renal failure. Further, having looked at the deceased's signature on the will, Dr. Forde concluded that the deceased was not in a position to understand or sign any kind of legal documents. However, when asked about the information given by the deceased to Mr. Dunne, as recorded in the will instruction sheet, Dr. Forde expressed surprise that the deceased was able to give this information.

43. As referred to earlier, the deceased had himself inherited the property from his mother ahead of his siblings. I am satisfied, having heard evidence on the character of the deceased, that he attached enormous importance to the property. Further, the defendant submitted that breaking up the property would have made no economic sense. Taking all this together, it seems to me that it was entirely logical and rational for the deceased to bequeath the property in its entirety to one member of the family. As the defendant appears to have had more involvement in agricultural matters than other members of the family it would seem to me that it was rational that he be the one chosen by the deceased to inherit the property.

44. Therefore, I reach the conclusion that on the evening on 15 March 2011 the deceased had testamentary capacity having regard to the following:

> (i) Though I accept the evidence of Mr. Murnagh, Solicitor, that the deceased did not have testamentary capacity on 12 March 2011 the situation had clearly changed by 15 March 2011. This is clear from the evidence of Mr. Dunne, Solicitor, of his attendance with the deceased which was recorded in a written memorandum prepared the following day.
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> (ii) Notwithstanding the deceased's mistake as to the acreage of the property and the nature of his signature, the conversations had and information given by the deceased to Mr. Dunne were of such content and detail as would lead me to conclude that the deceased had the necessary testamentary capacity.
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> (iii) Though under the effects of opioid based painkillers and in a severely weakened physical state, I am satisfied, from the evidence of Professor Passmore that the levels of these drugs present in the deceased's blood system on the evening of 15 March 2011 were low and did not adversely affect his testamentary capacity.
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> (iv) That the decision by the deceased to bequeath the property in its entirety to the defendant alone was rational.

Conclusion

45. By reason of the foregoing, I will reverse the decision of the Circuit Court and will hear counsel as to the appropriate order to be made.