Neutral Citation Number: [2006] IEHC 336

THE HIGH COURT

[2004 No. 10691 P]

BETWEEN

ANASTASIA ELLIOT AND DAVID ELLIOT

PLAINTIFFS

AND
ROBERT STAMP AND BRIDIE STAMP

DEFENDANTS

Judgment of Mr. Justice Roderick Murphy delivered on the 7th day of November 2006.

1. Nature of Claim
The plaintiffs are the sister and nephew of Nicholas Roche, deceased (the Deceased). The second named plaintiff, the son of the first named plaintiff, pursuant to a power of attorney granted on 6th April 2004, acts on her behalf. The court acceded to an application amending the pleadings to reflect the position of the second named plaintiff.

Proceedings began by way of summons dated 13th July 2004, wherein the plaintiff claimed an order refusing probate of "the pretended will" purportedly executed on or about 20th February 2003; a declaration that the said will was not validly executed; that the testator was not of sound disposing mind and, in the alternative, a declaration that the will was procured by acts of undue influence brought to bear upon the Deceased by the defendants.

The first named defendant is the principal beneficiary and was appointed sole executor under the purported will. The second named defendant is his mother and the sister of the Deceased.

The Deceased, late of Ballyvalden, Blackwater, Co. Wexford, died a bachelor without issue on or about 3rd May, 2003. His assets include a residential farm, credit union deposits and cash.

Certain particulars were given in the statement of claim regarding alleged dominion and control, and the involvement of the defendants, and in particular the first named defendant in the procuring of a solicitor for the purposes of preparing and executing the will which, the particulars continued, was not the product of the free and voluntary act of the Deceased but rather was the result of requests and/or demands made of the Deceased by the defendants and either of them. It was further stated that the Deceased was in fear of not complying with the said requests.

The undated Defence denied that the will was a pretended will, was void. The act was a free act of the testator who made the will with full capacity, competence and understanding. The Deceased testator independently drew up his will over a two day period between 19th and 20th February with the advice and assistance of a solicitor, and without any interference, duress, or influence, undue or otherwise. The Deceased was of sound disposing mind at the date of the execution of the will which was drawn up in accordance with the provisions of the Succession Act 1965 (the Act). The will contained many and numerous legacies and bequests in accordance with the testator's detailed instructions to his solicitor.

By Reply delivered 31st May 2005, issue was joined. It was denied that the pretended will was the free act of the testator or that he made the will with full capacity, competence and understanding. It was further denied that he drew up his pretended will independently with the advice and assurance of a solicitor and without any interference, duress or influence. Particulars were given that the first named defendant (inadvertently referred to as the second named defendant in the reply) was actively involved in the procuring of the execution of the said will and repeatedly liaised with the solicitor drafting same, both in relation to its drafting up and its execution. He gave information to the instructing solicitor in relation to the tax advantage of the disposition of the Deceased's farm.

By way of special reply the plaintiffs put the defendants on strict proof that the Deceased was of sound disposing mind on the date of the execution of the will and that the will was drawn up in accordance with the provisions of the Act. It was denied that the will contained many and/or numerous legacies and bequests in accordance with the testator's detailed instructions.

Notice for particulars were raised and replied to but do not appear to have furthered the matter significantly.

2. Motion to Strike out Proceedings
By notice of motion dated 30th January 2006, the defendants applied for an order striking out the plaintiffs' claim for failure to comply with a request for further particulars and on the grounds that the plaintiffs' claim disclosed no reasonable cause of action etc., there being no evidence to support the plaintiffs' claim of undue influence on the testator and the plaintiffs' having failed to provide same in the replies to particulars. The motion was grounded on the affidavit of the first named defendant exhibiting medical reports. The second named plaintiff, referring to his appointment as attorney of the first named plaintiff, denied responding to the particulars and said that the pretended will was prepared by a non-legally qualified person, was procured in haste and that the statement of claim and reply raised the following issues as valid grounds for challenging the will -

Issues of:

the due execution of the will;

lack of capacity; and

undue influence.

There were further affidavits from Dick Parle, a beneficiary under the will and neighbour and friend of the Deceased; of Mrs. Bridie Stamp, the second named defendant and of Tom Murphy, legal executive in the firm of M.J. O'Connor & Company as to his role in taking instructions, drafting and witnessing the will when executed.

By consent order made by Quirke J. on 23rd June 2006, it was ordered that the application be refused and that the costs of the motion be reserved to the hearing of the action.

The court directed that the issues to be determined were as follows:

1. Whether will was executed in accordance with provisions of the Succession Act 1965;

2. Whether testator Nicholas Roche was of sound disposing mind; and

3. Whether will was procured by duress or influence of the defendants or either of them.

3. Evidence on behalf of the Plaintiff
The court has carefully considered the oral evidence of the following nine witnesses:

3.1 Anastasia Elliot: evidence on commission
The plaintiff gave evidence and commission before Mr. Hugh Byrne, B.L. on 26th September 2006, in the Royal Hospital in Donnybrook. Mrs. Elliot, the plaintiff, is aged eighty one, a widow with six boys. The Deceased was the youngest and was her only brother. He stayed on the family farm. She had been, on occasions, in the 1970s at the farm tidying, cooking and paying bills. The testator was not good at school and could not read. She did not see him when he was with her sister Bridie, the second named defendant.

When she was in the Royal Hospital in Donnybrook, she could not go down but she knew he had made a will when he died. He did not like anything about wills and was thinking of getting married.

Her boys used to go down in summer and were always there helping. There were others there, but not as much as her boys. Her brother was very quiet and simple. She doubted he would have understood. He could be bullied, if afraid and was not strong willed. While he was slow on the uptake she imagined that he was all right in his head.

She said the last time she had been down on the farm was in the 1970s when she used to go down once a week but she had not seen him for a long time.

Her brother rang her not long before he died, he was in good form and never complained about his health.

She said that she wanted to start this case.

3.2 Evidence of David Elliot
David Elliot, the attorney of the plaintiff and nephew of the testator, had visited his uncle in September 2002, and noted that he had deteriorated from his visits from two years previously. He had severe arthritis and looked as if he were dying. He was shocked that he would have made a will. He was aware that his uncle had sold a site and used a solicitor but did not know who it was at some time previously. He was of the opinion that he would be vulnerable and believed that the first named defendant had influenced him while he lived with the second named defendant from Christmas 2002, until he went into hospital on 21st February, the day after he made the will. It was not the will his uncle would have made – he would not have known the Folio number of his farm.

In cross-examination he agreed that the first named defendant resided close to his uncle. He did not know the extent to which the defendants had assisted the Deceased. He agreed that his mother, the first named plaintiff had gone to live with the second named defendant for twelve to fourteen months after her husband died and before she got a stroke and then stayed for two weeks with him, before she eventually went into the Royal Hospital in Donnybrook, Dublin.

He agreed that his uncle went to Wexford Hospital on 21st of February 2003, and thereafter to St. John's Nursing Home. He returned to his own house on 7th April 2003, expecting home help which did not materialise until shortly before he agreed to go to Lawson Nursing Home on 25th April 2003.

He said the Deceased would not have made a will. He could not read nor write though he could sign his name. The witness said that he was suspicious that Mr. Murphy, the legal executive, and Robert Stamp, the first named defendant had gone together to make the will. He said that this was not his uncle's (the Deceased's) will.

He did not see his uncle after he had made the will.

He agreed that following the testator's death on 3rd May 2003, he entered a caveat on 21st August of that year and was granted a Power of Attorney from his mother on 6th April 2004.

3.3 Evidence of Mary Roche
Mary Roche, the sister of Anastasia, and Bridie, and unmarried sister of the Deceased, had told the court that her father had died in 1950 and her mother in 1970. In 1974 her sister Madeline had died. There were four surviving children including the Deceased, herself and the plaintiff and the second named defendant.

She described her brother as not being well off, quiet, dyslexic and not being good on the land. She was told by her sister Bridie (the second named defendant) that he had made a will in February, and she did not think any more about it. She had not discussed it with him. She had visited him, but not very often. When she did, he was not too bad, sitting by the fire, but kept getting worse. She was told that after he had made the will he went to hospital. He had made a great – a tremendous – recovery and went for physiotherapy – he had made a good recovery. He then went to Lawson Nursing Home and died shortly afterwards. It was very sad.

He had been close with all (of his sisters) but closer to the first named plaintiff.

She did not believe that he could make a detailed will as he could not read or write.

In cross-examination she said she did not remember signing anything in 1993 when the farm was put in her brother's name. She said she had objected so that her brother would be safeguarded and that someone else would not get the deed. She had not signed anything. He owned the farm, but she had cleared the debt on the farm.

She again referred to her brother having been brought to physiotherapy by her nephew, the second named defendant, and having made a good recovery. Robert, the second named defendant, had brought him for physiotherapy and had also brought her to see her sister Anastasia in Dublin.

3.4 Evidence of Niall Elliot

Mr. Elliot, an older son of Anastasia has lived in Toronto since 1990. He met his uncle on 7th October 2002, having been in Ireland two years before that.

He remembers always having been with his uncle holidaying on the Deceased's farm over the summer before he went abroad and taking part in farm duties. He had an interest in old vintage buses and rent was being paid to his uncle for keeping them in an old caravan park near his uncle's house.

The Deceased could neither read nor write but was young at heart. He saw him for three weeks in September/October 2002 on the farm and noted that he had deteriorated. When he was home he stayed in Enniskerry. He vaguely remembered the farm being changed to his uncle's name and remembered his uncle asking him where to put money. He recommended the credit union, but did not know what money his uncle had.

If his uncle had made a will, his farm would have gone to his three sisters. He was very fair. Robert Stamp, the first named defendant, had contacted him regarding the vehicles remaining on the Deceased's property.

He was not at his uncle's funeral. He denied that he was well founded as was indicated in the instructions taken by Mr. Murphy, the legal executive.

In cross-examination he referred to his uncle being registered as the owner of the farm on 11th March 1993. His uncle would not have necessarily wanted a young male to succeed him. He denied ringing Robert, the first named defendant, in February 2003, to ask if his uncle had made a will.

He agreed that he was in Canada, that David his brother lived in Dublin, while Robert Stamp lived nearby.

4. Evidence of the Defendants

4.1 Tom Murphy
Mr. Murphy, a legal executive was employed by M.J. O'Connor, solicitors of Waterford and Wexford for thirty seven years and was the senior legal executive there with responsibility for conveyancing and wills. That firm had seven partners, several solicitors and legal executives. A qualified solicitor dealt with administration.

He had ascertained from the records of his office that Nicholas Roche, the Deceased, was a client of the firm from November 1992 and that he had dealings with regard to the granting of a right of way on the farm having previously dealt with wayleaves and the sale of a site. In 1992 he became the registered owner of Folio 6773 by way of a s. 49 application. In September, 2002 Mr. Roche had instructed him with regard to a wayleave over the land and further instructed him that this was not to affect his right to apply for planning permission.

On Monday, 17th February 2003, his office was phoned by Robert Stamp, the first named defendant, and the call was transferred to him, requesting him to attend at Mr. Stamp's mother's residence to take instructions from Mr. Roche.

On Wednesday, 19th he attended on Mr. Roche in the afternoon and interviewed him while he was sitting in the parlour. There was no one else present, though the first and second named defendants were in the house, having brought him in to meet Mr. Roche. He attended with him for some one and a half to two hours. Mr. Roche seemed very clear minded and gave him details of family members, of assets and of his wishes. He had already details of Folio 6773. Mr. Roche gave him details of cash he held and was fully aware of his assets. He did not have any paper with him. His instructions "came from his head".

The instructions were used to draft a will and he had said that it would take a day or two and he would come back. However the next day, 20th February 2002, Mr. Stamp rang him to say that Mr. Roche had got a bed in hospital for which he had been waiting and asked if Mr. Murphy could come that day. Mr. Murphy said in evidence that he preferred to see clients at home. He found Mr. Roche in the parlour on his own. He read the will over to him carefully. He raised the issue of tax on the farm bequest and asked for permission to discuss the matter with Mr. Stamp. Mr. Roche agreed. Afterwards Mr. Murphy asked Mr. Stamp to leave the room and continued with Mr. Roche. No changes were made to the will nor did Mr. Stamp get any other benefit.

Mr. Murphy's wife, who also gave evidence, had come with him and was brought in from the waiting car to witness Mr. Roche's signature after her husband had witnessed it.

Under cross-examination, Mr. Murphy agreed that there were some discrepancies between the instructions and the drafting of the will. It was the residue that was made subject to the death and funeral expenses rather than the bequest of the farm to the first named defendant as per the instructions. Mr. Murphy did not explain to the testator that this change had been made. Moreover, a provision for abatement in the event that the estate not having sufficient funds to pay the pecuniary legacies was not included. Mr. Murphy was agreed that the wording of references to the Stamp family differed from those to the Elliot's.

Mr. Murphy also agreed that the will had been drafted by him. No other solicitor in his firm had dealt with it. He understood there was an urgency as the testator had been scheduled to go to hospital. In his opinion there was no need for any medical examination as the testator was in his own environment and was clear minded.

He also agreed that Mr. Robert Stamp was an accountant and as such had a relationship with the firm M.J. O'Connor.

He agreed that Robert Stamp had been told of the bequest and the implications for tax before the will was executed. Mr. Murphy agreed that Mr. Stamp had played a significant role in notifying Mr. Murphy of Mr. Roche's desire to make a will.

4.2 The court also heard the evidence of Mrs. Mary Murphy, the other attesting witness, who said that she found Mr. Roche sitting in his chair quite bright and smiling and she saw him signing, a little shakily, and then Mr. Murphy signed and she signed and they had no other dealings with Mr Roche.

4.3 Evidence of Bridie Stamp
Mrs. Stamp, the second named defendant, referred to her brother as a quiet, retiring person with whom she had a good relationship. Over the years he used to stay overnight with her on occasions. He stayed with her from Christmas until February 2003.

She referred to her five children and to Robert, the first named plaintiff, helping her brother. She referred to the plaintiff staying with her for four months, three and a half years ago, before she went to the Royal Hospital. There was a good relationship between them

and they had no dispute.

When the Deceased had stayed with her at Christmas 2002, he had developed a pain and Robert brought him to a new doctor. They were told that his arthritis could be fatal. He stayed for about seven weeks until 21st February. The witness herself had an operation on 19th March and afterwards she went to her daughter Elizabeth for three weeks to convalesce.

She remembered Tom Murphy, legal executive, coming to the home. She had previously told her brother that he should fix up his affairs but had no conversation with him before Mr. Murphy came. She did not know of his plans. Anna, her daughter and Robert's sister, helped her washing clothes and bed linen for her brother. Her brother needed lifting, which was done by Robert.

When he came out of hospital he was in good form. He was quite clever despite lack of schooling. He was intelligent and there was no drawback in relation to his business. No one discussed his affairs, or ever forced him. It was no surprise to her that the legal executive came. She did not know that he would leave the farm to Robert, but had expected it.

In cross-examination, she agreed that her younger son, Nicholas, was a farmer. Robert would help her brother in anything he could. She agreed that Robert was on many occasions alone with her brother. Robert may have helped to dress him. Before the Deceased came to them for Christmas he did his own shopping. Afterwards she looked after him.

4.4 Evidence of neighbours
4.4.1 Mr. Aidan Murphy, bachelor, neighbour and friend used to visit the Deceased every Thursday; saw him a month before he went to hospital and noted that he did not like hospital or doctors and had put it off.

Before that, the Deceased came every Thursday night to his home. After he returned from hospital Mr. Murphy visited him three weeks before he died.

He noted that Robert, the first named defendant, was his favourite nephew: he always spoke of Robert, though Mr. Murphy did not know him. He knew his brother Jim alright. He did not see anything wrong with what the Deceased was doing with his farm and agreed that he was competent. Nobody would bully him. He got opinions from others before he acted.

When he saw him three weeks before he died he said that he had fixed his affairs and gave him €50, Mr. Murphy said that "there were no flies on him" and he replied that "if there were, they were all dead ones". He missed him terribly.

In cross-examination he said that nobody had asked him to give evidence before he got the solicitor's letter requesting that he attend on 5th October 2006.

4.4.2 Mr. Richard Parle
Mr. Parle was a friend and neighbour and a widower and had received a bequest in the will. He regarded the Deceased as gentle and honest with great memory. He used to come down to his place on Mondays. He saw him when he came back from St. John's in February, when he went to the Deceased's home. The Deceased was not very good and was complaining of pains in his hands. Mentally he was very clear and wanted to know what was going on. He saw him the day before he died and he was very good – much better – sitting in the day room of the nursing home in a chair. He was able to get up. The witness was surprised that he had died the following day. He said that he was not bullied, he did what he wanted to do. He had met Robert Stamp when they were testing cattle with the Deceased's sister Mary and he also knew the Deceased's sister Anastasia and his nephew Jim Stamp.

In cross-examination he said he did not know the Elliot family as he had been working in the United Kingdom and he was only back from 1994 onwards.

4.5 Evidence of Robert Stamp
Mr. Stamp, an accountant, the son of Bridie, the second named defendant married with three children, all boys. From 1987 he saw a lot of his uncle in relation to cattle, reading his post and paying his bills. Since 1992 he saw him on every Wednesday and Friday night and the Deceased relied on him. He also helped Mary Roche bringing in the hay. He drove the Deceased and his aunts to see the plaintiff in the Royal Hospital every second Sunday.

On Christmas night 2002, he was not well. His doctor had him on painkillers and he told the witness that he would like to change doctors. Mr. Stamp arranged that he meet Dr. Curtis on 3rd January 2003. He was referred to Wexford Hospital for x-rays.

He stayed with his mother, the second named defendant until Dr. Curtin got him to Wexford Hospital under Dr. Riordan, consultant. He had previously stayed with the witness's mother for a month in 2001, while the witness looked after his stock, and dogs and cats.

On Sunday evening 16th February 2002, he said he wanted to get a solicitor out. The following day the witness contacted M.J. O'Connor's. Mr. Murphy came out that evening (17th February).

On Wednesday 19th February, he had asked Mr. Murphy to come as his uncle had got a bed in Wexford Hospital for the following day. He came out at dinner time to dress his uncle and to prepare him for the visit with Mr. Murphy. He was not present when his uncle was with Mr. Murphy. He did not know who was going to get what other than Mr. Murphy had told him that his uncle wished to leave him land and expressed a concern about tax. He did not tell anyone. On Friday 21st February, he took him into hospital at 2.00 pm. He said that he never raised his voice to his uncle nor did not pressurise him. He was in hospital for a short time and then came home for approximately three weeks and was to have had home-help, which did not materialise until three days before he went into care.

During that period he brought him to have physiotherapy in St. John's.

During that period friends visited him - he did not visit anyone. A friend, Jim Casey, suggested a nursing home. The witness rang six, and his uncle agreed and was happy with moving into Lawson Nursing Home which was the cheapest. On Friday 5th April, he settled in remarkably and was a good patient and happy. The witness visited him every night in Lawson. On Friday 2nd May, he had not seen him so well. He was joking, chatty and relaxed. He died the following day.

He said that Niall Elliot, his cousin had telephoned him from Canada on 5th April 2003, to ask if his uncle had made a will.

He said he was surprised on the day that he had got the farm. His uncle had never indicated one iota to whom he would give the farm. He found out after his death that the Deceased had gated a right of way to Jim Casey.

When he left for hospital, his uncle, the Deceased, had asked him to take the cash which was in jam jars in the house and put it into his car for safe keeping.

On cross-examination he said that it had occurred at his uncle's request. That is what happened, it was not businesslike. His uncle was a quiet and simple, retiring man. He agreed that such people are susceptible to suggestions, but that his uncle was his own man. He acknowledged that his uncle had agreed with him to go to Dr. Curtis. He had quite a degree of contact with him, he helped to dress him during the six week period in his mother's house, but acknowledged that his mother had said that her brother was capable of dressing himself.

He agreed that when he chose the nursing home that the witness knew that he was a beneficiary. However he said that the deciding factor for his uncle was that it was cheaper.

He said he did contact Mr. Murphy with regard to the will. He agreed that the Deceased was then dependent. His sister Anna lived nearby. He agreed that his uncle made his will after the diagnosis of the illness being fatal.

He said that his uncle had asked for Mr. Murphy, he did know whether he was a solicitor or not.

He said that when it was he knew that the Deceased was going into hospital that his mother asked him to ring Mr. Murphy. He said that he was there before and after Mr. Murphy's visit and was surprised that (the first visit) lasted a couple of hours. He did not supply any information to his uncle.

His aunts had been very good to his uncle, paying his debts, helping with the harvest and looking after him, even though they were much older than he was.

He agreed that his aunt Anastasia Elliot, the plaintiff, was entitled to enquire into the circumstances of the will and to deal with it with suspicion. There was no correlation between his uncle's intelligence and his illiteracy.

He had initiated the motion to strike out for want of replies to particulars. As far as he was concerned the will was a valid one, drafted by a firm of solicitors. He agreed that one could have influence over another without raising one's voice. However he did not pressurise his uncle. He did not develop a very close relationship such as to cause a dependency.

5. Decision of the Court
He agreed that he played a significant role in the will coming into being and that he knew of the benefit before the will was executed.

The court finds that Mr. Stamp gave honest answers, on occasions against his own interest; and did spend considerable time looking after his uncle personally and with regard to his affairs. In the circumstances it seems to the court that the role played with regard to the contacting of the solicitors and in particular the legal executive, Mr. Murphy, was at the behest of the testator. Whatever the views of the testator's sister with regard to him not countenancing the making of a will, it is clear that due to the circumstances of his illness and, indeed, dependency on his sister, the second named defendant, and on the diagnosis of Dr. Curtis and, indeed, the promptings of his sister in that regard, that the Deceased did decide, without undue or any pressure, to ask Mr. Stamp to arrange that Mr. Murphy visit him for the purpose of instructions.

Having regard to the exhibits in Mr. Murphy's affidavit of the instructions given, it seems to this court that, other than supplying the Folio number of his farm that the information emanated from the testator and that the detailed instructions were well reasoned and demonstrated a clear testamentary capacity particularly in the light of the evidence given by Mr. Murphy and Mrs. Murphy as attesting witnesses.

It seems to me that the discrepancies - particularly that of the debts and funeral expenses being deducted from the bequest of the farm which is not reflected in the will which had the most deductions from the residue, do not invalidate the will. I have particular regard to the decision of *Mitchell v. Gard* (33 L.J. p. 7, referred to in Jarman on Wills, (1951) 8th Ed. at 31) where the residuary legatee, who prepared the will, intentionally omitted some legacies to which he had been directed to insert, and the omission was not noted by the testatrix: it was held that the will was nevertheless valid. Probably in such a case the residuary legatee would be held to be a trustee for the disappointed legatees.

In this particular case there was no admission of legacies but rather apparent discrepancies between the instructions, noted by Mr. Murphy on 17th February 2003, and the text of the will executed on 20th February.

I have also considered the apparent discrepancy between the abatement in the event of insufficient assets. Clearly this does not arise and, to a certain extent, can be taken together with the first apparent discrepancy. I have been subject to the actual wording of the will.

The relationship between the first named defendant, as accountant, and M.J. O'Connor, solicitors for the Deceased, was fully acknowledged by Mr. Tom Murphy. The Court has not heard any evidence nor has there been any credible suggestion that such relationship constituted undue influence. The choice of the Deceased was to have M.J. O'Connor draft his will. He had dealt with Mr. Tom Murphy previously. Mr. Murphy had extensive experience in the drafting of testamentary dispositions.

In relation to that will I am satisfied that it was read over to the testator; that there had been no changes as a result of the meeting with Mr. Robert Stamp; that the testator was capable of knowing and did know of the contents of the will and approved of the same by virtue of his signature which was attested to by both Mr. and Mrs. Murphy.

It seems to me that the will did correspond with the provisions of the Succession Act 1965.

It does not seem to me that there was any evidence, notwithstanding the dependency of the Deceased upon the defendants that he was under their dominion and control.

There is ample evidence of the involvement of the defendants in the care of their brother and uncle. The second named defendant looked after him especially from Christmas, 2002 to his hospitalisation on February 21st. The first named defendant looked after his cattle, post and bills from 1987 onwards and saw him every Wednesday and Friday. The second named plaintiff agreed that he did not know the extent of such assistance.

Notwithstanding that the Deceased had little schooling, it is clear that, while being a simple person, he was honest and intelligent in

the running of his own affairs. I have no doubt from the evidence of those who were closest to him, both family and friends that he was his own man, not susceptible to pressure or dominion. The second named defendant, his sister who knew him well having lived closest and who was with him in his last few months believed him to have had little schooling but quite clever. Mr. Parle, his neighbour and friend believed him to be mentally very clear. Aidan Murphy said he told him at their last meeting that "there were no flies" on him. No one would bully him. He gave detailed instructions in relation to his assets and in relation to beneficiaries. He may not, indeed, have known the extent of cash assets which, rather carelessly, he had left in his home and had asked his nephew to put in his car for safekeeping. There is no suggestion that his nephew, in gathering up and accounting for that money, has been in any way unprofessional. He followed the directions given by his uncle with regard to his safekeeping even if, understandably, he had regarded as being imprudent to have left it in the car.

Accordingly, the court will find that the will was executed in accordance with the provisions of the Succession Act 1965. While the second question, whether the testator was of sound disposing mind, was not pursued by the plaintiffs, nor indeed was there any necessity to call either Dr. Curtis nor Dr. Riordan, the court should confirm that the allegations that the Deceased was not of sound disposing mind on the date of the execution of the same, had no foundation in the evidence heard by the court.

The main thrust of the plaintiffs action related to the third question which, by order of Mr. Justice Quirke, dated 23rd June, 2006, was one of the issues to be tried.

The court has carefully considered all of the evidence. It is clear that the evidence and commission of the plaintiff, at its height, suggested that her brother would not have made a will at all or, would have made a different will, is not evidence of undue or any influence.

The evidence of Miss Roche goes no further. The evidence of Mr. David Elliot and that of his brother Niall Elliot is that the confluence of circumstances whereby the first named defendant, the executor of the will, was sufficient to ground evidence of undue influence. The court must say, in emphatic terms, that there is no evidence of undue influence disclosed; that the onus of proof in relation to undue influence is clearly on the plaintiff and has not been discharged and, indeed, that the confluence of circumstances does not, in any event, give rise to a suspicion let alone proof of undue influence.

In this regard the court has considered the particulars in the statement of claim and in the reply. There is no evidence whatsoever of dominion and control.

The allegation that the Deceased was not hospitalised after Christmas 2002, notwithstanding that he was quite ill, unable to sleep, unable to walk and was in a very bad way and that the defendants, in those circumstances took control of the Deceased who appeared to be terminally ill was unfounded. Indeed the first named defendant did bring the Deceased to Dr. Curtin on 3rd January, 2003 who, in turn obtained a bed for the Deceased on 21st February, 2003. None of the defendants referred to his being unable to sleep, unable to walk and being in a very bad way. The allegation that the Deceased "should be in hospital at a time when he was being detained under the control of the defendants" was not proved; there was no evidence that he should have been in hospital at an earlier time; that he was being detained nor that he was under the control of the defendants.

No evidence was given that the first named defendant was in "a position to wield authority over an individual particularly an elderly vulnerable individual. Neither was there evidence that the will was made at the behest and instigation of the defendants or either of them. Nor was there any evidence as to the necessity for the Deceased to comply with their requests or that he would be cut off from the affection of the defendants. It was not proven that the Deceased was in a vulnerable position and lacked the ability to resist the pressure and/or demands and/or requests of the defendants or both of them to execute the pretended will in the terms thereof". There was no evidence of the Deceased being in fear of not complying with the alleged requests.

Moreover, the particulars given in the reply of 31st May 2005, that the documents relating to the preparation of the alleged pretended will "demonstrate that the first named defendant was actively involved in the procuring of the execution of the said will and repeatedly liaised with the solicitor drafting same, both in relation to the drawing up of the said will and its execution" were not proven.

The evidence adduced before the court does not substantiate such an allegation. In particular, the alleged liaison was not substantiated.

The court has had regard to the references to the case law in Brady: Succession Law in Ireland, 2nd Ed. (1995) at 2.91 to 2.94 in relation to the existence of a particular relationship between a testator and a beneficiary not giving rise to a presumption of undue influence. The court considers that the other circumstances surrounding the making of the will which could give rise to such a presumption where testators have been elderly or physically infirm did not arise in the present case.

Brady, following Mellows advised that where there is any doubt about the strength of the evidence in relation to undue influence, where moral guilt is necessary, it is better to issue processes only requiring proof that the testator knew and approved of the contents of the will.

The definition of undue influence including importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or for escaping from the stress of mind or social discomfort, these have carried to a degree in which the free play of the testators judgment, discretion or wishes is overcome, will constitute undue influence is such as to render it inadvisable to plead on the basis of suspicion only.

This is so notwithstanding the matter of public policy wherewith wills should be open to scrutiny and to be found free of suspicion as adumbrated by Budd J. in Re: *Morrelli; Vella v. Morrelli* [1968] I.R. 11. In that case Budd J. at 34 stated:

> "In our country the results arising from the testamentary disposition of property are a fundamental importance to most members of the community and it is valid that the circumstances surrounding the execution of testamentary documents should be open to scrutiny and be above suspicion. Accordingly, it would seem right and proper to me that persons, having real and genuine grounds for believing, or even having suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court."

This, of course, relates to the circumstances of the execution of testamentary documents and may, indeed, include allegations of undue influence.

However, a balance has to be made between the will being executed in accordance with the provisions of the Succession Act and the

testator being of sound disposing mind, on the one hand, and more tendentious allegations of duress or undue influence based merely on suspicion.

In the estate of Thomas Wilson Potter deceased: *Potter v. Potter* (Unreported decision of the High Court of Justice of Northern Ireland, delivered 5th February 2003), Gillen J. held at para. 18 that he had found no evidence at all in that case to ground such a suspicion. On the contrary, all of evidence heard relevant to the period in question, pointed in the opposite direction. The burden of proving undue influence was on the person alleging it. He referred to *Wingrove v. Wingrove* (1885) 1 P.D. 81, where Sir James Hannen stated that to be undue influence in the eyes of the law there must be – to sum it up in a word, coercion:

> "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 it is undue influence."

Later, at para. 25 it was held:

> "Proof of motive and opportunity for the exercise of undue influence is required but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator. I reiterate that there was absolutely no evidence of any such influence in this case. The evidence has satisfied me that the Deceased was perfectly able to conduct his own affairs and was capable of resisting any undue influence if it had been brought to bear upon him. Despite all the efforts of well intentioned people to have him change his mode of living to embrace modern facilities, he resisted this and lived exactly as he wanted to. He was not a man to succumb to blandishment or coercion. Much less influence of course will induce a person of weak mental capacity or in a weak state of health to do any act and in such circumstances the court will more readily find undue influence. I repeat that in this case I have found no evidence of weak mental capacity or a weak state of health at the time this will was made. The deceased had the benefit of independent advice from Mr. McRoberts Solicitor."

It seems to be that the circumstances in that case have some relevance to the present case.

The court has found that there is no evidence of weak mental capacity or indeed, despite the illness of Mr. Roche, a weak state of health that would have made the testator more susceptible to undue influence. Moreover, the Deceased had the benefit of independent advice from a legal executive of some thirty seven years standing. In the circumstance the court finds that the will was not procured by duress or influence of the defendants or either of them.