THE COURT OF APPEAL

Irvine J.
Hogan J.
Edwards J.

2015 No. 429

IN THE MATTER OF THE ESTATE OF BRIAN EARLS,

LATE OF 2 OVOCA ROAD, SOUTH CIRCULAR ROAD, DUBLIN 8,

RETIRED DIPLOMAT, DECEASED

BETWEEN

SAID LAASER

PLAINTIFF/APPELLANT

AND

MAURICE EARLS AND WILLIAM EARLY

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 2nd day of March 2016

1. This is an appeal from *an ex tempore* decision of the President of the High Court (Kearns P.) dated the 30th June 2015 as refused the plaintiff's application for an order condemning a testamentary document dated 4th July 2013 and an order establishing a will dated 14th March 2013 as the true and original last will and testament of the deceased, Brian Earls.

2. Mr. Laaser is the surviving civil partner of the late Mr. Earls. They had formed a romantic relationship over a decade ago and they had lived together for about two years at No. 2 Ovoca Road, South Circular Road, Dublin 8 prior to this death. Their civil partnership took place on 16th November 2012. Mr. Laaser is a pharmacist who is now a naturalised Irish citizen, having been originally born in Morocco. His English, while excellent, is nonetheless not perfect and it may be assumed that he would be quite unfamiliar with the intricacies of our civil procedure and the running of civil actions.

3. The late Mr. Brian Earls ("the testator") died in hospital in the early hours of 5th July 2013. He had been a noted diplomat who had had postings in Moscow, Warsaw and Ankara. During this period he had accumulated a large collection of books, paintings, rugs and carpets and was accomplished in a large variety of languages. It is obvious that the deceased was a highly cultured and educated man.

4. The first defendant, Maurice Earls, is the testator's brother and the second defendant, William Early, is married to the testator's sister, Mary. The defendants are the executors of the testator's will and are sued in that capacity.

5. There are two testamentary documents at issue in these proceedings. There is no issue, as such, regarding the first of these documents, namely, a will executed on 14th March 2013. It is accepted that this was a will which had been duly executed by the testator in which he had made a variety of testamentary dispositions, including leaving the house at No. 2 Ovoca Road to his civil partner, Mr. Laaser, as well as bequests to his family and a specific bequest of some €50,000 to a Mr. Ararat Andressian, an Armenian friend of his. This will was accompanied by a letter explaining the thinking behind his various testamentary dispositions, which letter was discovered immediately after his death.

6. This will was executed after the presence of a lump in the deceased's mouth was discovered following a dental procedure. The testator was then facing major surgery involving some degree of facial reconstruction. After a short delay this surgery took place about a week later and the initial prognosis for recovery was good.

7. The testator returned to hospital at the end of June 2013 because of a recurrent infection which was impeding the continuation of his chemotherapy treatment. On July 2nd, however, his family received the unpleasant and deeply distressing news that he had developed secondary forms of cancer and that the prognosis was now extremely bleak. The testator was ultimately to die at about 4am on the morning of Friday, July 5th, 2013.

8. Since the precise sequence of the events of these three days is of critical importance, I propose to summarise the evidence given by the relevant witnesses. Before doing so, however, it may be convenient to set forth the terms of the both the March will and the July will.

The March will

9. The March will provided for payment of €35,000 to the testator's sister, Ms. Catherine Early and €50,000 to Mr. Ararat Andressian. The testator gifted his large collection of books, papers and documents to his brother, Mr. Maurice Earls. Mr. Earls was gifted €40,000 towards the running costs of the *Dublin Review of Books* and in the event of that publication ceasing to exist, the remainder was to be divided equally between the testator's three siblings. The testator left his paintings, statuettes, carpets and *objects d'art* to be divided equally between his three siblings and Mr. Laaser, along with the contents of the property at 2 Ovoca Road. The testator left

the property at Ovoca Road and the residue of his will (including savings accounts) to Mr. Laaser.

10. The testator had written a personal letter to his brother, Mr. Earls, along with a letter explaining the rationale for the dispositions to accompany this will. These letters were discovered after his death.

The July will
11. While the July will followed the lay-out and style of the March will, it was different in a number of important particulars. The bequest to Mr. Andressian was now €30,000 (instead of €50,000 in the March 2013 will). The testator continued to leave his paintings, statuettes, carpets and objects d'art to be divided equally between his three siblings and Mr. Laaser, but the specific bequests of €35,000 to Ms. Catherine Earls and €40,000 to Mr. Maurice Earls for the *Dublin Review of Books* were not repeated.

12. The most significant change was that he now left his house at Ovoca Road and the remainder of his savings to be divided between Mr. Laaser (who was now to receive 50%) and his three siblings who were each to divide the remaining 50% equally between them. It will be seen that, relatively speaking, the new will tended to advantage his siblings and Mr. Laaser did not fare quite as well in that will as compared with the March 2013 will.

13. We may next turn to consider the evidence actually given in the High Court.

Mr. Maurice Earls
14. Mr. Maurice Earls was a brother of the deceased. He is an executor and beneficiary under both the March and July wills and is named as the first named defendant. He was the chief witness in the action.

15. Mr. Earls gave evidence that on Wednesday July 3rd, the testator asked to speak alone with him. He indicated to Mr. Earls that he intended writing a new will and that he was dividing his assets between Mr. Lasser and his siblings. Later that day the testator gave Mr. Earls further instructions to go back to the house at Ovoca Road and to retrieve the March will. He also asked him to attend at Harrington St. Church on the South Circular Road in order to fetch a priest. Mr. Earls then returned on 11 am on Thursday 4th July with the March will. They both discussed the new will and Mr. Earls followed the general style and lay-out of the March will, while making the appropriate changes as his brother had requested. The testator then recalled that the new draft had not made provision for Mr. Ararat, so a further change was made for this purpose.

16. Mr. Earls then returned to Ovoca Road. While the family realised by this stage that the cancer was terminal, it was thought – or, perhaps, assumed - that the testator might linger for another week or two. At lunchtime Mr. Earls then received a message to the effect that the doctors were now saying that death was imminent and that the testator had requested him to come quickly.

17. Mr. Earls then typed up the draft. He realised that his brother had not specified the amount which he was leaving to Mr. Ararat, so that sum was left blank. On his return to the hospital in the early afternoon he asked his brother how much it was intended to leave to Mr. Ararat. Mr. Earls could not understand his brother's reply, so he wrote out figures from €10,000 to €50,000 on a notebook and he pointed at the figures. The testator stopped him when he pointed to €30,000 and Mr. Earls then wrote in that figure in his hand. At that point Mr. Earls read the will to his brother and the testator responded "fine."

18. At that point Mr. Earls realised that his brother was so physically weak that he simply would not be able to sign the will. He spoke to other family members about this and a nephew, a legal practitioner, said that in these circumstances an "X" would suffice. The will was then executed at about 6.30pm in the presence of Mr. Earls and his witnesses, namely, his nephews, Mr. Fitzgerald and Mr. Roberts. The nurses had arranged for the testator to sit up in bed and Mr. Earls supported him with his arm around his back.

19. The family – including Mr. Laaser – were aware of the fact that a new will was being executed. Mr. Earls gave evidence that, to some extent, the entire question of the new will was an unwelcome distraction at a time when the family wanted to concentrate on supporting the testator in his hour of need and helping each other at a difficult time as his life ebbed away over the final few days. Mr. Earls went home briefly and returned at about 10pm. He stayed with his brother through the night, reading to him a review from *The Times Literary Supplement*. Mr. Earls acknowledged that his brother's articulation at that point was not "great", but that at times he saw his brother nodding through an oxygen mask in acknowledgment.

20. At about 2am Mr. Earls said that he took a nap, but some hours later he was woken by a nurse to say that his brother was slipping away. The testator died at about 4am in the morning of July 5th, 2013. Mr. Laaser and other family members were contacted, but they arrived shortly after the testator's demise.

21. Mr. Earls said that he qua executor had been advised as to Mr. Laaser's inheritance rights and he had no difficulty at all with Mr. Laaser exercising such rights.

Fr. Gerard Deignan
22. Fr. Deignan is a Roman Catholic priest attached to Harrington St. Church. So far as he recalled he had been requested by Mr. Maurice Earls to see his brother in hospital, but he did not personally know the testator and had never met him before. Fr. Deignan could not recall precisely the day on which he arrived, save that it was in the afternoon. (Other witnesses – such as Ms. Mary Early – had a clear recollection that it was on the 4th July.)

23. When Fr. Deignan arrived at the bedside he formed the opinion that:

> "The sick man was capable of receiving ministrations in a sort of lucid way. He appeared to be conscious and alert."

24. Fr. Deignan asked the family to leave the room while he performed the Last Rites. He spent some five minutes alone with the testator. He formed the view that the testator had the capacity to receive spiritual ministration of this kind.

Ms. Mary Early
25. Ms. Mary Early said that she was a sister of the testator. She recalled returning to the hospital bedside on the afternoon of the 4th July. Her brother Maurice asked her to step outside while he went through the new will with the testator. She later re-entered the room and could see that the testator was tired and fell asleep. After a while the testator awoke and was gesturing to her in a sort of agitated fashion in relation to the notebook on the window sill.

26. A typed version of the will had been placed in the notebook and the testator managed to ask her to read the will to him. Ms. Early did so, saying that she found it an extremely distressing experience. She struggled to pronounce Mr. Ararat's name and they both laughed. Her anxiety was to ensure that the will reflected the testator's wishes.

27. Ms. Early considered that the testator had consciousness until about 9pm that evening, although he had slept from time to time after having some injections. His mother came to see him about 6pm and they said prayers together.

Mr. David Roberts
28. Mr. Roberts said that he was a nephew of the testator. He arrived at the hospital at about 5.30pm in the afternoon in order to see the testator. His uncle Maurice asked him to witness the will and they waited for his cousin, Thomas Fitzgerald, to arrive. When Mr. Fitzgerald arrived at about 6.30pm there were then four of them in the room. Mr. Maurice Earls spoke to the testator and explained to him that this was the will. The testator nodded and said yes. It was explained to him that a mark was sufficient and Mr. Roberts saw the testator execute the document with an "X".

29. In cross-examination Mr. Roberts stated that he was unaware of the terms of the will and, indeed, he had not realised until he reached the hospital that the end was so close or that there was any issue in relation to the will. He accepted that he had not discussed the will with the testator or that the will had been read in his presence. Mr. Roberts was satisfied that the testator knew that it was his will and that he knew what he was signing.

Mr. Thomas Fitzgerald
30. Mr. Fitzgerald gave very similar evidence to his cousin, Mr. Roberts, regarding the manner in which the will came to be executed. He accepted that he had not discussed the will with the testator. He also agreed that he had not heard the will being read and he was unaware of its contents at the time.

Mr. Said Laaser
31. Mr. Laaser gave an account of the testator's final days which in many ways replicated that given by Mr. Earls and Ms. Early. He emphasised, however, that the testator was asleep or otherwise barely conscious for much of July 4th. He had no recollection of the testator talking during that day. While Mr. Laaser wanted to communicate with the testator, there was either no response or a minimal response any time he tried to speak with him.

32. Mr. Laaser stated that he was aware that a new will had been prepared, but he had not been present for its execution. He recalled Mr. Early stating to him that because he (*i.e.,* Mr. Laaser) was the civil partner, "Brian left you the bulk of his estate." As I have noted already, Mr. Laaser's first language is not English and he said that he was unaware at the time what the word "bulk" meant. He objected to the will on the ground that he was not satisfied that the July will truly represented the will and wishes of the testator.

The High Court
33. Kearns P. delivered an ex tempore judgment dismissing the plaintiff's claim in the course of which he stated:

"It is quite clear from the evidence of both nephews that the will was properly executed and, of course, it is well known that in circumstances such as this a person can execute a will by marking a mark thereon, provided it otherwise complies with the requirements of the Succession Act and is explained [to the testator]. And there is a full and eloquent explanation in this case of why the deceased [executed] his will by applying a mark rather than writing his signature. The will was made only a matter of hours before his death and obviously he was in a very weak condition. I am satisfied from the evidence I have heard that he was certainly well enough to know what he was doing. He certainly knew the nature of the character of the document he was signing. He was able to interact with his brother who read to him in his very final hours an extract from a literary review on a historical piece of work and he was able to make clear his wishes. So Mr. Laaser's apprehensions are, I think, misplaced in this regard. I also have completely independent evidence from the priest who came to him in his final hours who again was quite satisfied that he understood the purpose of his visit. There may be cases were unworthy suspicion may well be based, but this most definitely is not one such case."

34. Kearns P. went on to acknowledge that "a Court must be vigilant and zealous in scrutinising the circumstances of the drawing up of a will, particularly where no officer of the court is involved and where, if you like,… a home made will is involved as in this instance." The President then stated that the Court has been "very vigilant and zealous in scrutinising all the circumstances" particularly where no officer of the court is involved and where, if you like, … a home made will is involved as in this instance."

35. Kearns P. concluded by saying that he could not see any evidence which:

> "On the full hearing of this case would support any suspicions or raise any kind of serious query over the state of mind of the deceased at the time he made and executed this will. I am satisfied that it was read over to him and Mr. Maurice Earls took the trouble of writing down on the page, having regard to the fact that an Armenian friend of his was to receive a financial sum. He wrote down in big letters five different figures and he ensured that he had actual fix on the figure that this gentleman was to receive before that figure was written in. I am satisfied that the figure was written in before the will was executed in the manner described by the witnesses. So in all the circumstances I am satisfied to admit this will to proof in solemn form of law and will so direct."

The issues in this Court
36. The principal issue in this case was whether the testator had sufficient competence in the circumstances to execute the will of July 4th, 2013. Section 77(1)(b) of the Succession Act 1965 ("the 1965 Act") provides that in order to be valid, a will "shall be made by a person who…is of sound disposing mind."

37. It was accepted in the High Court – and not disputed on appeal before this Court – that in the circumstances of a case such as the present one, the onus rested on the party propounding the July 4th will, in this case, the first defendant. This was especially so given that there were appreciable changes between the two wills which benefited the next of kin, where no officer of the court was involved in taking the testator's instructions and where the testator was obviously so enfeebled and immediately close to death that he could only make a mark by way of execution of that will.

38. It is worth emphasising that no medical evidence of any kind was led by either party in the High Court. Nor was any medical assessment carried out in the early evening of July 4th 2013 as to the testator's capacity.

Whether the testator had appropriate testamentary capacity on the evening of July 4th, 2013

39. The testamentary capacity of a dying or otherwise highly compromised testator is an issue which has confronted the Supreme Court from time to time. So far as this issue is concerned, Mr. Laaser relied particularly on the Supreme Court's decision in *In bonis Corboy* [1969] I.R. 148, a case which is generally regarded as the leading authority on testamentary capacity.

40. In Corboy the testator in that case had been ill for some two years prior to his death. He had difficulty in speaking and expressing his wishes generally. Although it was not clear precisely how much he had understood what was said to him, the testator in that case had been an able businessman. A legatee who had been residing with the testator prior to his death drafted a codicil to the will for the purpose of increasing the legacies bequeathed by the testator to her. When the codicil was read to the testator, he was asked whether that was what he wanted and he apparently nodded his head. The testator executed the codicil by making his mark thereon, his hand having been guided for this purpose.

41. In the course of his judgment Budd J. said [1969] I.R. 148, 162:

> "Taken as a whole, the evidence indicates that the testator was a chronically sick man. He was subject to recurrent attacks of convulsions which varied in duration and intensity. While their effects lasted, he was clearly incompetent to make a will. In between attacks there were difficulties of communication. He said little and frequently had difficulty in making himself understood. Likewise it was frequently difficult to know how much he understood. His condition was transient and varied. It would be a formidable task to discover whether he had testamentary capacity at any given time.
>
> It is obvious from the evidence I have referred to and from all the surrounding circumstances of this case that the circumstances under which this codicil came to be made, and the position in which it stands in law, call for very careful investigation and consideration. Here is a man who, on any view of the case, was suffering from a high degree of incapacity. His illness was serious and had been continuing for some time. He had for long taken no interest in affairs and had a very limited capacity to communicate with others. If ever a case called for the intervention of a competent solicitor to investigate all the circumstances and seek out with great care and diligence the testator's wishes, this was one. The circumstances surrounding the purported execution of the codicil give rise to obvious doubts and suspicions and I will refer to these . . . ."

42. Budd J. then went on to say ([1969] I.R. 148, 167) that the testator had suffered a severe illness which had affected his mental powers:

> "….it was vitally important that his testamentary capacity on the evening [in question] should be firmly established. It would seem to be that nothing less than firm medical evidence by a doctor in a position to assess the testator's mental capacity could suffice to discharge the onus of proof of proving him to have been a capable testator. No doctor was brought to see him on that occasion. Such evidence as was adduced does nothing to aid matters."

43. For my part, I cannot see that the present case is really any different in principle from *Corboy*. It is true that in *Corboy* the testator's mental capacity had been affected by illness, whereas that was not true in the present case. On the other hand, it might be said the codicil which was at issue in *Corboy* had been executed some two and a half years before the testator had died, where the July 4th will in the present case was executed within hours of the testator's ultimate demise.

44. The real point of similarity between the two cases is that in both cases the testator had been enfeebled to the point of almost complete dependency and each of them were reduced to making a mark. On any view, the testamentary capacity of both the testator in *Corboy* and the testator in the present case was open to question. If the Supreme Court considered that affirmative medical evidence was required in *Corboy* to establish the testamentary capacity of the testator, the present case cannot realistically be regarded any differently.

45. It is, of course, true to say that, as Kearns P. observed in the course of his ruling, Fr. Deignan considered that the testator was then well enough to participate in the Last Rites when he visited him in the afternoon of July 4th., 2013. But Fr. Deignan freely admitted that he only spent some five minutes with the testator and that they had never previously met. It is one thing, however, to be an essentially passive participant in a religious rite as one's life ebbs away: it is quite another to infer from this that the testator must have had the necessary testamentary capacity to assent to a rather complex will to which there had been a number of subtle but significant changes as compared with the earlier March will.

46. Kearns P. also drew attention to the fact that Mr. Earls read an extract from *The Times Literary Supplement* to his brother in the evening of July 4th. The testator appeared to have appreciated this kindly gesture and seems to have nodded with approval through an oxygen mask. One cannot, nevertheless, draw any firm conclusions from these exchanges as to the testator's testamentary capacity to execute the will. Insofar as Kearns P. drew an inference from this bedside reading as the testator lay dying in order to demonstrate the testator's testamentary capacity, I fear that he was in error.

47. Nor do I consider that this case can be compared with the Supreme Court's decision in *Re Glynn, deceased* [1990] 2 I.R. 326. In that case the testator had given instructions to two independent lay persons to draw up his will. Subsequent to giving these instructions the testator suffered a massive stroke and was thereafter disoriented and incapacitated. Some two weeks later the two independent persons visited the testator in hospital. They verbally read the will to the testator who then approved the will with his mark. No medical evidence was called as to the testator's testamentary capacity.

48. A majority of the Supreme Court held that this was duly attested will which should be admitted to probate, with McCarthy J. holding that there was ample evidence before the High Court that the testator "fully appreciated what was going on and that the terms of the document upon which he placed his mark fully represented what he wanted done with his property": see [1990] 2 I.R. 326, 341.

49. The fact that the Supreme Court in *Glynn* was divided as to the outcome in its own way illustrates the fact that the decision is probably at the outer limit of what might be acceptable in terms of presumed testamentary capacity. Even then, however, there is the all important difference between *Glynn* and the present case in that in the former case the instructions for the will had been given at a time when the testator's testamentary capacity was not in doubt. That cannot be said in the present case.

The failure to cross-examine on the issue of capacity

50. There remains for consideration the fact that the evidence as to capacity which was given on behalf of the defendants was not directly challenged in cross-examination by Mr. Laaser, even though the testator's testamentary capacity was the critical part of his case. In these circumstances, questions directed towards this issue should have been put to the principal witnesses. Some allowance must, however, be made for the fact that Mr. Laaser was representing himself personally; that English is not his first language and he cannot have been expected to be have been familiar with the details of our court procedure.

51. Indeed, there may possibly have been a misunderstanding between all concerned when Mr. Maurice Earls was being cross-examined by Mr. Laaser. After Mr. Earls had explained the manner in which he had run his finger along various figures ranging from

€20,000 to €50,000 when discussing the bequest to Mr. Andressian with the testator, Mr. Laaser indicated that he wanted to question Mr. Maurice Earls about the March will. At that point the President said:

> "Well, we are concerned with the will of July so in fact I think you should confine yourself to around that time and the circumstances surrounding the making of the will. Have you no questions you want to ask? You've heard all the evidence.
>
> Mr. Laaser: Yes. No questions."

52. While the trial judge's concern to focus the evidence concerning the July will was understandable, the effect of this intervention appears to have given Mr. Laaser the (wrong) impression that he could not pursue issues arising from the March will and his cross-examination appears to have somewhat abruptly ended at that point.

53. It should also be noted that Mr. Earls stated in evidence that Dr. Osman, the testator's treating consultant, had told his sister, Ms. Mary Early, that the testator was "capable". This evidence was clearly inadmissible hearsay, as Dr. Osman did not give evidence and Ms. Early did not address this point in her testimony. There may possibly have been an assumption that Dr. Osman would be called to give this evidence and that issues as to capacity might have been tested at that point, but this never happened.

Conclusions

54. While the failure to pursue this and other matters in cross-examination was unfortunate, the fact remains that the onus of demonstrating testamentary capacity in the circumstances rested with the defendants. In the light of the circumstances in which the July 2013 will came to be executed, the effect of the Supreme Court's decision in *Corboy* is that this could only have been done by means of affirmative medical evidence led by the defendants as to that capacity. Insofar as the President dismissed the action even though such evidence was never led by the defendants, I fear that in the light of *Corboy* that he was in error.

55. In conclusion, therefore, I am coerced to the conclusion that this Court has no option but to allow the appeal and to direct a re-trial, despite the further delay and burdensome costs which this course of action necessarily entails. In the absence of such medical evidence this Court could not be satisfied that the requirements of s. 77(1)(b) of the 1965 Act as to testamentary capacity of the testator have been satisfied. Given, however, that Mr. Laaser's failure actively to pursue the question of testamentary capacity in cross-examination may have given the defendants the wrong impression that this issue was no longer at issue or that they were now dispensed with the obligation to call medical evidence, I believe that the fairest course of action in the circumstances would be to order a complete re-trial and I would so direct.