

**Neutral Citation No: [2022] NICH 15**

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*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

**ICOS No: 2018/51561**

**Delivered: 29/09/2022**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**Between:**

**ALICE BRANIFF**

**Plaintiff**

**and**

**NICHOLAS BRANIFF**

**Defendant**

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**Mr John Coyle BL (instructed by McShanes, Solicitors) for the Plaintiff  
Mr Keith Gibson BL (instructed by T G Menary & Co, Solicitors) for the Defendant**

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**McBRIDE J**

***Introduction***

[1] The plaintiff, as executrix of the Will of Annie Josephine Braniff (deceased) ("the Testatrix") issued proceedings seeking to have the Will of the testatrix dated 27 November 1999 proved in solemn form.

[2] The defendant, a brother of the plaintiff, defended the proceedings on the basis that - the testatrix lacked testamentary capacity; there was a lack of knowledge and approval of the Will and the Will was procured by the undue influence of the plaintiff. He counterclaimed that the grant of probate extracted on 15 November 2018 be revoked.

[3] At trial, the defendant did not proceed on the grounds of lack of capacity or lack of knowledge and approval as he accepted the expert evidence the testatrix had testamentary capacity. The only remaining ground of challenge was that the Will was procured by the undue influence of the plaintiff.

[4] The plaintiff was represented by Mr John Coyle of counsel and the defendant was represented by Mr Keith Gibson of counsel. I am grateful to both counsel for their joint submissions on the law which were of much assistance to the court.

### *Background*

[5] The testatrix was born on 22 February 1916. She married Thomas Vincent Braniff and together they had 12 children including the plaintiff and the defendant. The deceased lived with her husband and family at Loughkeeland Road, Downpatrick.

[6] The plaintiff was born in 1957 the youngest child of the family and is single. The defendant was born in 1947 is a middle child and is also single. He remained living in the family home until January 2015 when he was required to leave by reasons of an occupation order made by the magistrates' court following a contested hearing, in favour of the plaintiff. Another sibling, Gerard, was also single and he remained living in the family home until his death. All the other family members married and moved out of the family home save Vincent, who although living at the home at the date of the Will, moved out thereafter.

[7] On 27 November 1999 the testatrix executed the Will which was drawn up by Aidan Hanna, principal in Colman Hanna & Company, Solicitors. The Will was executed at the deceased's home.

[8] The testatrix died on 17 December 2010. On 15 November 2018 a grant of probate was extracted. Notwithstanding the grant of probate the estate has not been administered to date.

### *The Estate*

[9] The bulk of the testatrix's estate consists of a dwelling house and 12 acres of agricultural land situate at Loughkeeland Road, Downpatrick and contained in folio 18996 Co Down, ("the lands").

[10] The registered owner of the lands is the defendant, Nicholas Braniff. On 24 February 2014 the applicant issued proceedings in the Land Registry seeking to be registered as owner of the lands in fee simple pursuant to section 53 of the Land Registration (Northern Ireland) Act 1970. The matter was part heard before the Registrar Ms Christine Farrell in June 2016. The court was advised that she declined to hear the remainder of the case and it was referred to this court. A notice of motion was issued in the Chancery Division of the High Court by the applicant against Nicholas Braniff on 23 October 2017 for an order pursuant to section 53 of the 1970 Act to be registered as full owner of the lands ("adverse possession proceedings"). The adverse possession proceedings were adjourned by agreement pending the outcome of the present proceedings.

[11] The original registered owner of the lands was Gerard Braniff who died a bachelor intestate on 27 December 1942. His brother, James, took out a grant of letters of administration on his father's estate on 17 May 1946. James also died intestate on 21 July 1968 and his wife Catherine took out a grant of letters of administration of his estate on 30 September 1976. She died in July 1984 without having administered her husband's estate or that of her late brother-in-law, Gerard Braniff. Kathleen Murphy, the daughter of Catherine and James Braniff, took out a grant of letters of administration on 9 May 2012 and on 20 September 2012 she transferred the lands in folio 18996 Co Down into the name of the defendant, Nicholas Braniff, in consideration of £6,000.

[12] As appears from the pleadings in the adverse possession proceedings the testatrix's husband, Thomas Vincent Braniff, farmed the lands contained in folio 18996 Co Down and resided in the house situate on the lands from in and around 1942, initially on his own and laterally with his wife the testatrix and their family. He died intestate on 6 May 1970. After his death the testatrix avers in the pleadings that she continued to reside in the house and farm the lands and in particular allowed members of her family including the defendant to farm the lands with her consent. In the early 1990s the testatrix built a new house on the lands. She states this was funded by her and the plaintiff. In addition, a number of the children, including Patrick and Nicholas assisted by carrying out manual and building works. The house was completed in or around 1995 and the testatrix lived there with the plaintiff, Nicholas, Vincent and Gerard. Nicholas farmed the lands but the adverse possession pleadings indicate that this was done with the specific consent of the testatrix until she died in 2010.

### *The Will*

[13] By her Will dated 27 November 1999 the testatrix appointed her son, Vincent, and the plaintiff to be her executors. She left the dwelling house and the curtilage thereof to the plaintiff, Alice, subject to rights of residence in favour of Vincent, Daniel and Nicholas, on condition that they made contribution to amenities and services to the home. She left the lands to Alice absolutely but with the request that she allow her brothers use of the land, provided they used it responsibly. She left the residue of her estate to Alice.

### *Grounds of Challenge to the Will*

[14] The defendant's only ground of challenge to the Will is that it was procured by the undue influence of Alice. The following particulars of undue influence were set out in the pleadings:

- (a) The plaintiff was the principal beneficiary under the Will.
- (b) The plaintiff gave instructions for the Will to the solicitors.

- (c) The plaintiff was present when the testatrix met the solicitor to make her Will.
- (d) The Will was not read over to the testatrix before she signed it.
- (e) The testatrix was vulnerable due to her age, poor eyesight, limited mobility and weak state of health.
- (f) The testatrix was reliant on the plaintiff who was her primary carer.
- (g) The plaintiff isolated the testatrix from her family.
- (h) The plaintiff orchestrated a situation where the carers no longer attended with her mother and therefore the care of the testatrix fell solely upon the plaintiff.
- (i) The plaintiff threatened the testatrix that she would leave and put her into a care home.
- (j) The plaintiff was verbally and physically abusive to the testatrix.

### *The Evidence*

#### *Evidence of the solicitor, Aidan Hanna*

[15] Mr Hanna gave evidence that he was admitted to the Roll of Solicitors in 1978 and is the principal in the firm of Colman Hanna & Company. He is a very experienced solicitor who practices primarily in the field of probate law. He gave evidence that he was aware of the Braniff family and the history in relation to the adverse possession claim to the lands and the fact that attempts had been made in the 1970s to have the families come to an agreement about the lands. The testatrix was therefore known to the firm although he accepted that he had never personally been instructed by the testatrix before she instructed him to draft her Will.

[16] He stated he first met Mrs Braniff on 27 November 1999. He did not recall meeting her previously in the Newcastle office but accepts that she may have attended his offices. He recalled that the plaintiff spoke to him in the street in Downpatrick and asked him to call out to see her mother as her mother wanted to make a Will. Mr Hanna advised her to make an appointment. The plaintiff then made an appointment with his secretary, and he attended the family home on Saturday 27 November 1999. His understanding was that the testatrix wanted to get her affairs in order and, therefore, before he attended, he asked that an independent witness be present to witness the testatrix's signature to any Will that she may make.

[17] When he arrived at the home he recalled that the plaintiff was present together with her niece, Patricia Middleton. He was aware that Nicholas lived at the home but was not present when he called. He went down to the testatrix's bedroom where he spoke to her alone. She was not in bed but was sitting on a chair. They

then discussed matters and he was satisfied that she was clear in her mind and knew what she wanted to do. She then gave him detailed instructions for the Will which he recorded in an attendance note. In his attendance note he recorded some background information and the fact that after the testatrix's husband's death she was "totally in charge" and Nicholas was her main helper. He further recorded that the testatrix moved into the new house in 1994 and that it was built with Alice's savings and "labour from the boys with some payment by them." The testatrix further instructed that the lands were used by all the family but only with her permission. The attendance note then further recorded as follows:

"I want to leave Alice in full ownership with express wish that she does allow family members to use the farm in a responsible way. My site is clearly delineated by the round gate post, the two retainer posts and the thorn hedge which is now inspected by Aidan Hanna, Solicitor."

The attendance note was signed by the testatrix.

[18] The solicitor then drew up the Will by hand that day at the home. After drafting the Will he then discussed its contents with the testatrix and thereafter read the Will over to her. Once satisfied she was content with it, he asked Patricia Middleton to come down into the room to witness the testatrix's signature.

[19] When Miss Middleton attended the testatrix signed the Will and then Ms Middleton and Mr Hanna signed in each other's presence and in the presence of the testatrix. The solicitor assessed that he was with the testatrix for approximately two hours.

[20] After he left the room he spoke briefly to Alice and then went outside to check the curtilage of the house. He denied that at any time he ever discussed the Will or its contents with Alice.

[21] Mr Gibson put a number of points to Mr Hanna during cross-examination. Firstly, it was put to him that the testatrix had previously expressed a wish to leave the lands to Nicholas. A handwritten note on a letter dated 6 September 1974 stated:

"Annie Braniff wished Nicholas Braniff to have home place. His is fixing cottage which he will transfer to the other unmarried members of the family. Cottage at Ballyronan Four Roads..."

Mr Hanna accepted this note was written by a solicitor in the firm of King and Boyd and reflected instructions given by the testatrix at that time.

[22] It was further put to him that the testatrix had never indicated an intention to leave lands to Alice and had never transferred lands to her during her life. In contrast she had transferred lands at Ballydock by way of gift, in or around 1976 to her sons, Nicholas, Vincent, Patrick and Peter. Mr Hanna accepted that she had transferred these lands to her sons.

[23] Mr Gibson further put to Mr Hanna that there were “alarm bells” for undue influence in this case which included the fact Alice made the appointment with the solicitor for her mother to make a will; was present when the Will was made; the Will was rushed; there was no follow-up appointment; the deceased was vulnerable; she had poor eyesight and Alice was her main carer and in a position of influence and control.

[24] Mr Hanna accepted that Alice made the appointment but was clear in his evidence that she was not present when he met with the deceased to discuss and make the Will and denied that he ever discussed the details of the Will with Alice. He further confirmed that Alice never discussed with him what her mother wanted in the Will.

[25] As an experienced solicitor Mr Hanna said he had an awareness that undue influence can be present in certain circumstances but, in this case, he did not see anything to cause him concern that undue influence was at play. Firstly, there was nothing about the demeanour of the testatrix which indicated to him that she was being forced in any way to make the Will in the terms in which she made it. In his view she was very clear about what she was doing and that she was a “willing signer.” Secondly, he considered that the substance of the Will was nuanced and balanced and the testator had indicated to him that she wanted to be fair to all the family members and this was reflected in the terms of the Will which granted rights of residence to all her sons who remained living at home and also placed a moral responsibility on Alice towards her brothers. Thirdly, he considered that the Will was not rushed. Given her age and the family histories of intestacies he considered that it was good practice to draft the Will immediately and he saw no good reason to delay making it until after he carried out a second consultation as she was clear in her instructions. Mr Hanna was aware that she had poor eyesight but he read the Will over to her and she indicated she was content with it and she was able to sign the Will albeit that her signature “headed north.” Although he knew Alice cared for her mother he was also aware that she worked full-time and, in all the circumstances, it was his view that there were no factors present which caused him to be concerned that the testatrix had been acting under any undue influence.

[26] Mr Hanna is a very experienced solicitor and he had a very clear recollection of events which was assisted by the fact that he kept a detailed attendance note. Overall, I found him to be an impressive and independent witness who gave a very balanced account to the court. I am satisfied that the Will was duly witnessed and properly executed and that it complied with all the legal requirements for a validly executed Will on the basis of the evidence of Mr Hanna. I further accept his

evidence that he spoke with the testatrix alone and that she gave him instructions which were reflected in the Will which he drafted. I accept his evidence that the testatrix was clear in her instructions and that he noted nothing about her demeanour to indicate that she was acting under any pressure or force. I further accept that Mr Hanna did discuss with the testatrix the claims that all the family members would have on her estate and I accept his evidence that the Will reflected what the testatrix considered to be a fair balance between all the family members' interests.

[27] I therefore reject the assertions by the defendant that the plaintiff gave instructions to the solicitor regarding the Will. I further reject the assertion that she was present when the testatrix met the solicitor and I am also satisfied that although the testatrix was elderly and had poor eyesight she still had testamentary capacity, knew what she wanted in her Will and agreed with its contents after it was read over to her by the solicitor. I am further satisfied that she signed her assent to the attendance note and signed the Will in the presence of the two attesting witnesses.

*Patricia Middleton*

[28] Miss Middleton is a granddaughter of the testatrix. She gave evidence that she was staying at her grandmother's home at the relevant time. Her grandmother asked her to act as a witness to her Will and she agreed. She recalled the solicitor attending at the home. Alice let him in and he went to speak with her grandmother alone. After a period of time the solicitor then called her into the room and she witnessed her grandmother signing the Will. She recalled her grandmother saying that no one would know she had won the prize for best handwriting at school as her signature was so shaky now. Miss Middleton did not see the Will or know its contents. After witnessing the signature she left the room. She formally gave evidence to confirm her signature on the Will and the fact she saw the testator sign in her presence and in the presence of the solicitor.

[29] Under cross-examination she confirmed her grandmother asked her to act as a witness to the Will and denied that she knew anything about the contents or that they were talked about before or after the Will was made.

[30] I found Miss Middleton to be a clear, consistent and honest witness and I accept her evidence.

*Dr Barbara English*

[31] Dr English was instructed to prepare a report to give a medical opinion with regards to the testator's testamentary capacity at the time she made the Will in November 1999. By report dated 17 January 2019 she opined that the testatrix had testamentary capacity. She also further opined as follows:

“At the time of making her Will of 27 November 1999 Mrs Braniff was an elderly visually impaired lady who appears to have been experiencing significant dependence on others. The GP record indicates that in March 1998 Mrs Braniff’s principal carer was Geraldine Braniff, daughter however in 2001 her daughter Alice reported that she had moved back home to live with her 6 years ago when she became frail in order for her to look after her. In my opinion based on the information above and considering the balance of probabilities Mrs Braniff’s reliance on others would in November 1999 have placed her at increased risk of undue influence/duress particularly from those in a caring role with regard to her disposal under her Will.”

[32] She was called to give evidence only on the issue of undue influence as lack of capacity was no longer alleged. She gave evidence that vulnerability to undue influence can arise when there are factors such as a power differential, a belief that a care/ongoing support relationship is contingent on a certain disposal of the estate, vulnerability due to age, lack of mobility, poor sight, the testator’s dependence on others and the testator’s isolation from family and others. She stated it was an inexact science and it was a judgment call whether in fact undue influence was exercised.

[33] Under cross-examination she accepted that the engagement of a solicitor to draw up a Will was a mitigating factor but did not accept the proposition that the involvement of a solicitor was a nullifying factor. She accepted the fact the testatrix had testamentary capacity was a relevant factor and further accepted that any issues regarding Alice interfering with carers which took place three years after the Will was made could not be extrapolated back as a cause for concern of interference in 1999 when the Will was made.

[34] Dr English is a very experienced medical legal practitioner in the field of testamentary capacity and I accept her expert opinion which was unchallenged that the testatrix had testamentary capacity.

[35] I also consider that Dr English has experience of undue influence being exercised in certain cases and is cognisant with the factors or triggers which individually or collectively may render a testator vulnerable to the exercise of undue influence. The factors set out by Dr English, I consider, are relevant to the court’s consideration as to whether a testatrix would be vulnerable to the exercise of undue influence and in that sense are uncontroversial. Dr English, however, was not in a position to give evidence about whether undue influence was actually exercised in this case. The answer to this question is a matter for the court and is one which can only be determined after considering all the available evidence. Dr English therefore whilst in a position to give evidence about the generic factors which would leave a



testator vulnerable to undue influence was not in a position to give expert evidence about whether or not on the facts of this case the testator's Will was procured by the exercise of undue influence by the plaintiff and in fairness to Dr English she did not seek to give such expert evidence.

[36] I therefore accept her evidence with regard to the various factors, which are uncontroversial, which would leave a testator vulnerable to undue influence.

*Nicholas Braniff*

[37] The defendant was born on 8 October 1947 and is a middle child. He is single. He gave evidence that he worked on the family farm all his life. In or around 1995/96 his mother's health deteriorated and he stated that it was decided that a new house should be built. He offered to build a new home for his mother in Mary Jane's land but his mother said "no this is your home." A new house was built and it was his understanding that he would own it.

[38] In addition to farming the 12 acres or so at Loughkeeland Nicholas gave evidence that he farmed around 300 acres of other lands which he either owned or took in conacre. He said that Alice never farmed any of the lands. In 1996 he moved into the new home with his mother Alice, and his brothers. He said he provided funds to build the new house and raised these funds by selling animals.

[39] As his mother's health deteriorated he said that she needed help to cook, clean and go to the toilet. He gave evidence that he and Alice helped her. He recalled that on one occasion in 1996/97 Alice let his mother slip from the commode on to the floor and proceeded to call her a "fat sow." He did not know if Alice let her slip off the commode "on purpose or not."

[40] He further recalled that Alice was verbally abusive to his mother on occasions. He said that Alice was frequently cross and cheeky with his mother and raised her voice at times. He said that Alice drank most evenings and when in drink she was "more snappy, more wicked" and shouted more at her mother and also threatened to put her in a care home. He said that she said this once or twice per week. This made his mother unhappy and his mother said to him "do not let Alice put me in a home."

[41] He also gave evidence that at times Alice did not treat the testatrix well but at other times she "did her best."

[42] Nicholas said that Alice restricted people coming into the home and on one occasion had closed the door in the face of Catherine Douglas who had come to talk to him about horses. He said that Alice had a bad relationship with the carers and had stopped home helps coming into the home which his mother was not happy with.

[43] In relation to the Will he said he never had any discussions with Alice about who would get the house as he knew he was to get it after his mother died. He said he never heard any conversations between Alice and his mother about the disposal of the house. He accepted that his mother was a strong-willed person who did not like to be bossed.

[44] Under cross-examination he stated that Alice said she would put her mother into a care home throughout 1997/98 and that she then stopped making these comments from in or around early 1999. He admitted that Alice did let his friends into the home and did make them tea and he accepted that on the one occasion when Catherine Douglas had called she had delayed letting her in for a short time as she was assisting her mother when she arrived. He also accepted that the testatrix was a strong-willed woman who spoke her mind. He said that she was "the boss" and that on occasion she checked him but "she checked Alice more." He confirmed that no one told his mother what to do.

### *Patrick Braniff*

[45] Patrick was born on 21 April 1949 and is a younger brother of Nicholas. He is a former builder and he gave evidence that he left home at the age of 21. In the 1990s he assisted in building the new home for his mother. He lived approximately seven miles away and he said that he regularly visited his mother. He recalled visiting one evening in 1997. On that occasion he had an A4 sheet of paper in his hand and when he left his mother's room Alice confronted him and said "I hope you weren't getting anything signed." The situation became heated between them and the police were called. Patrick left the home and after this he said he avoided going to the house when Alice was present. He did however continue to visit his mother regularly during the day when Alice was working. He gave evidence that on occasions when he was working outside in the yard he overheard heated conversations and arguments between Alice and his mother. He accused Alice of drinking and said that she falsely accused Nicholas of assaulting her and obtained a non-molestation order against him when she "likely walked into a door when drinking." He said that Alice treated his mother very poorly and that his mother had confided in him that she had a lot to contend with. He also stated that his mother was totally dependent on Alice to take her out and to take her to medical appointments.

[46] Under cross-examination he was unable to give a satisfactory answer to the question why he had an A4 sheet of paper with him when visiting his mother. He accepted under cross-examination that he had uninterrupted access to his mother and that his mother kept a photograph of his graduation from Downpatrick Technical college in her bedroom. He also accepted that formerly he and Alice have enjoyed a good relationship.

*Mary McIlmail*

[47] Mary McIlmail gave evidence that she provided care to the testatrix in 1998. At this time the testatrix needed assistance getting washed and dressed in the morning. She said the testatrix was very much “with it” and knew what she wanted and what she did not want. She stated that she had rarely met Alice as Alice was usually at work but stated that when she did need her on a few occasions she experienced no difficulties with her.

*Alice Braniff*

[48] Alice gave evidence that she was born in 1957 and is the youngest member of the family. She is single. She lived in the home until age 26/27. At that stage she moved to live with her sister in Drumkeeragh, Dromara but she continued to call at the family home every day and frequently took her mother out to shop etc.

[49] Initially she worked in Forster Green Hospital and then the Downe Hospital as a domestic. From in or around 1978 she worked in the Chemist shop in Downpatrick. In 1995 she moved to live with her mother and her brothers Gerard, Nicolas and Vincent in the new home. In 2008 she left work to care full-time for her mother.

[50] In November 1999 Alice’s mother asked her to make an appointment with the family solicitor as she wanted to make a Will to “get her affairs in order.” Alice made an appointment with the solicitor and she went with her mother to the Newcastle office. The solicitor spoke to the testatrix and said he would have to come out to the house to walk the lands. Approximately a month later he called out to the home. At this stage Patricia Middleton was living with her grandmother and when the solicitor arrived only Alice, Patricia and the testatrix were present. The solicitor spoke to the testatrix alone in her bedroom and she and Patricia remained in the kitchen. After approximately two hours or so the solicitor came up to the kitchen and asked Patricia to come down to sign the Will. Patricia left and Alice remained in the kitchen. The solicitor then came back up, spoke briefly to her and then walked outside and thereafter left. Alice denied that the solicitor ever discussed the contents of the Will with her and denied that she ever discussed the contents of the Will with her mother.

[51] In relation to the new home Alice said that she had paid for the planning permission and paid for materials and other building costs totalling approximately £20,000/£30,000. She accepted that Patrick had done some building work, Nicholas had done plumbing work and her mother had paid the balance due towards the costs of building the new home.

[52] After the house was built she lived in it with Nicholas, Gerard, Vincent and her mother. At that time she was on good terms with Nicholas and she did his washing, cooking etc. She gave evidence that she remained on good terms with

Nicholas until in or around late 1999 early 2000. At that time Patrick's son pulled a knife on the testatrix and assaulted Alice. After this relationships within the wider family deteriorated.

[53] Alice denied that she isolated the testatrix from her family. She stated that several family members had keys to the home and were able to attend when they wished and at no stage did she bar them. Alice also gave evidence that Nicholas was in debt and she had assisted him by paying some of his debts. She said that he never contributed to the housekeeping and was under the threat of bankruptcy due to unpaid tax.

[54] In around 2014 as a result of Nicholas' behaviour towards her Alice obtained a non-molestation order and occupation order which was made on 6 January 2015 for a period of 2 years. These orders were made after both parties gave evidence during a contested hearing before the magistrates' court.

[55] Alice gave evidence that she now lived alone in the house as Gerard was deceased and Vincent had moved out in 1995 or so.

[56] She gave evidence that when her mother was alive she had carers who attended to her needs during the day. Alice then cared for her mother in the evenings and at weekends. She gave evidence about how she looked after her mother's needs and how she also took her out in the car to shop, attend medical appointments and for recreational purposes.

[57] Under cross-examination Alice denied that she ever discussed with her mother what was to happen to the family home notwithstanding the fact Alice had no other place to live and Alice had put money into the home. She also denied that she controlled her mother in any way. She stated that her mother was in "command of her faculties" and said that she was a "strong woman" who had "firm opinions", "knew her own mind and carried out her own wishes." She denied that she ever threatened to put her mother into a care home and denied that she had any heated arguments with her mother.

[58] Mr Gibson then referred Alice to a document provided by the Trust which recorded in 2004 a synopsis of issues around the care package which was currently in place for Mrs Braniff. It recorded as follows:

"25/6/03 - Alice refused to have a particular carer into the house.

27/6/03 - Alice complaining of standard of care provided.

30/6/03 - Care workers refused due to Alice's behaviour, they felt that she was treating them like school children shouting at them... Alice asked that care workers from

NCD do not come back ... Alice refused direct payments. Alice declined services. No other family member prepared to help. Again, offered service from Age Concern, again refused.

29/7/03 - Alice very annoyed she did not want anyone to call at the house.

29/9/03 - Alice declined certain care workers.

19/1/04 - Care workers frightened by outburst from Alice.

13/8/04 - Alice requested change of care workers.

25/8/04 - Meeting with Lawrence Clarke, Coleen Templeton to discuss difficulties.

Some care workers refused to cover the case ... feel put under undue stress by Alice's attitude to them."

[59] Alice denied the accuracy of what was recorded in this document. She accepted that there were some problems with carers and gave by way of example the fact she was unhappy that some carers wore latex gloves as her mother was allergic to these and she also referenced other problems with other carers who arrived late or went into the kitchen and handled food. She said she was mostly at work when the carers were present in the home. She said all issues had been sorted out by November and everyone was content with the on-going arrangements. She denied that she had ever lost her temper or shouted at carers.

[60] In respect of the Trust document entitled "Over 75 Screening", Alice gave evidence that this contained a number of inaccuracies. In particular it recorded that Geraldine was the testatrix's daughter and that she was her principal carer. Both of these matters were inaccurate. It also stated that the testatrix had one carer when in fact she had three carers. Alice also gave evidence that her mother never had and was never diagnosed with depression and therefore the reference in this document stating her mother was prone to depression was inaccurate.

[61] In relation to the deceased's eyesight the plaintiff accepted that her mother's eyesight had deteriorated with age.

[62] Finally in relation to the commode incident Alice said that she was not present at the home when her mother fell. When she returned home she found her mother on the floor. She lifted her up and enquired as to her well-being and whether she was in pain. Due to an ongoing complaint of pain she phoned the ambulance the next day. She denied that at any time she called her mother "a fat

sow.” She denied being verbally abusive to her or engaging in heated arguments in which voices were raised.

[63] When it was put to her that she now lived alone in the property as all those with a right of residence could no longer reside there, she said that she could not have foreseen these things happening.

### *Relevant Legal Principles*

[64] The law in respect of undue influence in respect of making a Will is relatively well settled and the relevant principles were conveniently summarised by Lewison J in *Edwards v Edwards* [2007] WTLR 1387 at para [47] as follows:

- “(i) In a case of testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence.
- (ii) Whether undue influence has procured the execution of a Will is therefore a question of fact.
- (iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition.
- (iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator’s Will must be overborne, or by fraud.
- (v) Coercion is pressure that overpowers the volition without convincing the testator’s judgment. It is to be persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator’s free judgment discretion or wishes, is enough to amount to coercion in this sense.
- (vi) The physical and mental strength of the testator are relevant factors in determining how much

pressure is necessary in order to overbear the Will. The Will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A 'drip drip' approach may be highly effective in sapping the will ...

- (ix) The question is not whether the court considers that the testator's disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

[65] Therefore, in determining whether a Will was procured by undue influence the touchstone is whether the will of the testatrix was overborne. As was set out in *Wilks* [2006] WTLR 401 at para [87]:

"Undue influence means coercion to make a Will in particular terms"

Similarly, in this jurisdiction in *Megarry v Gilhooley* [2020] NICH 15 para [74] the court held:

"In relation to making a Will undue influence means coercion. Coercion can range from actual violence through to incessant talking to a weak and feeble testatrix in the last days of his life such that he may be induced for 'quietness sake' to give way to the pressure. Persuasion or immoral influence executed over the testatrix is not in itself undue influence. The test is whether the conduct complained of is "carried to a degree in which the free play of the testatrix's judgment, discretion or wishes is overborne ..." per J P Wilde in *Hall v Hall* [1868] LR1P&D 481."

[66] Determining whether the will of the testatrix was overborne in any particular case will depend on all the relevant facts and circumstances peculiar to each case. Nonetheless, I consider that the following list of the factors (and they are by no means an exhaustive list) ought to be taken into account in every case:

- (a) The physical health of the testatrix and in particular her mobility and any limitations in her senses including hearing, eyesight.

- (b) Whether the testatrix has testamentary capacity.
- (c) The mental strength of the testatrix.
- (d) Whether and the extent to which the testatrix is dependent (including for care) on the main beneficiary.
- (e) Whether there is a power differential between the testatrix and the main beneficiary.
- (f) The extent to which the testatrix is isolated from family members and others.
- (g) The substantive provisions of the Will and whether they make reasonable provision for all those having a claim on the testatrix's estate.
- (h) If not, whether there are good reasons to explain the exclusion or reduction in provision made.
- (i) The circumstances surrounding the making of the will eg was it a home-made will, was there a change in the provisions of the will from earlier wills, was a solicitor engaged, was there a change in solicitor, who gave instructions for the will etc.,
- (j) The words spoken by and conduct of all those who had a claim on the testatrix's estate prior to, during and possibly after the Will was made.
- (k) Any other relevant circumstances.

The relevance and weight to be given to each of these factors will vary depending on the specific facts and circumstances of the particular case.

***Findings of Fact and Discussion re whether the Will was validly executed***

[67] The testatrix had testamentary capacity. Secondly, I am satisfied on the basis of the evidence of the solicitor, which I accept, that although the plaintiff arranged the appointment, the solicitor spoke to the testatrix alone and prepared her Will as per her instructions. I am further satisfied that he read the Will over to her and satisfied himself that she understood it and was in agreement with its terms and provisions. I therefore reject the defendant's case that the plaintiff gave instructions for the Will and that she was present when the testatrix met the solicitor. The defendant produced no evidence in support of these submissions and failed to undermine the evidence of the solicitor who gave, what I consider to be clear consistent and honest evidence to the contrary. I am further satisfied that the testatrix duly executed her Will in the presence of Miss Middleton and the solicitor.



[68] I am therefore satisfied that the Will complied with all the necessary legal requirements to make it a valid will, subject only to the question whether it is invalidated by reason of undue influence.

[69] In determining whether the will of the testatrix was overborne in this case it is necessary to take into account the following particular factors:

- (i) The physical health of the testatrix including her mobility and eye sight and the extent of her dependence on Alice.
- (ii) The mental strength of the testatrix and in particular whether there was a power differential between her and Alice.
- (iii) The extent to which the testatrix was isolated from family members and others.
- (iv) The provisions of the Will and whether they made reasonable provision for all those having a claim on the estate and if not whether there are good reasons to explain the exclusion of, or reduced share given to, Nicolas.
- (v) The circumstances surrounding the making of the will including the involvement of a solicitor and how instructions were given etc.
- (vi) The conduct of Alice and Nicholas prior to the Will, during the making of the Will and after the Will was executed.

### *Physical health*

[70] At the date of the Will the testatrix was elderly. She had limited mobility and deteriorating health. As a result, she required assistance with personal tasks including dressing, washing, toileting, cooking and cleaning. She also required to be taken out to shops and to medical appointments.

[71] In addition, the testatrix had deteriorating vision. In May 1999 the records show that her vision had deteriorated but it was still capable of correction. By 12 May 2000 she was registered blind. Therefore, at the time she made the Will, in accordance with the evidence of the solicitor and the medical notes, I find that although she had difficulty seeing she was still able to sign her name on the Will albeit her signature "headed north."

[72] Alice was living at home with her mother and although the defendant also lived at home the main burden of caring for the testatrix fell to Alice. She became her main carer but she was not her sole carer. At the time the Will was made Alice was still working full-time and therefore although she cared full-time for her mother in the evenings and at weekends other carers looked after the testatrix during the day. These carers called several times during the day. Therefore, I find that

although the testatrix was dependent on others for assistance she was not totally dependent on Alice.

### *Mental strength*

[73] At the time the testatrix made her Will she had full capacity. I am satisfied on the basis of the evidence of the solicitor, Miss McIlmail, Nicholas, Patrick and Alice that the testatrix was a woman who was strong willed. All the family members referred to her as “the boss.” Nicolas gave evidence that the testatrix in her last years continued to “check him” and he said that she “checked Alice more.” She was not someone who would be easily influenced and on the basis of all the evidence I consider that the testatrix was not a person who could be coerced into doing something she did not want to do. I am satisfied that she was a woman who knew her own mind and was in control of her own powers of decision making.

### *Isolation*

[74] Although the defendant alleged Alice isolated the testatrix and prevented family members and others calling with her I do not accept this evidence. The evidence of both Patrick and Nicolas was that family members called at the family home and that they had unimpeded access to their mother. This is corroborated by Patrick’s acceptance under cross examination that the photograph he gave his mother of his graduation was displayed in her bedroom and his evidence that he called frequently with his mother albeit when Alice was not at home. I am further satisfied that many family members had keys to the property and had therefore unimpeded access and therefore I do not find that Alice isolated her mother from family members.

### *The provisions of the Will*

[75] Under the terms of the Will Alice is the main beneficiary. The Will, however provides, for rights of residence to her three unmarried brothers Nicolas, Gerard and Vincent and in addition places a moral obligation upon her to allow her brothers to have use of the land upon certain conditions.

[76] In respect of the substantive terms of the Will I accept that originally the testatrix did intend to leave the house and lands to her son Nicolas. This appears from the handwritten note endorsed by her solicitor on a letter dated 6 September 1974. That note recorded that the testatrix wished the defendant to have the “home place.” This gift however was conditional upon the defendant fixing a cottage and transferring it to the unmarried members of the family. There is no evidence that the defendant ever fixed a cottage or transferred it to his unmarried siblings. Further, there appear to be good reasons why the testatrix changed her mind about leaving the home place to the defendant. Nicolas experienced financial difficulties and was at risk of bankruptcy. Such an event would have placed the lands at risk of being sold off to pay his debts. Further, it appears that the testatrix was unhappy about

the way Nicholas managed the lands and this was one of the reasons she gave the solicitor for leaving her estate in the way she did. I am therefore satisfied that the testatrix had good reasons to change her mind about the disposition of the home place to the defendant and therefore the change of mind in and of itself is not indicative of her will being overborne.

*Circumstances surrounding the making of the Will*

[77] The testatrix made her Will with the benefit of independent legal advice. I accept the involvement of the solicitor, especially one who has not had previous dealings with the client and one who was not totally familiar with the inter family relationships would not act as a nullifying factor in respect of undue influence. Nonetheless, Mr Hanna was an experienced solicitor and some significance must be attached to the fact he noted nothing about the testatrix's demeanour to indicate undue influence.

*Actions of the parties prior to, at the time of and subsequent to the Will*

[78] Mr Gibson submitted that the Trust document relating to how Alice treated the carers in 2003/2004 indicated that she was a person who had a bad temper and who intimidated carers. Consequently, her denial of the events recorded show that she is a person who lacks veracity and the court should find that she was someone who did lose her temper with the testatrix and did threaten to put her into a care home. As a result the testatrix was afraid of Alice and in all the circumstances was coerced into leaving the farm and home to her because she was afraid of her and was dependent upon her for care.

[79] Although the events recorded in 2003/2004 took place a long time after the Will was made, I nonetheless find that they are relevant in assessing Alice's character and personality. I am satisfied from these notes and also from my own assessment of Alice giving evidence that she is a person who has a forceful personality. She is someone who speaks her mind and is not afraid to challenge other's behaviour. I am satisfied that the events recorded in the Trust document did take place and I am satisfied therefore that at times Alice did lose her temper with her mother. This is not surprising. As appears from the 2003/2004 Trust document no other family member was prepared to help. She was her mother's main carer and her mother was quite demanding. She had no assistance from other family members to assist her in this very challenging role. Notwithstanding this, I find that Alice was nonetheless a loving and caring daughter who was very fond of her mother and did provide her with love, care and attention throughout her life. She devoted most of her spare time to caring for her mother and since 2008 provided her with full-time care.

[80] I therefore accept that there may have been heated exchanges between Alice and her mother, and I accept that she was defensive under cross-examination, but I find that she was not being deliberately untruthful with the court. I consider that

she was embarrassed to admit that she had heated exchanges with their mother and may have expressed herself in ways in which she now wishes she had not done so. I have no doubt that as a carer she was under stress and may have said things that she now regrets. Nonetheless, I do not consider that the testatrix felt in any way intimidated by Alice. They were similar in personality and as Nicolas noted the testatrix was confident enough to continue to “check” Alice.

[81] I find in relation to the commode incident the mother simply fell from the commode and indeed Nicolas accepted that he did not know if Alice had done this on purpose or not. I therefore reject the contention that Alice physically abused her mother.

[82] I further am satisfied that although there may have been heated exchanges between the parties there is no evidence that Alice ever threatened to put her mother into a care home if she was not bequeathed the house and lands. The evidence, as appears from the Trust’s notes, is that a long time after the Will was made leaving the house and lands to Alice, Alice gave up her job to care full-time for her mother. I do not consider she would have acted in this sacrificial way in circumstances where she had already coerced her mother into making a Will leaving the home and lands to her.

[83] I am therefore satisfied that Alice did provide care, love and attention to her mother and at times acted sacrificially and I specifically reject Patrick’s evidence that she did not treat her mother well.

[84] I further find that Nicolas prior to the making of the Will had conducted himself in such a way that the testatrix decided not to leave him the farm. As already set out he had financial problems and lived under the threat of bankruptcy and I find this is something which influenced the testatrix’s disposition of the house and lands. Further, he appears not to have farmed the farm in a responsible way, which did not please the testatrix and she gave this explanation to the solicitor when he was taking instructions about how she wished to dispose of her estate and also referred to it in her Will indirectly when she stated the land was to be used “responsibly.”

### *Conclusion*

[85] I am satisfied that the Will was an expression of the testatrix’s own mind and that her will was not overborne by Alice. I have come to this conclusion on the basis of my findings of fact.

[86] I consider that the substance of her Will is a very strong indicator that she was not subject to undue influence. The Will was nuanced and balanced in its treatment of all the family members and I consider it reflected the testatrix’s desire to be fair to all family members. If Alice had been exercising undue influence over her mother one would have expected the Will to leave everything to her absolutely. Instead, the

Will left her with a moral obligation to her brothers and more significantly the gift of the home to her was burdened by rights of residence given to her three brothers. Given that the ages of the persons entitled to a right of residence were close to Alice's age and given the fact Nicolas was single it must have appeared to be most unlikely at the time the Will was executed that Alice would ever be able to live alone in the house in her lifetime and would ever have been able to sell or mortgage it.

[87] Further, I am satisfied that at the time the Will was executed Alice could not have realistically contemplated that she could orchestrate a situation whereby she would be able to live alone in the property. I am satisfied that she could not have foreseen the events which lead to the present situation whereby she resides alone in the property. She could not have foreseen the untimely death of Gerard or the circumstances giving rise to Vincent voluntarily leaving the property. Further, given that Alice and Nicolas were on good terms when the Will was executed, she could not have foreseen that he would perpetrate domestic violence towards her which would ultimately result in the court granting an occupation order in her favour.

[88] Although I accept that the testatrix was vulnerable and dependant on others including Alice for assistance, I consider that she was very strong willed and a person of forceful personality. The testatrix was a person who was very much in command of her own decision making and I am satisfied on the evidence that Alice would not have been able to coerce her into doing something she did not want to do. I am further satisfied that there is no evidence that Alice sought to influence her mother in relation to the contents of her Will. I am therefore satisfied that the Will was not procured by the exercise of any undue influence by the plaintiff but was rather the product of the testatrix's own freewill.

[89] Given that I have already found that the Will was properly executed I propound the Will in solemn form and dismiss the counterclaim.

[90] I will hear the parties' submissions in respect of costs.