Neutral Citation No: [2020] NICh 15 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McB11281** *ICOS No:* **2015/93616** *Delivered:* **06/11/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE ESTATE OF BRIGID GILHOOLY (DECEASED)

BETWEEN:

THERESA McGARRY

Plaintiff;

-and-

KEVIN MURPHY AS THE PERSONAL REPRESENTATIVE OF BRIGID GILHOOLY (DECEASED)

Defendant.

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McBRIDE J

Introduction

[1] The plaintiff challenges the validity of the Will of the deceased Brigid Gilhooly ("the testatrix") dated 21 September 2011 on the grounds that:-

(i) The testatrix lacked testamentary capacity;

(ii) The Will was obtained by the undue influence of the defendant;

(iii) The Will is a forgery.

[2] The plaintiff initially had legal representation but dispensed with her solicitors at an early stage of the proceedings and throughout the entire hearing acted as a litigant in person. The testatrix's estate was represented by Mr Gibson of counsel.

Background

[3] The testatrix was born on 21 August 1917. She married Frank Gilhooly in 1965. After living for a period in America she and her husband returned to live at 41 Carricknagavna Road, Belleeks, Newry in 1973.

[4] The testatrix's husband died in 1983.

[5] In 1992 the testatrix made a statutory declaration regarding the dwelling house and lands situate at 41 Carricknagavna Road, Belleeks, Newry.

[6] The plaintiff is a niece of the testatrix on the maternal side. The defendant is a nephew of the testatrix on the maternal side. The plaintiff and defendant are therefore first cousins.

First Will

[7] On 30 September 2008 the testatrix executed her first Will which was drafted by Tara Walsh, solicitor. The Will provided that Kevin Murphy and Daire Murphy be appointed as her executors. After making a number of pecuniary legacies and a number of specific bequests of various chattels the testatrix left her dwelling house and lands at 41 Carricknagavna Road, Belleeks to Malachy and Mary Quinn. The residue of her estate was left to the two executors. Under the provisions of this Will the plaintiff was given a pecuniary legacy of £200.

[8] The testatrix also left shares in Duke Energy to the defendant and his wife Maureen Murphy. Subsequently on 26 June 2009 the testatrix wrote a letter to Duke Energy Corporation requesting that her shares in the company be transferred into the names of Kevin and Maureen Murphy.

Second Will

[9] On 21 September 2011 the testatrix executed a second Will ("the disputed Will"). This Will was prepared by Tiernans, solicitors. In the disputed Will the testatrix appointed Kevin and Daire Murphy as executors. She again left her dwelling house and lands to Malachy and Maureen Quinn and the residue of her estate to her executors.

[10] There are a number of differences between the first and second Will. In particular the disputed Will did not make any specific bequests of chattels and it did not refer to her wishes regarding the inscription on her headstone. In addition the disputed Will changed the amount of the pecuniary legacies left to her nephews and nieces. Specifically the plaintiff was now to receive the sum of £100 as opposed to £200 provided for in the first Will.

Medical chronology

[11] The following material matters are recorded in the medical and social care records which were provided to the court:-

(i) The testatrix had total hip replacements in 2002 and 2007.

(ii) The testatrix was in receipt of domiciliary care from the date of her first hip replacement in 2002.

(iii) The first documented contact with a professional is a note dated 18 November 2007 when social services discussed with the testatrix alternative care providers. Thereafter care was provided by Catherine Murphy, who was paid via direct payments.

(iv) On 25 December 2011 the testatrix attended A&E after a fall. Glasgow Coma Scale was 15/15.

(v) On 7 June 2012 the plaintiff phoned the testatrix's GP noting concerns about the testatrix's level of confusion. The defendant also advised the social worker that the testatrix had mild memory loss.

(vi) On 8 June 2012 Dr Maguire, the GP, carried out a home visit and noted that the testatrix was orientated in time but had some difficulty in recall.

(vii) On the same date Catherine Murphy, the testatrix's carer, advised the social worker that the testatrix's short term memory was very vague and that she was forgetful.

(viii) On 11 June 2012 the social worker carried out a home visit to investigate concerns raised by the plaintiff on 7 June 2012. The social worker noted that the testatrix was alert and had good recall. The testatrix advised the social worker that she had not seen the plaintiff for many years.

(ix) In an Adult Social Review Schedule, dated 11 June 2012, signed by the social worker, the testatrix and the defendant; the professional assessment recorded that the testatrix was "alert and orientated, engaged well in meaningful discussion".

(x) On 29 October 2012 the plaintiff contacted the testatrix's social worker, GP and the Office of Care and Protection. The plaintiff expressed concerns about the testatrix's appearance and weight loss when she had recently seen her at a relative's funeral. The plaintiff advised that her cousin also informed her that the testatrix was confused. The

plaintiff expressed the view that the testatrix was neglected and was unable to manage her affairs and advised that the defendant could be taking advantage of her. She further advised that she was unable to visit the testatrix.

(xi) The social worker carried out a home visit with the testatrix on 30 October 2012. The social worker noted that the testatrix had limited recall, had limited awareness of the value of money, had a decline in memory and noted an inability on the part of the testatrix to remember who the social worker was and why she had called. On the same date the social worker contacted Catherine Murphy, carer, who advised her that the testatrix was forgetful but orientated in place. The social worker also contacted Dr Dean, GP, who advised that he was not going to carry out a home visit as the District Nurse had advised him she had no concerns regarding the testatrix's memory. Dr Dean also advised that the testatrix may be a little forgetful but was orientated in person, place and time. On 7 November 2012 the defendant advised the social worker he had noted a decline in the testatrix's memory but stated that this fluctuated.

(xii) On 11 December 2012 Dr Dean undertook a home visit and reported that the testatrix was very lucid and he had no concerns about her capacity.

(xiii) On 13 December 2012 the social worker visited the testatrix at home and found her "alert and orientated at the time, person and place" and had no concerns regarding her ability to make decisions.

(xiv) On 28 November 2012 the carer advised that she had no concerns regarding the testatrix's memory.

(xv) On 16 January 2013 the testatrix attended A&E with a fractured wrist. The hospital social worker noted "throughout the OT assessment the testatrix presented as *compos mentis* with no indication of any confusion".

(xvi) On 23 January 2013 Daisy Hill Hospital conducted an assessment which recorded a MMSE score of 22/30.

(xvii) On 6 February 2013 a social worker carried out a home visit following a call from the defendant and noted that the testatrix's recall was nil although she was orientated to person and place. The social worker explained to the defendant that a referral to the Office of Care and Protection may be required if Dr Dean assessed that the testatrix lacked capacity and power of attorney arrangements should be considered.

(xviii) On 25 February 2013 power of attorney arrangements were put in place whereby the defendant was given authority.

(xix) On 16 April 2013 Dr Dean advised that the testatrix had physically improved and with this her memory had also improved. He noted that she was very coherent in her conversation and he reported that she was very strong and had constant family support.

(xx) On 22 April 2013 domiciliary care staff reported that the testatrix could be confused.

(xxi) On 29 April 2013 the social worker requested an assessment and asked the testatrix's GP to refer her to a Consultant in Old Age Psychiatry.

(xxii) On 1 May 2014 the social worker noted marked cognitive decline.

(xxiii) On 22 April 2014 the GP visited and noted an MMSE of 18/30. On 5 June when he visited he noted an MMSE of 12/30.

(xxiv) On 10 June 2014 the testatrix was referred by her GP to Memory Services and this referral was screened on 23 July 2014 and forwarded to Memory Team OT.

(xxv) On 30 June 2014 the testatrix fell and was admitted to hospital. Upon admission she was noted to have significant memory deficit and diagnosed with dementia. The Memory Liaison Service recorded an MMSE of 16/30 and short-term memory of 0/30. She was viewed as lacking capacity to make decisions regarding her future caring needs/placement due to moderate cognitive impairment. CT scan showed "brain atrophy, chronic small vessel disease". The testatrix was discharged home with care and family support.

(xxvi) Between 12 October 2014 and 5 November 2014 the testatrix was admitted to Daisy Hill Hospital with pneumonia. Dr McGleenon, consultant geriatrician, completed a medical certificate on 5 November 2014 in which he opined that the testatrix lacked capacity to manage her property and affairs and estimated that her mental disorder had been present for the previous six months to one year.

(xxvii) On 5 November 2014 the Office of Care and Protection issued a medical certificate in which Ms McCleave certifies that the testatrix is incapable of managing her affairs.

(xxviii) On 8 November 2014 the testatrix died.

Chronology of events subsequent to the testatrix's death

[12] (a) On 30 March 2015 the plaintiff sent a letter to the defendant in which she accused the testatrix of criminality in relation to forging a Will for her father.

(b) On 1 April 2015 a caveat was entered by the plaintiff.

(c) On 27 May 2015 – a warning to the caveat was entered by the defendant.

(d) 30 June 2015 – an application was made by the defendant to clear off the caveat.

(e) On 15 July 2015 – probate was extracted.

(f) 7 August 2015 the executors executed an Assent in respect of the land and dwelling house at 41 Carricknagavna Road, Belleeks, Newry in favour of Malachy and Mary Quinn.

(g) On 11 June 2018 – the plaintiff's solicitors came off record.

(h) On 20 November 2018 the plaintiff instructed Dr Craythorne, forensic scientist, regarding the authenticity of the Will.

(i) On 30 November 2018 after a number of applications for discovery, all medical and social work records were provided to the plaintiff by the Trust.

[13] The plaintiff initially instructed Dr English to prepare an expert medical report on capacity. Dr English furnished a report on 3 April 2018. After receipt of the updated discovery the plaintiff requested Dr English to update her report. Dr English refused as she indicated she was unwilling to accept instructions from the plaintiff as at that stage she was acting as a litigant in person.

[14] At a number of review hearings the plaintiff advised the court that she intended to instruct Dr Todd a psycho-geriatrician. The court permitted the instruction of another expert but required the report to be filed prior to the date of hearing. In the event as of the date of hearing Dr Todd had not reported. The court proceeded to hear the available evidence but adjourned the hearing for a period of six weeks to permit the plaintiff to confirm to the court whether Dr Todd was willing to provide a report and if so to advise on his availability to attend and give evidence. At a review hearing on 7 November 2019 the court extended time for the plaintiff to lodge the expert's report requiring it to be filed on or before 30 January 2020. A report was provided by Dr Todd to the court dated 17 January 2020. Subsequently he filed an addendum report on 4 March 2020 and a letter dated 20 March 2020.

[15] Thereafter as required by court direction both parties filed written submissions. Subsequently, the plaintiff sought leave to call Dr Todd to give evidence. The court indicated that it would permit Dr Todd to give oral evidence. After this indication was given the plaintiff wrote to the court stating that she did not intend to call Dr Todd to give evidence.

Relief sought

[16] The plaintiff seeks that the court:-

(a) Pronounces against the validity of the disputed Will.

(b) Sets aside the grant of probate and assent made on 7 August 2015 by the executors in favour of Malachy and Mary Quinn.

(c) Issues a grant of letters of administration of the estate of the testatrix to the plaintiff.

Evidence

The plaintiff's evidence

[17] The plaintiff gave evidence in which she described a close relationship with her aunt, the testatrix, and recalls spending summer holidays with her. When the testatrix married in 1965 the plaintiff was her bridesmaid. After the testatrix returned to live in Northern Ireland in 1975 the plaintiff called to see her about 7 or 8 times per year. In or around 2008 the testatrix told the plaintiff that she had a made a Will with Tara Walsh, solicitor and had a left legacy to all her nephews and nieces save for her brother's children because she had had a dispute with her brother.

[18] As the years passed the plaintiff believed the testatrix was beginning to exhibit signs of dementia. In particular she thought the testatrix was becoming forgetful as she wrote to Duke Energy to transfer the shares to the defendant and his wife even though she had already provided for this in her Will. Further, the plaintiff noted that the testatrix had a "vacant far-away look" which from her medical training she knew was a classic symptom of dementia. The plaintiff's sister also advised her that the testatrix was very confused in her speech any time she spoke with her. She further referred to the fact the testatrix had had a number of falls at home with multiple attendances at A&E and also had the assistance of a home help and 'meals on wheels'.

[19] In the summer of 2011 the plaintiff noted that the testatrix presented as dishevelled and neglected and only gave monosyllabic answers to questions. She was also aware that she had "wandered off" at various times.

[20] As a result of her concerns the plaintiff contacted Social Services in March 2012 and advised them that the plaintiff was neglected and dishevelled and that she was concerned that the testatrix may be taken advantage of and therefore intervention was required. The plaintiff felt her concerns were dismissed by Social Services.

[21] In October 2012 when the testatrix attended her sister's funeral the plaintiff stated that she was shocked by the testatrix's emaciated and dishevelled appearance. As a result she again contacted Social Services on 29 October 2012 and advised that she considered the testatrix was unable to manage her affairs and expressed concern that the defendant could be taking advantage of the testatrix. She advised that she had not spoken to the testatrix for a number of years because of the threatening and intimidating behaviour exhibited by the defendant towards her. The plaintiff did however speak to one of her other cousins who advised her that the testatrix was confused and had lost weight.

[22] Due to her concerns the plaintiff also contacted the testatrix's GP, the Office of Care and Protection and the police to advise them that the testatrix had significant memory problems and was unable to manage her affairs and was potentially at risk of being taken advantage of.

[23] When the testatrix died the plaintiff said she felt unable to attend the funeral due to fear for her own safety. She did however attend the grave later to pay her last respects.

[24] The plaintiff advised the court that she believed the testatrix lacked capacity to make the disputed Will because:-

(a) She was aged 94 when she executed the Will.

(b) She was living alone and had required considerable medical intervention including hospital admissions.

(c) She had dementia as appeared from the medical notes and records. In particular the plaintiff referred to the following matters:-

(i) The fact that the testatrix was diagnosed with dementia before she died. In a letter from Daisy Hill Hospital to the testatrix's GP dated 15 July 2014 the hospital confirmed that the testatrix had MMSE of 16/30, was known to the Memory Team and a CT brain scan showed brain atrophy and chronic small vessel disease.

(ii) The fact the referral to Memory Services was dated September 2010 which showed she lacked capacity from in or around this

time and therefore lacked capacity when she made the disputed Will.

(iii) The brain scan results showed brain atrophy and chronic small vessel disease thereby demonstrating that the testatrix lacked capacity before she executed the disputed Will.

[25] To substantiate her claim that the defendant exercised undue influence over the testatrix, the plaintiff stated that the defendant was close to the testatrix and had control over her as he: prevented relatives calling to the testatrix's home; failed to admit the testatrix to a nursing home; and neglected her as evidenced by her unkempt appearance.

[26] In respect of the plaintiff's claim that the Will was a forgery she advised that she relied solely on the expert evidence of Mr Craythorne, forensic scientist.

[27] Under cross-examination the plaintiff accepted that she had made a written statement on 30 March 2015 in which she had accused the testatrix of criminality on the basis that she had made a second Will for her father when he was old, frail, vulnerable and confused, approximately two weeks prior to his death, which made her and not her brother the beneficiary of his home and lands. When it was put to her that the testatrix had actually obtained the dwelling house and lands by way of an adverse possession claim rather than on foot of a bequest to her by her father as her father had in fact died intestate, the plaintiff stated that she had made this statement out of frustration.

[28] The plaintiff further accepted under cross examination that she only had a suspicion that the defendant exercised undue influence over the testatrix. This suspicion was based on the fact that the disputed Will differed from the first Will in a number of specific regards, namely that a number of specific requests were left out which meant the defendant, as the residuary legatee received a larger share. She also believed that he exercised undue influence because he stopped relatives calling to see the testatrix. The plaintiff accepted that there was no other evidence to support her claim of undue influence.

[29] Mr Gibson on behalf of the defendant put to the plaintiff that there were no notes or records which showed the testatrix lacked capacity in or around the time she executed the disputed Will and such records as existed showed the testatrix was healthy and able to make decisions. It was further put to the plaintiff when the testatrix was admitted to hospital due to a fall on 25 December 2011 that there was no mention of dementia. The plaintiff responded by stating that the brain scan results and the referral to the Memory clinic showed that the testatrix did have dementia throughout this time. In respect of the referral to the Memory Clinic Mr Gibson put to the plaintiff that the September date on the referral was the date the pro forma was created rather than the actual date of referral as confirmed in correspondence from the Trust. The plaintiff continued to assert that the date on the

referral to the Memory Clinic was September 2010. Accordingly it was her view that this proved the testatrix lacked the requisite capacity to make the disputed Will.

Solicitors' evidence

Mr Tiernan

[30] Mr Tiernan is the principal in the firm of Tiernans, Solicitors. He gave evidence that he had been a solicitor since 1988 and was very experienced in Will making and had drafted hundreds of Wills. He stated that he knew the testatrix because she lived 2 miles from his home and that he had seen her at church, local shops and restaurants. Under cross-examination he accepted however that he only had "a passing acquaintance" with the testatrix.

[31] Mr Tiernan advised the court that the testatrix contacted him by phone prior to 21 September 2011 asking to change her Will. He arranged to see her on 21 September 2011. He went to her home along with Alana McElroy, trainee solicitor.

[32] When they arrived they had a conversation about local issues and politics. Mr Tiernan advised that from his conversation he was satisfied that the testatrix had the necessary capacity to make a Will. Mr Tiernan stated that he attended with the testatrix for approximately one hour. After taking instructions he then wrote the Will out by hand, read it to her and confirmed that she was satisfied regarding its contents. She then signed it in his presence and in the presence of Ms McEIroy. They then witnessed her signature.

[33] Whilst at her home Mr Tiernan made an attendance note. In this he recorded the testatrix's name and address and the date of the attendance. Thereafter he set out her instructions about the content of her earlier Will; a list of her assets, and her instructions for the new Will.

[34] Mr Tiernan recalled that she had copies of her bank statements etc., with her at the consultation. She did not give him a copy of her earlier Will and he did not ask for a copy. He stated that he had no concerns regarding her testamentary capacity and therefore did not feel it was necessary to request a medical report even though she was aged 94 and was in receipt of domiciliary care.

[35] Under cross-examination he accepted that as he did not have the testatrix's earlier Will he was unable to note the exact changes and did not know or ask the testatrix why she was changing the provisions of her Will. He stated that these matters were simply not discussed.

[36] He accepted that his attendance note did not record the time he had spent with the testatrix or the fact that he had asked her questions about local issues and politics to ensure that she had capacity. He stated however that he would only have recorded such matters in his attendance note if he had been concerned that the

person lacked capacity. He stated that he recalled speaking to the testatrix about current affairs and agriculture. He was fully satisfied that she understood the value of money as they had had a discussion about land which had been sold in the area recently. He also stated that the testatrix was able to talk about her relatives and appeared clean and tidy. He accepted that he had recorded none of these matters in his attendance note but he stated that he clearly recalled having these discussions with the testatrix.

Ms McElroy

[37] Ms McElroy was a trainee solicitor in the firm of Tiernans. She commenced practice in 2009 and qualified in 2011 just after she had attended with the testatrix. At the time of her attendance she was therefore a trainee solicitor.

[38] On 21 September 2011 Ms McElroy attended the testatrix's home with Mr Tiernan. She took an attendance note during the consultation whilst Mr Tiernan spoke directly to the testatrix. Her attendance note is in very similar terms to that of Mr Tiernan. Like his attendance note it contains no reference to any questions asked to ascertain testamentary capacity.

[39] Ms McElroy recalled that the testatrix's home was clean and tidy and that the testatrix was well-presented. She recalled chatting to her about dogs and cats during the time that Mr Tiernan was drafting the Will by hand. Ms McElroy said that she had no concerns with the testatrix's capacity and that she presented as *compos mentis*. She confirmed that no one else was present during the interview.

Christine Quinn

[40] Ms Quinn gave evidence that she was a social worker with 20 years' experience having worked with the Frail Elderly Older Persons Team since 2003. She advised the court that the testatrix was known to the Trust from in or about 2007 as she was in receipt of a care package following a hip replacement. The care package consisted of a morning call to assist the testatrix with dressing. The notes indicated that the care package was to be reviewed annually although Ms Quinn noted that there was no paperwork indicating details of such reviews and therefore it was her view that these annual reviews may not have taken place.

[41] Ms Quinn first had contact with the testatrix on 11 June 2012 when she visited the testatrix at her home. This visit was to enable her to complete a review of the testatrix's care needs and to investigate the concerns raised by the plaintiff. When Ms Quinn visited the testatrix on 11 June 2012 she was present for approximately one hour. Ms Quinn advised that she did not find the testatrix emaciated or unkempt. She stated that she found the testatrix to be articulate, orientated and alert. She engaged well in a meaningful discussion. Ms Quinn discussed with the testatrix her care needs, her health, assistance required and the concerns raised by the plaintiff. She saw nothing which gave her any cause for concern regarding the

testatrix's mental state. She further advised the court that when she spoke with the testatrix about the concerns raised by the plaintiff, the testatrix was taken aback and advised that she had neither seen nor heard from the plaintiff for a number of years. As part of her investigations Ms Quinn also spoke to the defendant and Catherine Murphy, the testatrix's carer. Ms Quinn then completed an Adult Social Care Review Schedule on 11 June 2012 which was co-signed by Ms Quinn, the defendant and the testatrix.

[42] Ms Quinn visited the testatrix again on 30 October 2012 to monitor and to follow up after receipt of further information from the plaintiff. She found that the testatrix's memory recall and orientation had declined since her earlier call in June and noted that the testatrix had no awareness of the price of items or value of money. As a result of her concerns Ms Quinn contacted the testatrix's GP, Dr Dean. He later advised her that he had visited the testatrix on 11 December 2012 and found her to be very lucid and that he had no concerns regarding her memory capacity or relationship with the defendant.

[43] Ms Quinn again visited the testatrix in her home on 13 December 2012 to monitor the situation. She found the testatrix was alert and orientated to time, person and place. The testatrix was able to accurately advise Ms Quinn about the names of her home-helps and otherwise engaged in meaningful conversation about the weather and the state of the roads. Ms Quinn stated that she had no concerns at the time of this visit with regard to the testatrix's memory or her ability to make choices and decisions.

[44] Thereafter she advised that there was ongoing social work involvement. By July 2014 the testatrix had been assessed as having no short-term memory with an MMSE of 16/30. Subsequently, she was referred to the Memory Clinic and a diagnosis of dementia was made on 5 November 2014 by Dr McGleenon.

[45] Under cross-examination Ms Quinn stated that she had dementia awareness training and therefore knew the signs to look for. She further advised that she had training in respect of capacity. She confirmed that she saw no trigger signs of dementia during her visits in June 2012 or her visit on 13 December 2012.

Dr Todd

[46] Dr Todd, consultant geriatrician is currently the medical lead for the Memory Assessment Service based at Waterside Hospital, Londonderry. He was instructed by the plaintiff to prepare an expert's report and provide his professional medical opinion with regard to whether the testatrix had capacity to execute the disputed Will.

[47] The plaintiff requested leave to call Dr Todd in circumstances where all the evidence had been received by the court. I granted leave for Dr Todd to give

evidence by either video-link or in person. In subsequent correspondence the plaintiff indicated that she no longer wished to call Dr Todd to give oral evidence.

[48] In preparing his report, Dr Todd had access to all the medical and social work notes and records including the report prepared by Dr Barbara English, consultant in Old Age Psychiatry, dated 3 April 2018. After reviewing all the notes and records available to him at that time he prepared a report dated 17 January 2020 setting out his professional opinion in respect of capacity and his reasons for forming this view. Subsequently the plaintiff forwarded further medical records and documents to Dr Todd and he provided an addendum report dated 4 March 2020. Thereafter, the plaintiff again furnished further comments and questions to Dr Todd. He responded by letter dated 20 March 2020.

[49] In his initial report dated 17 January 2020 Dr Todd noted that in the available notes and records no concerns were documented by medical, social care practitioners or close family members in respect of the testatrix's memory or decision-making ability before or around the time she made the disputed Will.

[50] He noted that confusion was first reported around June 2012 and then again in October 2012 and February 2013. After each episode her cognitive ability was reported to have improved. Dr Todd considered that these were episodes of delirium with subsequent improvement. He further noted that referral was not made to specialist memory services until 2014 and a formal diagnosis of dementia was not made until the summer of 2014 which was assessed as having been in existence for at most 18 months.

[51] Dr Todd stated that delirium occurs more frequently in people with dementia and therefore it was his view that the testatrix did have dementia at the time of the first episode of delirium in June 2012 even though it was not diagnosed. He noted however that there was no suggestion of cognitive impairment in the autumn of 2011. He further opined that even if (which he did not find) the testatrix had mild cognitive impairment in September 2011 this would not in and of itself have established that she lacked testamentary capacity as a person with dementia may still have testamentary capacity. Based on the materials available to him he concluded, on the balance of probabilities, that the testatrix had testamentary capacity when she made the disputed Will.

[52] In an addendum report dated 4 March 2020 after reviewing additional notes and records he concluded that the additional documents provided increased confidence in his earlier opinion that the testatrix did have testamentary capacity on 21 September 2011.

Mr Craythorne

[53] Mr Craythorne, forensic scientist was instructed by the plaintiff to examine the disputed Will in order to establish whether or not it was an authentic Will of the

testatrix written on 21 September 2011 and whether it bore her genuine signature. Mr Craythorne prepared an expert's report dated 20 November 2018 which he adopted as his evidence.

[54] Mr Craythorne in his oral evidence stated that he examined the original handwritten disputed Will for evidence of indented writing. This is writing which occurs when writing is placed on a piece of paper when it is on top of the document in question. After ESDA testing he found a number of indentations on the front of the Will.

[55] Mr Craythorne's view was that the indentations were made in or around March 2015. He opined that the signature of "McArdle" which appeared as an indentation on the front of the Will was the result of someone practising this signature before signing. He accepted however that there may be another explanation for this signature appearing on the front of the Will.

[56] He further accepted that he could not tell from the indentations whether the Will was written in 2015 or whether in fact the indentations were made at or around the time the Will was filed for probate which was in 2015.

[57] In addition to the indentations Mr Craythorne considered other aspects of the Will including the inks used, to ascertain if, for example, additions were made to it. Upon a physical and technical examination of the will he found nothing unusual.

[58] Mr Craythorne also carried out an examination of the signature on the disputed Will to ascertain whether it was the testatrix's genuine signature. To enable him to do this he compared the signature on the Will with a number of other sample signatures of the testatrix on handwritten documents which included a handwritten letter dated 26 June 2009 and documents signed by the testatrix on 11 June 2012 and 15 December 2011.

[59] Mr Craythorne noted a number of similarities and differences between the signature on the disputed Will and the specimen signatures. Particular points of concern related to the construction of the letter "B" which was written using different pen strokes. Secondly, the letter design of the letters 'g', 'd' and 'h' also differed between the signature on the Will and the specimen documents. Thirdly the signature on the disputed Will was much shakier than the free-flowing signatures found on the specimen documents.

[60] In his opinion these differences were indications of forgery as a forger, who is drawing a signature which is not natural to him draws it in a more shaky hesitant way. In addition, as a forger is making a design which is not natural to him he can get it wrong and this would explain the different construction of the letters forming part of the signature.

[61] He concluded that the multiple strokes taken to make the letters, the incorrect letter designs, and the poor writing fluency were three indicators that the signature could be a forgery.

[62] He accepted in cross-examination, however, that he could not rule out other explanations for the construction of the signature including the fact that there was a great variation in the way the testatrix signed her name as appeared from the various specimen documents. In addition he opined that the unusual variant of the signature on the Will could also possibly be due to ill-health on the day or the fact the testatrix was using a different writing implement such as an ink pen or an implement with which she was unfamiliar.

[63] He stated that that this was really a "50/50" case and he could not reach a definitive conclusion, on the balance of probabilities, that the will was a forgery.

The relevant legal provisions

Capacity

The Legal Test

[64] At the time of making his Will a testatrix must have testamentary capacity. The test for the mental capacity necessary to make a valid Will was set out in *Banks v Goodfellow* [1870] 5 QB 549. Cockburn CJ stated:

> "It is essential … that a testatrix shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will on disposing of his property, and bring about a disposition of it which, if the mind had been sound, would not have been made."

[65] Consequently, to have testamentary capacity a testatrix must be able to comprehend the following matters:-

(i) The effect of his wishes being carried out at his death, though it is not necessary that he should view his Will with the eye of a lawyer and comprehend its provisions in their legal form.

(ii) The extent of the property of which he is disposing. It is not necessary that he knows the precise value of his estate or its components just that he be able to

appreciate its approximate value and the relative worth of the assets it comprises.

(iii) The nature of the claims on him. He must be able to recall the several persons who may be fitting objects of his bounty and understand their relationship to himself and their claims upon him so he can decide whether or not to give each of them any part of his estate by his Will.

[66] Although "insane delusions" was treated in *Banks v Goodfellow* as an aspect of the third test it is now accepted that it should be treated as a separate limb (see *Sharp v Adam* [2006] EWCA 449).

[67] A testatrix suffers a 'delusion' if he holds a belief on any subject which no rational person could hold and the delusion in the mind of a testatrix deprives him of testamentary capacity if the delusion influences or is capable of influencing the provisions of his Will. A Will will not be invalid however because a testatrix is moved by capricious, frivolous, mean or even bad motives.

The burden and standard of proof

[68] The burden of proof lies upon the person propounding the Will to prove that the testatrix had testamentary capacity at the relevant time. If however a duly executed Will is rational on its face a presumption of capacity arises and the evidential burden then shifts to the person challenging the Will to raise "a real doubt" as to capacity. If a real doubt is raised then the evidential burden shifts back to the propounder of the Will to establish capacity nonetheless – see *Key v Key* [2010] EWHC 408 (Ch) at [97]. The standard of the proof is on the balance of probabilities.

Evidence of capacity

[69] There has been much jurisprudence and academic comment regarding the weight to be attributed to medical, legal and lay witness's evidence in respect of testamentary capacity. In *Hawes v Burgess* [2013] EWCA 74, at paragraph [60] the Court of Appeal in England and Wales compared the view of a medical expert who had never met the testatrix unfavourably with the first-hand opinion of a solicitor. In contrast in *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch) the court observed at paragraph [43]:

> "I accept the wisdom of these comments [in *Hawes v Burgess*] though I observe that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testatrix's capacity, must be shown to be based on a proper assessment and accurate information or it is worthless."

In other cases, the evidence of independent lay witnesses such as neighbours, ministers, priests *etc*., has been of magnetic importance.

[70] All of this illustrates the principle that there is *per se* no hierarchy in the sources of evidence. The weight to be given to any particular witness's evidence, whether he is medical, legal or lay, will depend on a number of factors, including:- his experience; his training; his understanding of the test of testamentary capacity; his ability to make an assessment of capacity; the quality of the assessment made by him as appears from his notes and records and evidence; his knowledge of and familiarity with the testatrix and his independence.

The Applicability of the Golden Rule

[71] In practice the most difficult question facing a solicitor instructed to make a will for an elderly or ill client is to decide whether and if so when he ought to obtain a medical capacity report. In *Re Simpson* [1977] 127 NLJ 487 Templeman J observed:

> "In the case of an aged testator or a testatrix who has suffered a serious illness there is one golden rule which should always be observed ….the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator…"

This dictum has been approved in a number of cases in England and Wales including *Key v Key* [2010] WLR 2020 and has become known as the "golden rule".

[72] I consider however that this so called "golden rule" is not a rule of universal application and therefore need not be slavishly followed in all cases for the following reasons. Firstly, the rule is not a rule, it is merely guidance. Secondly, failure to follow the rule does not automatically invalidate the will; nor does compliance guarantee validity – See *Sharp v Adam [2206]* EWCA Civ 449. Thirdly, the golden rule does not define "aged". We live in an age when there are many nonagenarians who continue to act as leaders, mentors and advisors. Most solicitors would find it very tricky if not downright insulting to require such a client to undertake a medical examination when it is clear that they have capacity. I consider that the duty of a solicitor instructed to make a will is not to follow a "golden rule"; rather, his duty is to take reasonable steps to satisfy himself that the testatrix has testamentary capacity. This duty does not dictate that a medical report is required in all cases of an elderly testatrix. What is required is that a solicitor must exercise his or her judgement in all cases. What is reasonable in any particular situation will depend upon all the circumstances including the age and health of the testatrix; the solicitor's knowledge of and familiarity with the testatrix; the testatrix's presentation to the solicitor, and whether there are any "red flags" suggesting a possible challenge to capacity. Red flags cases include situations where the testatrix is aged

over 80 years and is either in receipt of a care package or has had recent hospital admissions or other medical attention; the testatrix is vulnerable because for example she has recently been bereaved; the testatrix is making significant changes to her will; the testatrix's Will fails to make any or reasonable provision for someone who might bring a claim such as a family member; the testatrix is not an existing client of the firm; or the solicitor has some concerns about the testatrix's presentation or otherwise anticipates a challenge to the Will. In circumstances where there are any red flags a solicitor would be prudent to exercise more caution. In such cases, he may consider that the only way he can be satisfied that the testator has testamentary capacity is by obtaining a medical report. In cases where a client is elderly and not an existing client of the firm the need to obtain a medical report will usually be considered necessary to confirm testamentary capacity not least because it is now well recognised that some disorders including dementia are not always readily apparent to a non-medically trained person and may not therefore be detected during a one off consultation to take instructions for a will.

[73] The question of obtaining the testatrix's consent to such a medical report on capacity is a delicate issue which needs to be handled with sensitivity and care. If a testatrix refuses to consent then the solicitor must decide whether he can continue to accept instructions. Again, this is a question of judgement. If the solicitor is otherwise satisfied as to the testatrix's capacity and is satisfied that the testatrix has given cogent reasons for, *e.g.*, changing her will or not making provision for a certain person or persons, the solicitor may decide he can continue to accept instructions. In such a case, (although it is important to do so in all cases), it is extremely important that the solicitor prepares a full attendance note setting out a record of open questions asked and the answers given by the testatrix which satisfied him that the testatrix had the necessary capacity. In addition the attendance note should set out details of the solicitor's familiarity with the testatrix, how the testatrix presented to the solicitor, details of the testatrix's instructions and details of why the testatrix is for example changing her Will and/or excluding family members. In general I consider that the evidence of an experienced solicitor who is familiar with the testatrix and who conducts a full assessment of testamentary capacity and can prove this by reference to a good attendance note, will be given great weight by the court even in the absence of a medical report on capacity. Much however will depend on the particular circumstances of each case.

Undue influence

[74] 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 a testatrix is not of 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 judgement, discretion or wishes is overborne …" *per* JP Wilde in *Hall v Hall* [1868] LR 1 P&D 481.

[75] Undue influence cannot be presumed from a confidential relationship between the testatrix and the beneficiary - see *Boyce v Rossborough* [1857] 6 HLC at 49.

[76] The burden of proof is on the person alleging undue influence. It is not sufficient to show that the person had power to overbear the testatrix's Will rather it must be shown that the power was actually exercised and the execution of the Will was obtained by it.

Forgery

[77] The burden of proof lies on the person alleging forgery and he must prove that the Will is a forgery on the balance of probabilities.

Consideration

[78] Four questions arise for consideration:

(1) Did the testatrix have testamentary capacity?

(2) Was the Will the product of undue influence?

(3) Was the Will a forgery?

(4) Was the Will duly executed?

(1) Did the testatrix have testamentary capacity?

[79] The court had the benefit of three sources of evidence relating to capacity namely medical evidence, solicitors' evidence and the plaintiff's evidence.

Medical evidence

[80] The court heard evidence from Ms Quinn, social worker. It also had before it expert medical reports by Dr English and Dr Todd, together with a large bundle of medical and social care notes and records.

[81] Both experts were engaged by the plaintiff. They were in agreement that the testatrix had testamentary capacity at the time she executed the disputed Will.

[82] I consider however that there are limitations to the evidence of both Dr English and Dr Todd because neither gave oral evidence and they were not therefore subject to cross-examination. Secondly, neither met nor interviewed the testatrix prior to her death. Nonetheless in this case I give considerable weight to the expert medical evidence because; there is unanimity in their conclusion; both are independent experts; both have considerable experience in this field and their

conclusions are supported by the available medical and social care notes and records.

[83] An examination of the voluminous medical and social care notes and records shows that there is no record of any concerns regarding the testatrix's capacity or decision-making ability at or before the time she made the disputed Will. At the time when she made the disputed Will the testatrix was in receipt of domiciliary care. She had a carer and family members were in regular contact with Social Services about the provision of care for the testatrix. Notwithstanding the regular interaction with social care practitioners there is no record in the notes and records that the testatrix had any cognitive deficits. I consider that if the testatrix had such difficulties these would have been recorded. I therefore find that the silence in the records as to capacity issues in or around September 2011 is evidence that the testatrix at that time presented with no such difficulties.

[84] Secondly, such entries as exist in the records support a finding of capacity. On 25 December 2011 when the testatrix attended A&E after a fall her Glasgow Coma Scale was 15/15 which indicates that she was able to follow basic commands and respond coherently and appropriately to basic questions regarding orientation and time and place.

[85] Thirdly, the medical records show that the first reported concerns regarding memory loss or confusion was in June 2012 which is some 9 months after she executed the disputed Will.

[86] Fourthly, I consider that the records demonstrate that the testatrix was probably in the early stages of dementia by June 2012. At this time the plaintiff reported concerns about the testatrix's memory loss and lack of capacity. In addition the notes record that the defendant also reported that his aunt had mild memory loss. In addition Dr Maguire, the testatrix's GP at the time, attended with her at her home and noted that although she was orientated in time she had some difficulties in recall. Her carer, Mrs Murphy also reported that the testatrix's short term memory was vague and she was forgetful.

[87] As Dr Todd notes, a person in the early stages of dementia can still have capacity and in such circumstances it is vitally important that a proper assessment as to capacity is made. Significantly the social worker Ms Quinn attended with the testatrix in June 2012 and made such an assessment. After a consultation lasting approximately one hour she found nothing in the testatrix's presentation to give her cause for concern regarding her mental capacity and she was satisfied that the testatrix showed no signs of dementia. Ms Quinn is an independent social worker who has considerable experience in dealing with older people and has training in dementia and capacity. I am satisfied, as was recorded in the Adult Social Care Review Schedule, that the testatrix was alert, orientated and able to engage well in meaningful discussion. I therefore accept Ms Quinn's evidence and find that despite

the fact the testatrix was in the early stages of dementia in June 2012 she still retained testamentary capacity.

[88] Accordingly, it is my view, based on the available medical notes and records, the expert reports and the evidence of Ms Quinn, that the testatrix retained testamentary capacity up to at least June 2012 and therefore she had testamentary capacity in or around the time she made the disputed Will in September 2011.

[89] The plaintiff submitted that the medical notes and records established that the testatrix lacked capacity when she made the Will. She submitted that the testatrix was referred to the Memory Services Clinic in September 2010. She further submitted that the testatrix's age; her diagnosis of dementia in 2014 and her brain scan results all proved that she lacked capacity at the time she made the disputed Will.

[90] The Memory Services Clinic referral sheet contains a date in the top right-hand corner of September 2010. The referral then contains a number of sections including one headed `Reasons for Referral'. This section includes a reference to the testatrix's MMSE score on 22 July 2014. At the bottom of this document there is a signature and it is dated 23 July 2014.

[91] I am satisfied that the referral to the Memory Services Clinic was actually made in July 2014 and not September 2010 for the following reasons. Firstly, I am satisfied that the September 2010 date which appears on the document in the top right hand corner refers to the date when the referral form was created. This is confirmed by the Directorate of Legal Services, who act for the Trust, in a letter to the court dated 29 January 2019. Secondly, I am satisfied that the referral could not have been made in September 2010 given that the body of the document contains information, namely the MMSE score dated 22 July 2014, which was not available in September 2010. Thirdly, there is nothing in the notes and records to support a referral to the Memory Services Clinic in 2010. In contrast by 2014 there are frequent entries in the notes and records relating to memory problems and the need for the testatrix to be referred to the Memory Services Clinic and accordingly I am satisfied that the referral was in fact made in 2014 and not 2010.

[92] Whilst old age is often associated with dementia chronological age in of itself is not a definitive indicator of capacity. Therefore, the fact the testatrix was 94 years old when she made the will is not proof she lacked capacity.

[93] In 2014 a CT scan showed "brain atrophy, chronic small vessel disease". Dr Todd opined that there was no evidence that such findings were out of keeping for a 94 year old woman. Accordingly, I do not consider that the brain scan results are evidence that the testatrix lacked capacity in September 2011.

[94] Finally, I am satisfied that the fact that the testatrix was diagnosed with dementia in September 2014 is not evidence that she lacked capacity in September

2011. The doctor who made the diagnosis considered that she lacked capacity for the previous 6 – 12 months.

[95] I am therefore satisfied on the balance of probabilities, based on the content of the medical notes and records, the expert medical evidence and the evidence of the social worker that the testatrix had testamentary capacity when she made the disputed Will in September 2011.

Solicitors' evidence

[96] Both Mr Tiernan and Ms McElroy gave evidence regarding the execution of the Will. Unfortunately, I find that I can attach no weight to the evidence of Mr Tiernan in respect of capacity for the reasons set out below.

[97] I find that Mr Tiernan failed to make any or adequate inquiries as to the testatrix's capacity. Although Mr Tiernan advised the court that he did ask the testatrix questions designed to make an assessment of her testamentary capacity I do not accept his evidence in this respect. If such questions had been asked I consider that a record of this would have been made in his attendance note. His attendance note however records no such discussion. In addition the trainee solicitor who was present throughout the consultation and who accurately recorded all the other aspects of the meeting does not record that any questions were asked by Mr Tiernan to ascertain capacity. Therefore I consider that the solicitor did not make any professional assessment of the testatrix's capacity.

[98] This was a case where I consider there were a number of "red flags" regarding capacity. The testatrix was elderly; she was instructing a new solicitor and she was changing an existing Will. Further, as was accepted by Mr Tiernan under cross-examination, he only had a passing acquaintance with the testatrix. This was not therefore a case where the testatrix was a longstanding client of the solicitor or of the solicitor's firm and was known either to the solicitor or to others within the practice.

[99] In such circumstances Mr Tiernan ought to have taken reasonable steps to satisfy himself as to her capacity. I consider that it would have been prudent for him to have made inquiries regarding her capacity by obtaining a report from her GP or a consultant geriatrician. If it was impracticable to obtain a medical report he should have at the least made enquiries with her carer or social worker. No such steps were taken and I therefore find that the solicitor failed to take reasonable steps to satisfy himself as to her capacity before she executed the will.

[100] Although the testatrix was changing her Will, Mr Tiernan took no steps to obtain the earlier Will. Consequently he did not know what changes she was making in her new Will and did not make any enquiry as to her reasons for changing aspects of her Will. I consider it important that a solicitor should know what provisions were being changed and seek to ascertain the reasons for the changes. The answers

to such questions would assist the court when capacity is challenged especially if cogent reasons were given for each change. The failure of Mr Tiernan to obtain the earlier Will and/or to ascertain reasons for the changes to her Will meant that he was unable to give evidence which assisted the court in ascertaining her capacity to make the disputed Will.

[101] In this case the solicitor was not familiar with the testatrix and failed to carry out an adequate assessment of capacity before he drafted the will and had it executed by the testatrix. Accordingly, his evidence was of no assistance to the court in respect of capacity.

[102] Notwithstanding the absence of any assistance from the solicitor, the court is able to reach a determination as to the testatrix's capacity due to the content of the extensive medical notes and records and the evidence of the expert witnesses and the social worker.

Lay witness's evidence

[103] The only lay witness who gave evidence was the plaintiff. No oral evidence was called from the defendant, family members or the carer. No reason was advanced for this.

[104] The plaintiff presented as sincere and genuine in her beliefs that her aunt either lacked capacity to make the disputed Will and/or had been taken advantage of by the defendant and/or that someone had forged her Will. The plaintiff stood little to gain financially from the proceedings namely £100 being the difference between the two Wills in relation to the bequest made to her. Nonetheless, she spent large sums of money in pursuing her claim by engaging three expert witnesses namely Dr English, Dr Todd and Mr Craythorne. Notwithstanding my view that the plaintiff was genuine in her beliefs I consider that her beliefs were mistaken.

[105] In relation to the question of capacity, I consider, firstly that I can only give limited weight to her evidence because she had limited contact with the testatrix at the relevant time. On her own admission she was not a regular attender at the testatrix's home and accepted that she had not visited for several years before the Will was executed. The only evidence she could give about the testatrix's presentation related to seeing her from a distance at a funeral together with some hearsay evidence from her cousin about the testatrix's presentation. Consequently, I find that the lay evidence given by the plaintiff in this case as to capacity is of very limited assistance to the court in determining the question of whether the testatrix had testamentary capacity.

[106] Secondly, the plaintiff's case in respect of lack of capacity rested largely upon the medical notes and records. For the reasons set out above I do not find that the medical notes and records support her case that the testatrix lacked capacity.

[107] Finally, the plaintiff believed that Social Services had dismissed her claims without proper investigation. I do not accept this. It is clear from a perusal of the social work notes that the social worker involved carried out a detailed investigation of all the allegations made by the plaintiff and it is clear that the social worker after visiting with the testatrix and after liaising with other professionals had no concerns regarding the testatrix's mental capacity.

Conclusion on capacity

[108] I am therefore satisfied on the balance of probabilities that the testatrix had testamentary capacity at the relevant time based on the medical notes and records, the evidence of the two medical experts and the professional view of the social worker.

(2) ***Was the Will the product of undue influence?***

[109] The plaintiff gave evidence that the defendant exercised undue influence because he prevented relatives calling, failed to admit the testatrix to a nursing home and neglected her as evidenced by her unkempt appearance.

[110] The plaintiff reported these concerns to Social Services who carried out an investigation. It is clear from Social Services notes that they found no concerns that the defendant was exercising undue influence over the testatrix or that he had neglected her in any way. On the contrary, the records show that the defendant took a very active interest in the testatrix's care and well-being. He frequently contacted Social Services to ensure that the testatrix received all the domiciliary care and equipment she needed. In addition he and his wife provided care to the testatrix and frequently visited and supported her.

[111] I find that the plaintiff had a mistaken belief that there was a family history of forged or invalid Wills. She later had to accept that in fact the testatrix had not forged her father's Will so as to make her the main beneficiary of his estate. I find that the plaintiff was coloured by her view of a family history of skulduggery in Will making and she became convinced that history was repeating itself in relation to the testatrix. As a result she believed that the defendant must have exercised undue influence over the testatrix even though she accepted she had no evidence to support this view and it was only a suspicion on her part.

[112] I am completely satisfied that there is not a scintilla of evidence that the defendant exercised any influence over the testatrix never mind evidence of behaviour which was sufficient to meet the high standard required to prove that the Will was procured by undue influence. I am fully satisfied that the Will was the product of the testatrix's own free will and reflected her own wishes.

(3) Was the Will a forgery?

[113] The burden of proof lies on the plaintiff to prove on the balance of probabilities that the Will is a forgery. The only evidence before the court in respect of the assertion that the Will was a forgery was the expert evidence of Dr Craythorne. In his evidence Dr Craythorne stated that indentations on the Will, and differences in the design of the signature and its fluency were all indicators that the Will could be a forgery.

[114] Mr Craythorne was a very impressive expert witness and I accept his evidence in its entirety because of his expertise, independence and the fact that his conclusions were balanced and based only on the material evidence.

[115] In his report and in his oral evidence he accepted that he could not conclude on the balance of probabilities that the Will was a forgery.

[116] On the balance of probabilities I am not satisfied that the Will is a forgery although I have to say that this was a "line ball" case.

[117] Although there were a number of indentations on the Will, which can often point to forgery Mr Craythorne accepted, and I find that, there is another possible explanation for this. In particular, I am satisfied that these indentations can be explained by the admission of the Will to Probate.

[118] Secondly, I find that there were a number of features in respect of the testatrix's signature which were indicative of forgery namely the considerable variation in the design of the letters of her signature and the lack of fluency in her signature. I am not satisfied however on the balance of probabilities that these features prove that it was a forged signature for the following reasons:-

(i) The signature was written in ink. I am satisfied that the shaky signature may be the product of the fact that the plaintiff was not familiar with the pen she used to sign the disputed Will.

(ii) Mr Craythorne accepted that although her signature was fluent in the specimens her fluency could have deteriorated over time. I find that many elderly people have a shaky signature and in addition I find that because the signature was written at the very bottom of the page this could have affected its fluency.

(iii) Two solicitors gave sworn evidence that they witnessed the plaintiff sign the Will. Although I have not accepted Mr Tiernan's evidence that he asked the testatrix questions to confirm capacity I nonetheless do accept his evidence that he witnessed the signature. I do so because his evidence in this regard is corroborated by Ms McElroy. I am also satisfied that there is no evidence that

Mr Tiernan forged the plaintiff's signature and no motive for any such action on his part was provided to the court.

(iv) I find that little weight can be placed on the different design features of the signature as the specimen documents demonstrate considerable variation in the testatrix's signature.

(v) Mr Craythorne when pressed stated that he could not say on the balance of probabilities that the Will was a forgery.

[119] Consequently, I find that the plaintiff has not proved to the requisite standard that the Will is a forgery.

(4) Was the Will duly executed?

[120] I am satisfied on the evidence of Mr Tiernan and Ms McElroy that the Will was duly executed and complied with all the statutory requirements.

Conclusion

[121] I refuse the plaintiff's application to set aside the Will dated 21 September 2011 and refuse to set aside the grant of probate of that Will and further refuse to set aside the Assent made on 7 August 2015 by the defendant in favour of Malachy Quinn and Mary Quinn.

[122] I will hear the parties in respect of costs. Written submissions should be provided by the defendant and plaintiff in respect of costs within 14 days of delivery of this judgment.