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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

PROBATE AND MATRIMONIAL OFFICE

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IN THE ESTATE OF THOMAS WILSON POTTER DECEASED

BETWEEN:

MARTHA MARIA POTTER

Plaintiff

and

SAMUEL EDWARD POTTER

Defendant

_____

GILLEN J

[1] The plaintiff in this action is the only surviving lawful sister of the deceased Thomas Wilson Potter who died on 18 April 1999 (hereinafter called "testator" or "the deceased"). The defendant is sued in his capacity as sole surviving executor and residuary legatee of the will of the deceased.

[2] By will dated 1 February 1996 the deceased made a number of specific legacies with residue of the estate to the defendant. The defendant is a nephew of the deceased. The estate is situated at 114 Lisburn Road, Saintfield, County Down and includes a house and farm of approximately 28 acres together with a cash sum of approximately £16,000.

[3] Probate of the will was obtained on 17 May 1999.

[4] The will was drafted by Mr McRoberts solicitor and allegedly witnessed by him and Freda Johnston an employee of his.

[5] The plaintiff claims:

(i) That at the time of the making of the will dated 1 February 1996, the testator Thomas Wilson Potter was not of sound mind, memory and understanding. The particulars of that allegation are:

(a) The deceased was 83 years of age and suffering from senile dementia;

(b) The deceased was throughout his life of limited intelligence having suffered a head injury in his youth;

(c) The deceased had been the subject of (sectioning) (sic) under the Mental Health (Northern Ireland) Order;

(d) The deceased's domestic circumstances were in a state of considerable disarray in the later years of his life;

(e) The deceased failed to grant any benefit to his only surviving sister or to inform her of the existence of the said will despite having always confirmed his intention to leave his estate to her.

(ii) Alternatively it is alleged that the said will was procured by means of the undue influence of the defendant over the testator. The particulars of that allegation in the statement of claim were as follows:

(a) The deceased lived alone and in the last years of his life was unable to look after himself and by reason of old age and infirmity was very dependent on the defendant;

(b) The defendant made use of the deceased's dependence upon him to force him to make the will contrary to his own wish by procuring his isolation and impeding his efforts to have a telephone installed on the premises;

(c) The defendant promised to look after the welfare of the deceased but failed and/or neglected to do so.

[6] Accordingly the plaintiff claimed:

(1) A declaration that the testator was at the time at the making of the will of unsound mind, memory and understanding;

(2) A declaration that the making of the will was procured by means of undue influence on behalf of the defendant;

(3) Revocation of the will;

(4) That the estate be administered according to the rules of intestacy;

(5) That the defendant account fully for all use made of the property and monies comprised in the said estate;

(6) Such further or other order as the court might deem just;

(7) Costs.

[7] The defendant in his defence and counterclaim denied the claims made in the statement of claim and counterclaimed that the deceased duly executed his last will dated 1 February 1996 naming the defendant as executor. The defendant in addition counterclaimed that the court should pronounce in the solemn form of law for the will of the deceased dated 1 February 1996.

[8] Mr Long QC appeared on behalf of the defendant along with Ms McBride. At this hearing the plaintiff was represented by a Mackenzie friend Mr Peter Potter although as the case proceeded another Mackenzie friend Mr Jabed Ahmad represented the plaintiff. The presumption in favour of permitting a Mackenzie friend is a strong one (see Re H (Mackenzie Friend: Pre-trial Determination) [2002] 1 FLR 39). Accordingly I permitted both these persons to act in this capacity throughout the hearing.

Testamentary Capacity

[9] Before dealing with the factual matters relevant to this claim of testamentary incapacity, it may be helpful if I set out some of the legal principles which have governed my conclusions:

(1) It must be shown that the testator was of sound disposing mind at the time when the will was made. The law requires that there should be sound disposing mind both at the time when the instructions for the will were given and when the will was executed. Supervening insanity will not revoke the will (see Arthur v Bokenham [1708] 11 MOD RAP 148 at 157). Accordingly the relevant period in this instance is the date when the will was made namely 1 February 1996.

(2) Sound testamentary capacity means that three things must exist at one and the same time. First, the testator must understand that he is giving his property to one or more of the objects of his regard. Secondly, he must understand and recollect the extent of his property. Thirdly he must also understand the nature and the extent of the claims upon him both of those whom he is including in his will and those whom he is excluding from his will. The testator must realise he signing a will and his mind and will must accompany the physical act of execution. The criteria to be applied have been stated by Cockburn CJ in Banks v Goodfellow LR 5 QB 549 at 565:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act

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

[10] It is important to appreciate that the mere fact that a testator was eccentric is not of itself sufficient. An important reference is made in Williams on Wills 8th Edition at paragraph 4.11 where the author states:

> "However, simply because a person is deemed to be suffering from mental disorder within the meaning of the MeHA 1983 or even that he is detained pursuant to the powers contained in the MeHA 1983 does not necessarily mean that he is incompetent to make a will. Each case must, it seems, be considered with reference to the general definitions mentioned above and medical and psychiatric evidence will be important."

[11] The passage from this text was cited with approval by White J in O'Connell v Shortland [1989] 51 SASR 337. Eccentricity therefore must go to the heart of the decisions which determine the terms of the will itself. Eccentricities as they are commonly called of manner of habits of life, of dress and so on can usually therefore be disregarded in the absence of something more.

(3) It is presumed that the testator was sane at the time when he made his will but if the question of his sanity is contested, the onus is on the person propounding the will to prove that the testator was of sound disposing mind at the time when he made the will. A will not irrational on its face, duly executed, is admitted to probate without proof of competence unless such is contested. The law presumes that a state of things shown to exist continues to exist unless the contrary is proved and thus a testator, when there is no suggestion of insanity, is presumed to have remained sane. Rimmer J summed up the matter as follows in Goode, Carapeto v Goode (2002) WTLR 801 at 841:

> "The burden of proving that a testator knew and approved of the contents of his will lies on the party

> propounding the will. In the ordinary course, the burden will be discharged by proving the due execution of the will and that the testator had testamentary capacity. Where, however, the will was prepared in circumstances exciting suspicion something more may be required from those propounding the will by way of proof of knowledge and approval of its contents. A relevant standard of proof is, however, simply by reference to that balance of probability."

[12] Unsoundness of mind may be occasioned by physical infirmity or advancing years as distinguished from mental derangement and the resulting defect of intelligence may be a cause of incapacity but the intelligence must be reduced to such an extent that the proposed testator does not appreciate the testamentary act in all its bearings. (See again Banks v Goodfellow (Supra)). Where it is shown that the testator was incapable of reading the will and it is not read over to him, it is generally accepted that the criterion in such cases is whether he was really aware of the contents (see Re Wallace's Estate, Solicitor of the Duchy of Cornwall v Batten [1952] 2 TLR 925). The infirmity of the testator will strengthen certain presumptions which arise against the will in any case eg where the will is contrary to the previously expressed intentions of the testator as to his testamentary dispositions (see Harwood v Baker [1840] 3 MOO PCC 282. Old age, or the near approach of death at any age, may lend weight to suggestions that the testator had no proper knowledge of the contents of the will or that there was undue influence. Where there is some question of mental incapacity of the testator, it is prudent for legal advisors to seek the opinion of a medical practitioner (preferably one experienced in the field) and, if the practitioner is satisfied that the person does have the requisite capacity, he should act as one of the attesting witnesses. This practice has received judicial support from Templeman J in Kenward v Adams [1975] CLY 3591 and again in Re Simpson [1977] 121 SOLJ 224. In any situation where there is reason to suspect that the mental capacity test has not been satisfied, a full memorandum of the facts should be prepared by the solicitor responsible for the execution of the will. In Buckenham v Dickinson [1997] CLY 4733 a testator who was very old, partially blind and deaf, was held not to have capacity. However of striking significance (in contrast to the instant case) a next door neighbour in the Buckenham case who had great advantage of long experience in old peoples' homes, indicated that the testator was of such poor sight and hearing that he was virtually cut off from everything and everybody. He had stopped going around his garden and just sat in the kitchen all the time often with his head in his hands. As I will indicate when I come to deal with the facts in this case the factual contrast is striking. The burden of these cases is that as a matter of good practice solicitors should follow the "golden rule" that a medical practitioner should be present where there are doubts about the testator's capacity. However a

cautionary note is added by His Honour Judge Cooke sitting as a judge of the High Court in Buckenham v Dickinson (Supra) at p1091g:

> "Now of course what Simpson does not say, although counsel tries to submit that it does is that a failure to observe the golden rule will invalidate the rule; it says nothing of the kind, but it points very starkly to the problems that professionals face when they are drawing wills and they do not take these precautions or precautions as near to them as the practicalities require."

The facts of the case

[13] I turn now to the facts of this case. The only evidence of the medical condition of the testator at a time relevant to the making of this will was that of Dr McKelvey now a retired general practitioner who had formerly practised out of the Saintfield Health Centre until October 2002. The testator had been a patient of his for many years prior to this death. I found Dr McKelvey to be an extremely impressive witness. He gave his evidence with conspicuous care leavened with mature and considered insights into the way of life of the testator. He described him as an eccentric gentleman but one who knew exactly what was going on. A picture emerged of a friendly loner not much given to compromising with modernity but who was, as Dr McKelvey said, "very with it". He lived in very primitive conditions cooking on an open fire with no electricity and only outside water. He lived alone and did not seek anyone's help save in exceptional circumstances. In the 5 or 6 years prior to his death he had become frail and had suffered from urinary infections (common with prostate problems in a man so old) and had fallen on a number of occasions. Dr McKelvey had seen him on several occasions shortly before and shortly after the date when the will was made. In January 1996 he had seen him twice and again in March 1996 with urinary infections. On these occasions he displayed no impairment of mind and Dr McKelvey always found him to be clear thinking and to know exactly what he was doing. It is significant that Dr McKelvey recorded that he was amazed how well informed he was, being a man who obviously read the local newspapers, particularly Farming Life, every week. He asked about people in the village and their welfare and was always "pretty accurate" in everything he said. He seldom spoke about his family and did not seem to have much contact with them. Dr McKelvey formed the impression that the only real contact he had was with the defendant in this case Sammy Potter who, according to the information elicited by Dr McKelvey, visited the testator and did quite a lot for him. The doctor formed the impression from what the testator said that he did have a sister who contacted him from time to time. When asked specifically about the capacity of the testator in January 1996, one month

before the will was signed, Dr McKelvey said he would have been happy that he knew exactly what he was doing.

[14] In cross-examination he said the testator's eyesight was fair but not great although he was able to read if the print was sufficiently large. He was incontinent only in the last year to year and a half. It emerged in his cross-examination that the testator had been the subject of at least one and probably 2 robberies during December 1993 and again in January 1994. Whilst the doctor accepted that a robbery of this kind would have been upsetting for a while, he did not think that this man had any limited capacity for understanding and he reiterated that he knew exactly what was going on. It was interesting to note at this stage that the question of his admission to Downpatrick Hospital as a mental patient in 1936 was raised. Dr McKelvey, who said he had sat and chatted to the testator on a number of occasions for perhaps 20-30 minutes on each occasion, indicated that he saw no reason to have him referred to a psychiatrist and conversed easily with him.

[15] By itself this evidence would have been sufficient to have convinced me that this man displayed absolutely no unsoundness of mind or defect in intelligence. I found it compelling evidence that this was not a case where the golden rule applied. Dr McKelvey's account excluded any need for a solicitor at this time to have required the safeguard of a medical practitioner to satisfy himself as to the capacity or understanding of the testator or to make a record of any findings or examination. This evidence lent strength to the suggestion that he had a full knowledge of the contents of the will and knew precisely what he was doing. That he may have been a little eccentric in refusing to accommodate himself to modern facilities is quite insufficient to show want of capacity to make a will.

[16] The flow and content of Dr McKelvey's evidence was underlined by a number of other witnesses called in this case:

(i) Freda Johnston

This woman had been the book keeper with Mr McRoberts solicitor (now deceased) since 1971. I found her to be a careful and measured witness giving her evidence calmly and thoughtfully. She described how on the day Mr Potter made his will he arrived at Mr McRobert's office on foot of an appointment which Mr Samuel Potter had made for him. The testator came to the reception, was shown into Mr McRoberts office (he had been brought there by Mr Samuel Potter) and went into Mr McRoberts office on his own. She described Mr McRoberts practice, which she understood to have been followed in this instance, namely that Mr McRoberts would bring the testator into his office, take his instructions, discuss everything with him, then dictate what had been said and type up the instructions whilst the testator waited. This happened in this instance. The will, having been typed, was returned to

Mr McRoberts and he invited Miss Johnston, as a witness, to come in. She saw the will and witnessed it. She felt sure that if Mr McRoberts had felt that a doctor needed to be present one would have been summoned. She saw no reason here to obtain a medical report. Overall the testator was in the office for about one hour and she saw absolutely nothing wrong with him as he sat in the office. This witness was called by the plaintiff in this case but in fact she served to strengthen the defendant's case.

(ii) Mrs Elizabeth Potter, the wife of the defendant Samuel Potter, was also called on behalf of the plaintiff to give evidence. She had acted as carer for the testator since 1998 and had received for him an attendance allowance. She said that from March 1998 she took him into town about twice per week every Tuesday and Friday. From about November 1998 his general practitioner's nurse called and asked her to look after him in terms of fixing his fire and arranging something for him to eat. She said that thereafter she called Monday to Saturday until he died. Prior to 1998 she recalled that her husband went up to see the testator every Sunday and the odd night during the week. She recalled that British Telecom had come out with engineers to organise a telephone but had said that there was a problem getting up his lane. The testator had told them to forget the matter. She said that once in a while prior to 1998 she did see him. She recalled that his living conditions were poor and that he was untidy. She had done his washing for a very considerable length of time over many years when her husband brought his washing home. She never thought of calling on the social services because this was simply the way that the testator wanted to live. I found nothing in her evidence whatsoever that suggested that this man had any testamentary incapacity.

(iii) Samuel Potter, the defendant, also gave evidence. He said that every weekend from 1960 onwards until the testator died, he attended at his home on a Saturday and Sunday. He said that he was the only person who ever went near him. William Wade, who lived nearby, did call in from time to time as did other neighbours called Hanna and David Dodd. When asked about the effect of the burglaries on the testator, Mr Potter said that it did not really affect him on the first occasion because he had not been there, and when he was tied up and robbed on the second occasion, he did not want the police. Mr Potter said that he shopped for him, arranged for his clothing to be washed but that he never charged him for doing this. He tried to get him to have a telephone but as indicated by his wife this was to no avail. His recollection was that British Telecom could not get the poles into the laneway and needed a right of way which was not available. He recalled that the testator's furniture was riddled with woodworm. He denied that the plaintiff had ever telephoned him and the last time he remembered her coming over was in 1998. She had not come over for her mother's funeral. He emphasised that the testator was a man who did not want to change and did not invite or accept modernisation. He did not want to spend his money on modern

matters. However he did recall that the deceased was not in ill-health until shortly before he died and that he remembered that he read books as well as daily and weekend newspapers, especially Farming Weekend. He often did his own shopping until the last three months prior to his death. Mr Potter indicated that he had made telephone arrangements with the solicitor Mr McRoberts to arrange for Tom to come to his office. This was at the request of Tom. Mr Potter said he had not been present when the will was signed because he was in the secretary's office. He had brought the testator to the solicitor's office on that occasion at his request. Mr Potter was questioned about an allegation that the deceased had been kicked by a horse when he was young and "never had been right in the head since". Mr Potter had no recollection of this incident and was unaware of the allegation put to him that the deceased had attacked his brother in 1935 and thereafter had been taken to Downpatrick hospital when he was only 22 years of age. He emphatically denied that the testator was of weak mind or weak intelligence. Other than to accept that Tom, the testator, was a bit eccentric, Mr Potter was adamant that he knew exactly what he was doing. The suggestion was put to him that the family had given the house to him because he was weak willed and of low intelligence and that the farm had simply been signed over by all members of the family so that he could have somewhere secure for the rest of his life. The witness knew nothing of this but said that when the testator's mother died, the testator came to terms with that within a short time. He recalled the testator farming until about the late 1980s, having kept calves and cows.

Mr Potter struck me as a genuine and caring person who had a real affection for the testator. I have watched him carefully during the course of his evidence and I was satisfied that his intentions towards the testator were purely altruistic and born of a genuine concern for him. Nothing in this evidence of Mr Potter suggested that there was any testamentary incapacity in the case of the testator. On the contrary, it underlined and reinforced the evidence given by Dr McKelvey and others. I shall return further to this evidence when dealing with the question of undue influence.

(iv) Martha Maria Potter, the plaintiff in this matter, who is now 91 years of age, gave evidence before me. She made a number of points which included the following:

(a) She was born in Ireland but went to live in England in 1929. In 1935 she had visited the family in Ireland and she had given some money she alleged, to her father to buy the farm which is the subject of this action.

(b) She said that when the testator was 11½ years old a horse kicked him in the head. She said at that stage she had looked after him both feeding him and dressing him. Thereafter he always wore glasses. She said that whilst his memory was all right when he was young, the last time she had seen him, which was in September 1998, he was in a terrible state, talking nonsense,

incontinent and she had to wash him, shave him and buy food for him. She said he could not see to buy food and could only see bread and milk. She said that Tom had asked her to clean the place up and she had found that his clothes had not been washed which she then proceeded to do. She found that he was simple and would not answer questions if asked. She considered he was "dopey" and like a geriatric. Mrs Potter said that she had been a nurse in the past working in mental health units in a number of hospitals. Her assessment of Tom's mental capacity was that some times he was sensible and some times he was "crazy". She said that he looked like somebody from "Belsen" when she last saw him in 1998 and had to shave him each morning. I have to say that this contrast markedly with the impression given by Dr McKelvey. Mrs Potter of course conceded that before September 1998 she had last seen her brother in 1960 and therefore understandably she was driven to concede that she did not know if he had mental capacity to make a will in 1996. I have to say that I much preferred the evidence of Dr McKelvey who, as I have said, had absolutely no concerns about the ability of this man to make a will very shortly after February 1996 when he saw him. Her evidence about these matters also contrasted sharply with every other witness in this case and I was driven to conclude that her account was grossly exaggerated and unreliable.

(c) Historically Mrs Potter made the case that the testator had undergone treatment in a mental hospital for about a year in 1935 following a fight between himself and his brother. I should indicate that at this stage, however, that there is no record of this in Dr McKelvey's records. Mrs Potter said that during the period that he was in Downshire hospital he was in a padded cell due to his violence and that he had smashed windows there. I should indicate that even if this evidence is correct, which it may be, one must bear in mind that the relevant period in this case is February 1996 when the will was made. This incident of his detention in a hospital for the mentally ill occurred over 60 years before the will was made and therefore I am much more impressed by evidence of his mental capacity closer to the time. Mrs Potter indicated that their mother had wanted this house to be sold and divided equally amongst the brothers and sisters. The witness told me that she and the others then signed over their interest to Tom as they promised to look after him.

(d) She said that when she last saw Tom in September 1998, he said he had never made a will.

I found the evidence of Mrs Potter unconvincing in face of the conflicting evidence from other parties. The fact remains that she had not seen Tom for many years before September 1998 and certainly had not seem him at the time when the will was made whereas Dr McKelvey and others clearly had. Her evidence did not satisfy me that there was any element of testamentary incapacity at the time this will was made.

In the course of this trial, two weeks after the plaintiff had closed her case and after the defendant had called all his evidence, I acceded to a late application by the McKenzie friend on behalf of the plaintiff to permit further evidence to be called. I shall deal with these witnesses at this stage so as to record the entire evidence on behalf of the plaintiff in composite form. Accordingly I heard:

(vi) Constable Sharpe of the PSNI

This police officer had investigated the robbery involving the testator on 17 December 1993. He recorded a statement from him at that time and whilst he had formed the opinion that the testator was frail, he equally formed the impression that he knew exactly what was going on and remembered what had happened. He considered he was quite lucid and able to remember all the salient facts. Constable Sharpe concluded that whilst he was lonely he was happy by himself. In cross-examination Constable Sharpe recalled that at that time the testator was able to read and sign the statement giving straightforward answers to all the questions put to him. He saw no reason not to interview him and he certainly did not give the appearance of being "a bit soft". He said that it was not unusual in his experience for men of this age to take a great pride in not taking money from social services and he found nothing in his untidiness or a way of life that was that unusual for rural elderly dwellers in Ulster.

(vii) Charlotte Rhodes

This witness, also called by the plaintiff late in the proceedings, gave evidence that she had attended at the testator's house during the summer of 1998 (probably late July or August) when she was then aged 14. Her grandfather was Sam Potter who was a younger brother of Tom Potter the testator. She was taken to see the testator, the visit lasting for only a few minutes. She said his place was very grey and musty and it did not look at if it had been cleaned. She described the testator as a bit frail but she only spoke to him for a minute. He did not say very much to her other than "oh right" when she was introduced to him. She did not try to engage him in conversation nor did he try to engage her. She frankly admitted she did not know if she could have had a good conversation with him or not. After a few minutes Sam Potter's wife Elizabeth Potter asked them to go to the shops although the testator said he did not know what he needed. In the car to the shops he did not talk very much and made no conversation. She recalled that he had no gas, electricity or inside water but she frankly admitted that since she scarcely had a conversation with him, she did not know what state he was in two years previously when he had made the will. She felt his eyesight was

bad in 1998 insofar as he looked closely into her face but she had no idea what the situation was in 1996. Quite frankly this witness, who was only 13 or 14 years of age when she met the testator for a very short period, was in no position to give any assistance whatsoever as to the testamentary capacity of this testator in 1996 and through no fault of her own, her evidence was of little value in this matter.

Mr Long QC who appeared on behalf of the defendant called two witnesses. They were as follows:

(viii) David Samuel Dodd

This witness took land from the testator for grazing cattle over about 28 acres. He dealt directly with the testator for many years up until about 1998. When he had animals on the land, which he visited daily, he saw Mr Potter virtually everyday. He described him as an aging fit man who looked at cattle everyday with his dog. The two of them regularly discussed the price of cattle and what was happening in the neighbourhood. It was clear to him that the testator had read the papers because he was so knowledgeable, for example about the price of cattle, farms sold and who was selling them. Mr Dodd said that the testator clearly read Farming News and the local papers. Whilst he admitted he lived in primitive conditions, he seemed happy. He had last seen him about 1998 when he had last taken the land. Whilst he had never gone into his home, he was able to say that he was not tired or weak when he spoke to him. He steadfastly denied that this man was weak in the head or "doddery". I regarded Mr Dodd as an independent witness with no axe to grind and who was able to give a dispassionate and independent account of this man's state of health and mental capacity. He was yet a further witness who clearly underlined to me that the testator had full testamentary capacity at the relevant time.

(ix) Samuel Hanna

This was another neighbour who lived about half a mile away from the deceased. He had known him for over 50/60 years. Mr Hanna said that in his later years, he went up virtually every other Sunday to visit Mr Potter and often saw Samuel Potter there. Alternate Christmases he took him Christmas dinner and Sam Potter took him it the next year. Mr Hanna regularly visited the testator inside his house and until his death regarded him in good health and "good craic" as time went on. He recalled him talking about farming regularly. It was obvious he had read Farm Week and the News Letter because he knew the price of every beast in sale yards. He clearly knew who the members of his family were and spoke about his family from time to time. He also recalled that the testator went to the Balmoral show and to the Saintfield show. He saw him about two months before he had died in April 1999 and he appeared to be in good enough "craic". As in the case of Mr

Dodd, Mr Hanna conceded that the testator did not have any water or telephone or modern facilities, but he emphasised that that was the way he clearly wanted to live. I found Mr Hanna a quiet imposing man, truthful and discerning. His evidence heavily underlined the fact that this testator had testamentary capacity in 1996.

[17] I was therefore persuaded by all this evidence that on the balance of probabilities the testator in this case clearly had testamentary capacity when he made this will. I found no credible evidence to the contrary and having heard all the witnesses I was left with the clearest of impressions that this man had the requisite testamentary capacity at the time the will was made in February 1996. I have concluded that Mr McRoberts acted wholly appropriately in making this will and that there was no need whatsoever for him to have obtained any medical or other evidence at that time.

In the course of the hearing and in written submissions Mr Ahmad made a wholly unjustified attack on this solicitor which I reject in its entirety. I find absolutely no evidence to excite any suspicion in the mind of Mr McRoberts that there was reason to doubt that the testator knew or approved the contents of the will prior to its execution. Nothing about his demeanour or handwriting has been given in evidence which would justify such a conclusion. In short I am completely satisfied that Mr McRoberts took sufficient care in making a proper judgment as to the capacity of his client. Therefore was no need for him to avail of the services of a medical practitioner to witness or approve the making of the will.

[18] My attention was drawn to a number of authorities where the courts had advocated the use of a medical practitioner in the making of a will. These included:

(a) In re Simpson Deceased Solicitors Journal 1 April 1977
(b) Kenward v Adams (1975) CLY 3591
(c) Public Trustee v Till [2001] 2 NZLR 508
(d) Ryan v Public Trustee [2000] 1 NZLR 700
(e) Fuller v Strum (2002) WTLR 199
(f) Ewing v Bennett (2001) WTLR 249.

In all of these there was a good reason to excite the suspicion of the solicitor about the testamentary capacity of the testator. I found no evidence at all in this case to ground such a suspicion. On the contrary, all the evidence heard relevant to the period in question, pointed in the opposite direction.

[19] Undue influence

The burden of proving undue influence is on the person alleging it. In this case that is the plaintiff.

[20] In Wingrove v Wingrove (1885) 1 PD 81, Sir James Hannen said in the course of his address to the jury at p. 82:

> "To be undue influence in the eyes of the law there must be – to sum it up in a word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced in to doing that which he or she does not desire to do that it is undue influence.
>
> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quiteness' sake, to do anything. This would equally be coercion, though not actual violence.
>
> These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such condition, that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it'.
>
> There remains another general observation that I must make and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary to prove that in the particular case that power was exercised, and that it was by means of the exercise of

> that power, that the will such as it is, has been produced."

[21] It is necessary in this case therefore the plaintiff to prove that Samuel Potter overbore the deceased so as to induce him to make the will in February 1996 when he would not otherwise have done so. It is not enough to prove merely that Samuel Potter with or without his wife may have made appeals to the testator's affection and to have sought to persuade him to reward him by making generous provision for him in his will. The distinction between legitimate persuasion of this nature and illegitimate coercion – or undue influence – is illustrated by Sir J P Wilde in Hall v Hall (1868) 1 P&D 481. He said (at p. 482):

> "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like – these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgement, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be offspring of his own volition and not the record of someone else's."

[22] Allegations of undue influence or coercion are serious ones although the ordinary civil standard of proof is still the same, namely by reference to the balance of probability. However, even though the standard is the same, in Re H and Others (minor) (1996) AC 563, Lord Nicholls of Birkenhead said at p. 586:

> "The balance of probabilities standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to

> whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is less likely than negligence. .. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is an issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account in weighing the probabilities and deciding whether on balance the event occurred."

[23] The wholesale overbearing of a testator's will by coercion is an inherently more improbable event than, for example, the bringing to bear on the testator of legitimate persuasion of the type referred to in the Hall case, and I bear that in mind in assessing whether, on the evidence, the plaintiff has discharged the burden of proving coercion. I must also have regard to advice of the Privy Council given in Craig v Lamoureux (1920) AC 349. Viscount Haldane said, at p. 357:

> "As was said in the House of Lords when Boyce v Rossborough (1856) 6 HLC 2, 49, was decided, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an inference which can justifiably be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean …
>
> It is also important in this connection to bear in mind that which was laid down by Sir James Hannen in Wingrove v Wingrove (1885) 11 PD 81 and quoted with approval by Lord MacNaughten in delivering the judgment of this Board in Baudains v Richardson

> (1906) AC 169, and it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained."

[24] Applying those principles in this case I have come to the conclusion that there is absolutely no evidence of undue influence. I have already found that the testator was of sound mind and capacity and I am absolutely satisfied that he has made a disposition precisely along the lines which he wished to make. There has not been a single piece of evidence to persuade me that the acts of the defendant in this mind induced the testator to make a disposition that he did not intend to make. On the contrary I am satisfied that Mr and Mrs Samuel Potter acted with the best interests of the testator in mind and were motivated by nothing more than common decency and genuine affection for the testator. I have already dealt with their evidence in this judgment and I restate that I found them both honest and convincing.

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

[26] It is my view that the plea of undue influence in this case ought never to have been put forward because the plaintiff never had reasonable grounds to support it.

[27] I therefore reject the claim that the testator made the will in February 1996 as a result of the exercise upon him of undue influence.

[28] Accordingly, having rejected the claims of the plaintiff, I propose to pronounce in favour of the validity of the will of 1 February 1996 and dismiss the plaintiff's claims.