Neutral Citation No: [2019] NICh 17 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McB11118** *Delivered:* **11/12/19**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

IN THE ESTATE OF JOHN McGREGOR (DECEASED)

_____

Between

JACQUELINE GUY

Plaintiff

and

JAMES A McGREGOR
ROY McGREGOR
KAY WILLIAMSON

Defendants

_____

McBRIDE J

Introduction

[1] The testator, John McGregor (Deceased) ("the Testator") was married to Christina McGregor for 58 years. They had four children together, namely James A McGregor, Roy McGregor, Kay Williamson ("the defendants") and the plaintiff, who is the youngest child. The testator's wife died on 26 March 2005 and the testator died on 29 June 2013.

[2] The testator instructed Mr McAteer, Solicitor, to draft his first and last will. The testator executed this will on 3 August 2005 ("the will"). The will appointed the plaintiff as his executrix and as the sole beneficiary of his entire estate. The estate consisted of a dwelling house situate at 12 Waterloo Gardens, Belfast.

[3] The plaintiff, as the executrix, seeks to propound the will in solemn form. The defendants seek to challenge the will on the ground that the testator lacked

testamentary capacity. In their counterclaim they seek a declaration that the testator died intestate.

Representation

[4] The plaintiff was represented by Mr Coyle of counsel and the defendants were represented by Mr Dunford and Mr Hayward of counsel. I am grateful to all counsel for their helpful submissions.

Issues in Dispute

[5] The following two issues were in dispute:-

(i) Was the will duly executed as a testamentary disposition so as to satisfy the statutory requirements set out in Article 5 of the Wills and Administration Proceedings (Northern Ireland) Order 1994?

(ii) Did the testator have testamentary capacity when he executed the will on 3 August 2005?

Relevant Legal Principles

[6] Article 5 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 provides as follows:

> "5.—(1) No will is valid unless it is in writing and is executed in accordance with the following requirements, that is to say,—
>
> (a) it is signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears from the will or is shown that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness, in the presence of the testator (but not necessarily in the presence of any other witness), either—

(i) attests the testator's signature or the testator's acknowledgment of his signature and signs the will; or

(ii) acknowledges his signature.

(2) No form of attestation or acknowledgment is necessary."

[7] The classic test for the mental capacity necessary to make a valid will was set out in the judgment of Cockburn CJ in *Banks v Goodfellow* [1870] LR 5 QB at 256:

> "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 disposition of it which, if his mind had been sound, would not have been made."

[8] Thus, in order to have testamentary capacity a testator must be able to understand 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. ("Limb 1")

(ii) The extent of the property of which he disposing. It is not necessary that he knows the precise value of his estate or its components. He just has to know "generally the state of his property and what it consists of" (*Waters v Waters* [1848] 2 De GSm 591 at 621) or in more modern language, the testator must have the *capacity* to appreciate the approximate value and relative worth of his assets - See *Schrader v Schrader* [2013] EWHC 466 (Ch) and *James v James* [2018] EWHC 43 (Ch). ("Limb 2")

(iii) The nature of the claims on him. The testator must have "a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him" per *Broughton v Knight* [1873] 3 P&D 64 at 65-66, so that he can decide whether or not to give each of them any part of his property by his will. In *Hardwood v Baker* [1843] Moo P.C. 282-290 the testator's will gave all of his estate to his wife. It was held to be invalid on the ground that the

testator was incapable of recollecting his relations and weighing their claims on him. The court held at page 290:

> "…in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will, he is excluding from all participation in that property." ("Limb 3 (a) and (b)")

[9] As noted by Theobald On Wills, 18th Edition, the capacity to make a will may therefore vary depending on the complexity of the testator's affairs and family situation.

[10] The burden of proof as to testamentary capacity was conveniently summarised by Briggs J in *Re Key (Deceased)* [2010] EWHC 408 (Ch) as follows at paragraph 97:

> "The burden of proof in relation to testamentary capacity is subject to the following rules:
>
> (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.
>
> (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.
>
> (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless: see generally *Ledger v Wooton* [2008] WTLR 235, paragraph 5, per Judge Norris QC."

The standard of proof is on the balance of probabilities.

[11] The test for testamentary capacity set out in *Banks v Goodfellow* is not a medical test although the court will pay particular attention to and will generally be greatly assisted in most cases by expert medical opinion. The court will however also take into account and give weight to the evidence of drafting solicitors and lay witnesses who knew the testator.

[12] Obiter dicta in some recent cases has given rise to academic debate about whether there is a hierarchy of evidence in cases where capacity is disputed. In

Hawes v Burgess [2013] EWCA 94 Mummery LJ compared the view of an expert medical witness who had never met the testator, unfavourably against the first hand opinion of an independent experienced solicitor. Mummery LJ stated at paragraph 60:

> "My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property".

[13] The comments made by Mummery LJ were strictly obiter. They have however been the subject of academic criticism, not least by the authors of Theobald On Wills who note that the value of the view of a busy solicitor, lacking in medical training should not be overstated. They also note that numerous solicitor-drafted wills have been held to be invalid on the grounds of testator incapacity.

[14] In my view, in determining whether a testator has capacity the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness's expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact he has never met nor examined the testator and there are limited medical notes and records available to him, for example in respect of the severity of the testator's speech problems or memory loss as of the date of execution of the will. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will. In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view expressed by a solicitor as to capacity will depend on that solicitor's experience, his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity. The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity

of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight.

[15] Accordingly, I consider that there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance and in yet other cases the evidence of the lay witnesses will be decisive.

[16] Accordingly, I now turn to consider the evidence in this case which can be neatly divided into medical, solicitor and lay witnesses' evidence.

The Medical Evidence

[17] Expert reports on testamentary capacity were obtained on behalf of both the plaintiff and the defendants. The plaintiff instructed Professor Passmore who prepared a report dated 11 January 2008. The defendants instructed Dr Series who prepared a report dated 29 October 2017. Both experts are very experienced and knowledgeable in ageing and geriatric medicine and both specialise in memory disorders.

[18] The experts met on 22 January 2018 and prepared an extremely helpful joint memorandum. They agreed that the contemporaneous medical evidence was very limited but noted the most salient entries in the GP notes. These included the following entries:

> "10.6.06 – Surgery consultation, Mrs Carragher
>
> Wife died one year ago and "weepy" here today. Has noticed "speech" difficult since bereavement.
>
> 25.10.07 – Doctor Gough
>
> "Dysphasia since the death of wife 2½ years ago. Unable to say full words or sentences. Worse in social situations. Better at home … MMSE [Mini Mental State Examination, a short test of cognitive function]?
>
> Ref: Dr Montgomery
>
> 19.06.08 – Dr Gough
>
> "Patient reviewed - query advanced dementia or possibly dysphasia. MMSE 0/10. Pleasantly confused. Lives with

daughter. Patient and daughter happy to proceed with psychogeriatric reference".

19.06.08 – Referral to psychogeriatrician.

28.08.08 – Letter (20/10/08) from Sharon Moore, Nurse Led Memory Clinic to Dr Walker, GP:

"John appeared extremely dysphasic … he was unable to complete MMSE … he scored 13/19 on the daily living … Jackie [the plaintiff] describes a gradual onset, but she was able [*sic]* to clarify a course, but feels that it has deteriorated greatly over the past 3 weeks."

09.10.08 – PET/CT brain scan result reported … conclusion: the appearances are highly suggestive for established Alzheimer's disease.

16.04.09 – Letter from Sharon Moore, Nurse Led Memory Clinic to Dr Walker, GP:

"Attended memory clinic on 18/03/09 … very frustrated at his lack of ability to express himself verbally. His ability to understand what is being said to him remains good and he uses gestures and some single words to reply, most appropriately …"

27.07.09 – Letter from Dr Donnelly, Consultant in Psychiatry of Old Age, to Dr Walker, GP:

"… on picture naming test he scored 7/10 and demonstrated comprehension of single commands."

[19] On the basis of the medical notes and records the doctors agreed that the deceased was suffering from a form of dementia which first presented as problems with speech. They agreed that in 2005 when the will was executed the testator's dementia was at a relatively early stage. They further agreed that it is difficult to assess the extent of receptive dysphasia (comprehension of speech) when expressive dysphasia (expression of speech) is very marked.

[20] The doctors also commented on the non-medical evidence which consisted of written statements by solicitors and lay witnesses. Professor Passmore commented that the solicitors' statements were significant as they were from legal professionals. In contrast Dr Series noted that all the statements were written on the basis of memory recall 10 years or more after the will was executed and were based on casual conversation rather than careful assessment which he considered an

inadequate basis for reaching a conclusion about capacity particularly where the speech problems may have given the interlocutors a misleading impression of the testator's level of comprehension.

[21] Professor Passmore's conclusion was that it was more likely than not that the deceased had testamentary capacity. In contrast Dr Series' view was that it was difficult to say, with confidence, whether or not the deceased had testamentary capacity.

[22] The court had the benefit of hearing oral evidence from both doctors. Professor Passmore confirmed that there was no set deterioration pattern in dementia and that each case was unique. In his view the testator had testamentary capacity at the date he executed the will because of the following:

(a) The testator was in the early stages of dementia. In his experience, patients in the early stages of dementia can continue to have testamentary capacity. He stated that he had tested a number of such patients at the request of solicitors and had certified that they retained testamentary capacity.

(b) In his experience, where speech is involved dementia starts slowly and gradually. In this case, the first note of problems was in or around 2005. No referral was made until 2007 and he considered that the gap in time indicated that there was no evidence of much deterioration and that the dementia was therefore not causing problems for the testator.

(c) Even by 2007 he considered that he could not have made a definitive diagnosis of lack of capacity.

(d) An experienced and objective solicitor did not pick up on anything to indicate that the testator lacked capacity. He would have expected such an experienced solicitor to have noted any alarm signals.

[23] Dr Series gave evidence that although the testator was only diagnosed in 2008 it was likely that he had dementia in 2005. This is a condition which is capable of undermining testamentary capacity. Accordingly, he had a real doubt about the testator's capacity to make a will in 2005 especially as a difficulty with language, he considered, has a particular potency in effecting communication, understanding and decision making which are necessary in the execution of a will. He accepted that he did not know whether the deceased had capacity or not. This was largely because the medical notes and records did not record the level of severity of the testator's symptoms in 2005.

[24] He accepted under cross-examination that the reason why no referral about dementia was made until 2007, even though the testator had first reported speech problems in 2006 and had thereafter attended his GP on a number of occasions about other problems, may have been because the testator's symptoms had not reached the

stage where they were causing him any major difficulties. He did however stress that the testator may have had significant impairment in comprehension which was not picked up by lay witnesses including the solicitor as these people were non-medical specialists and the informal conversations they would have had with the testator would have been inadequate to enable a conclusion to be drawn about the testator's comprehension.

[25] I am satisfied that as of the date the testator executed his will he was in the early stages of dementia which manifested itself by problems with speech. The question whether the deceased had testamentary capacity at that date depends on whether his dysphasia was sufficiently advanced to undermine his ability to understand, recall relevant matters and express his testamentary wishes.

[26] On the basis of the GP notes and records I am satisfied that the deterioration in the testator's condition was gradual. Firstly, I note that there was a delay of some 16 months between the first reported speech problems to the GP on 10.06.06 and the referral in October 2007. I consider that the reason no complaint was made between 10 June 2006 and October 2007 was because neither the testator nor his family considered his speech problems were at a stage where they were causing him any major difficulties. If he had had difficulties I consider these problems would have been mentioned when the testator attended his GP on a number of dates between 2006 and 2007 in respect of other matters. Secondly, Sharon Moore of the Nurse Led Memory Clinic, reported that the plaintiff described a gradual onset of dementia with a rapid deterioration over a 3 week period in the summer of 2008. This note accords with a gradual decline between 2005 and the summer of 2008.

[27] I further find, on the balance of probabilities, that the testator did not have receptive dysphasia when he executed his will. Sharon Moore on 28 August 2008 recorded as follows:

> "His ability to understand what is being said to him remains good, he uses gestures and some single words to reply most appropriately."

On 27 July 2009, Dr Donnelly, Consultant Psychiatrist in Old Age, recorded that the testator demonstrated,

> "comprehension of single commands."

[28] Given that two experienced practitioners in dementia, as opposed to non-medical lay persons, both confirmed that the testator as late as 2009 retained and ability to comprehend what was being said to him and was able to respond appropriately. I am satisfied that these records indicate that the testator did not have any significant receptive dysphasia in 2005.

[29] I further note that this analysis of the medical notes and records accords with the view of Professor Passmore who stated that deterioration in dementia, especially when it is speech related, is generally slow and subtle and in his experience patients at the early stages of dementia can and do frequently retain testamentary capacity. Professor Passmore was therefore satisfied on the balance of probabilities that the testator had the necessary testamentary capacity when he executed the will. Dr Series did not agree with Professor Passmore's conclusion. His view was that, given the paucity in the medical notes and records about the level of severity of the testator's speech problems, he had a real doubt about the testator's testamentary capacity. He stated however that he could not categorically state that the testator lacked testamentary capacity.

[30] I consider that the medical evidence in its entirety supports the view that the deceased had testamentary capacity at the time he executed his will. This is because he was in the early stages of dementia; the deterioration was gradual; the notes of an experienced nurse and doctor indicate that he retained comprehension as late as 2009 and Professor Passmore is satisfied on the balance of probabilities that he had testamentary capacity and Dr Series cannot be sure whether he did or did not have capacity.

[31] I accept however that there is a gap in the medical evidence as the notes and records do not record the level of the testator's symptoms in 2005. Accordingly, I consider that it is necessary for the court to carefully consider the evidence of the solicitors and the lay witnesses in this case as they specifically gave evidence about the testator's presentation in or around the time he executed his will.

Solicitors' Evidence

[32] The solicitors' evidence consisted of a written statement by Mr Haslett, an affidavit sworn by Mr McAteer on 28 April 2016 and Mr McAteer's oral evidence.

[33] Mr Robert Stephen Haslett, solicitor swore an affidavit on 13 May 2015 "in contemplation of my death". Mr Haslett subsequently died. In his affidavit he avers that he and Mr McAteer entered the testator's home on the Antrim Road and he recalls there being a warm and friendly atmosphere. He confirms that he saw no sign of "aberrant behaviour" in the testator. He further confirmed that he witnessed the testator's signature on the will.

[34] Mr McAteer gave evidence that he had been a solicitor since 1976 and had drafted hundreds of wills. He knew the testator, having acted for him over the years in two or three legal matters. In particular, he recalled acting for him in a complex probate matter which was finalised a number of months before he drafted the testator's will. The probate case involved meeting with and speaking to the testator on the telephone on numerous occasions.

[35] Mr McAteer recalled that he received a telephone call from the testator who instructed him to prepare a will appointing the plaintiff as his executor and as the sole beneficiary of his entire estate, which consisted of his home at Waterloo Gardens, Belfast, which was subject to a mortgage.

[36] Mr McAteer prepared an undated attendance note of this telephone call. It simply set out the testator's name, address and telephone number and recorded the following details:

> "Executor: Jacqueline McGregor
> of 12 Waterloo Gardens, Belfast
>
> House: Mortgage of £60,000
> No savings
> Leave all to Jacqueline"

[37] Thereafter, Mr McAteer prepared a will in accordance with the testator's instructions. He sent it to the testator under cover of letter dated 26 July 2005 in which he advised the testator as follows:

> "… I enclose herewith draft will for your approval. Please telephone to advise if same is acceptable and I will arrange to call with you to have the original signed and witnessed. I know that your only asset in your estate is your property at 12 Waterloo Gardens which at this point in time is subject to a mortgage to the Abbey in the sum of £60,000.
>
> I believe that there is a life policy on your life to cover this sum and this is due to expire in March 2006 and I believe you are to talk to the insurance company about this. We can perhaps discuss same when I call."

[38] Mr McAteer could not recall the testator calling but recalls attending at his home with Mr Haslett, Solicitor. He recalls entering the home which was a substantial double fronted house and that he was greeted by a woman he now knows to be the plaintiff. She showed them into the front room where the deceased was. The plaintiff then left and after some introductions the deceased signed the will and his signature was witnessed by both solicitors.

[39] Mr McAteer could not recall reading the will over to the testator but was satisfied that the testator was content with its contents. Mr McAteer noted nothing unusual about the testator and stated that his demeanour did not give rise to any concern on his part regarding the testator's capacity. No-one ever alerted Mr McAteer to any such difficulties. He confirmed that he did not keep any attendance note of this meeting.

[40] Mr Dunford challenged Mr McAteer on a number of points. Under cross-examination Mr McAteer accepted that neither his telephone attendance note nor his affidavit referred to the testator's other children and he accepted that he had not discussed with the testator his reasons for eliminating his other children from his will. Mr McAteer recalled, although he did not record it in his telephone attendance note, that the testator had informed him that the plaintiff lived in the home and had helped look after his wife and that this was the reason why he was favouring the plaintiff.

[41] When he met the testator to execute his will Mr McAteer confirmed that there was no conversation about the elimination of the other children from the will and confirmed that at no time did he discuss different options which would have been open to the testator to divide his estate in a way which favoured the plaintiff but did not exclude his other children.

[42] When asked to explain who gave the information contained in the letter dated 26 July 2005 in respect of the name of the testator's mortgagee and the fact that the testator held a life insurance policy, Mr McAteer stated that the testator had discussed these matters with him during the initial telephone conversation when he gave instructions for his will and that he, Mr McAteer, had simply failed to record them in his attendance note.

[43] I accept that the solicitor knew about the name of the mortgagee and details of the life insurance policy because the testator advised him of these matters during the initial telephone conversation. I do so because the attendance note was very brief and I consider that a number of matters were discussed which were not recorded by the solicitor. Secondly I find that the letter dated 26 July 2005 was probably written a short time after the telephone attendance as the will was a very simple will to draft and would not have taken much time to prepare and accordingly the solicitor retained this information in his head. Thirdly, the information contained in the letter dated 26 July 2005 was accurate and I consider that it must have been known as a result of instructions given by the testator as I accept the solicitor's evidence that he did not consult with any other person before he drafted the will who would have known this information. Further the plaintiff confirmed in her evidence, that she had not discussed these matters with Mr McAteer.

[44] I also accept that the testator advised Mr McAteer during the phone call that he was leaving his estate to the plaintiff because of the services she had rendered to him and his wife and because she was living in the home. I do so because I consider the solicitor did not record everything he was told in his attendance telephone note and because I have no reason to doubt the evidence given by the solicitor in this regard especially as his evidence on this point was not challenged. The challenge related to the fact that he did not record reasons why the other children were eliminated and the fact that there was no discussion about eliminating the other children.

[45] Mr McAteer is a very experienced solicitor who has drafted hundreds of wills and, although he is not medically trained, I consider that he has particular knowledge and experience in the area of testamentary capacity derived from practical experience over many years and he would therefore be alert to any signs that a person lacked testamentary capacity. Although he did not have a specific conversation with the testator in respect of testamentary capacity as such, he did not note anything about his presentation which caused him to have any concern regarding his capacity. Whilst I accept Mr McAteer had limited opportunity to assess the testator's capacity as he only had a brief telephone conversation with him and a short meeting with him when he executed his will, this was a case where the solicitor knew the deceased quite well having had recent frequent contact with him relating to a complex probate case. I therefore consider that the fact Mr McAteer noted nothing untoward about the testator during any of these meetings points towards the testator having capacity.

[46] In addition, I am satisfied the testator gave clear instructions to Mr McAteer to make a will; knew what assets he owned and was able to identity his assets with accuracy and particularity and knew in particular that if his life policy expired before his death the impact this would have on his estate. In addition the testator gave rational reasons to the solicitor for wishing to leave his entire estate to the plaintiff. I consider that all of these matters indicate that the testator had testamentary capacity.

Lay Witnesses

Rev. Morrison

[47] The Rev. Morrison is the Minister of Eglinton Presbyterian Church, Belfast. He gave evidence that when he became the Minister of this Church in 1983 the deceased was an elder at that time. He stated that the deceased attended church every Sunday, attended the monthly congregational committee meetings and monthly Kirk Session meetings on a regular basis, and attended other events in the church. He stated that he had never had a long one to one conversation with the deceased although he had visited the testator after his wife died. The Minister specifically recalled officiating at the plaintiff's wedding on 19 August 2005 and remembered sitting beside the testator throughout the entire wedding meal. He was seated at the end of the table and therefore the only person he could converse with was the testator. Throughout the length of the meal he engaged in conversation about general and church related matters. He recalled that the conversation lasted approximately 1-2 hours and during this time he noted nothing unusual about the testator's speech or general demeanour.

[48] I find that this witness, despite the testator's significant involvement in the church, had limited knowledge of the testator. As a Minister however he is someone who has considerable experience in dealing with older people and he confirmed that he had experience dealing with a number of church members who had dementia.

His evidence that the testator exhibited no signs of dementia during the time he spent with him at the wedding, points towards the testator having capacity.

Suzanne Montgomery

[49] Ms Montgomery made a witness statement dated 16 November 2017 and gave oral evidence. She recalled that in her former employment as an outreach worker for the Alzheimer's Society she visited the testator's home in 2005 on several occasions to offer support to the testator and to the plaintiff as Christine McGregor, the wife of the testator had vascular dementia. After Mrs McGregor died Ms Montgomery visited the home on a number of occasions and indicated that her involvement ceased in or around 2007.

[50] She stated the testator was present when she called at the home. She noted that he was quiet and reserved but always was part of the conversation. She never queried his capacity and remembered chatting to him about music and dancing and found nothing in his interaction which caused her concern in respect of his capacity.

[51] I find that although Ms Montgomery noted nothing to give her concern about the testator's capacity, she had limited interaction with him. Whilst her evidence corroborates the evidence of the solicitors and the Rev Morrison I consider that her evidence is otherwise of limited assistance to the court especially as she agreed the testator was quiet, reserved and mostly agreed with what was said in conversation. As noted by Dr Series such normal non-probing conversation is not of much assistance in terms of assessing capacity and accordingly I give limited weight to her evidence.

The Plaintiff

[52] The plaintiff swore an affidavit of testamentary scripts on 10 May 2016 and also gave oral evidence to the court. She advised the court that she was the testator's youngest child and had lived all her life at Waterloo Gardens. She left work at age 19 at her father's request to care for her mother who had vascular dementia. Just before her mother died she got engaged to be married. After the testator's wife died the plaintiff and the testator were both very upset and provided mutual comfort and support to each other. Prior to her wedding in August 2005 the testator asked the plaintiff to remain living with him and to invite her husband to live with them. The plaintiff did so and she and her husband and later their son, resided with the testator until his death.

[53] The plaintiff gave evidence that the testator had operated a furniture business and before that he had been a musician and had his own showband. He was an active member of Eglinton Presbyterian Church where he was an elder. He attended every Sunday with the plaintiff and regularly attended the Kirk Session and monthly committee meetings. He also taught Sunday school every Sunday afternoon.

[54] The plaintiff stated that she first noticed her father had issues with his speech after the death of her mother and stated that although he struggled for words "he got there eventually". She did not have any concerns however until 2007 when her father was "not able to say very much". He was diagnosed with Alzheimer's in 2008 and died in 2013. During this time the plaintiff cared for him. She said her siblings visited occasionally but provided no practical care to the testator.

[55] When cross-examined to the effect that it was surprising the testator did not provide for his other children the plaintiff said that she did not find it surprising because:-

> "I lived there all my life. At 19 years I was asked to care for my mother. When I asked to go back to work Dad didn't reply. I had to do physio, cooking, washing and minding my nephews and nieces. They called me Cinderella. When I got married at 39 years of age I was to get an apartment where I would be near daddy. My daddy cried and said "My Birdie (his wife) is away and I have never lived on my own."

The testator then asked the plaintiff to move her husband in. She stated;

> "I thought I would never have a life of my own but I couldn't say no. I had in mind if Stephen (my fiancé) said no I would not marry him but he said he would."

[56] The plaintiff further stated that her father had promised to give her the house. She opined that if he had not left her the house she would have been rendered homeless which her father would not have done given that he had asked her to remain living with him.

[57] She acknowledged that her relationship with her siblings broke down in or around the funeral when her sister advised her that she should never have been allowed to remain in the house and that it "will be a solicitor's letter for you".

[58] I found the plaintiff to be a very impressive witness who gave her evidence with conviction and raw emotion. She is someone who has provided loving care and support to both her parents from age 19 until age approximately 47 years without any support from her siblings. She gave sacrificially and as a result was unable to secure a career or obtain her own home and independence.

[59] There is no evidence that the plaintiff excluded her siblings or in any way exerted any undue influence over her father.

[60] Although she is not an independent witness I nonetheless found her to be very honest and forthcoming in her responses. I accept her evidence that the father

was able to manage all his own affairs including paying bills notwithstanding the speech problems which he exhibited in 2005. I further accept that his speech problems only became marked in or around 2007 and as a result he attended with his GP. I therefore find that her evidence is corroborative of the evidence given by the other independent lay witnesses to the effect that in or around 2005 the deceased had testamentary capacity and that no-one had any concerns in 2005 about his capacity.

The Defendants

[61] None of the defendants gave evidence. There is however a certificate of conviction in relation to offences of dishonesty committed by the first-named defendant.

[62] Given that this is a case where capacity is contested and given the gaps in the medical evidence and the consequent importance of the lay witnesses' evidence I consider it surprising that the defendants did not give any evidence in relation to the testator's presentation to them in or around 2005. Such evidence would have been of great assistance to the court in determining capacity. As a consequence of their failure to give evidence the evidence of the plaintiff and the other witnesses could not and was not directly challenged.

Consideration

(i) Was the will duly executed?

[63] I am satisfied on the basis of the evidence of Mr McAteer, Solicitor and Mr Haslett, Solicitor, that the will was duly executed as a testamentary disposition so as to satisfy the statutory requirements set out in Article 5 of the Wills and Administration Proceedings (Northern Ireland) Order 1994. This was not seriously contested by the defendants in any event.

(ii) Did the testator have testamentary capacity to make the will?

[64] So far as the *Banks v Goodfellow* threefold test is concerned there was not too much dispute between the parties that the first two limbs were satisfied. In any event, on the basis of Mr McAteer's evidence I was completely satisfied that the testator understood he was making a will and what it was and that his instructions to Mr McAteer demonstrated that he understood the extent of the assets of which he was disposing especially as he was able to identify them accurately. Accordingly, I am satisfied that the first two limbs of the *Banks v Goodfellow* test are met.

[65] The main dispute related to the third limb, namely "whether the testator was 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, revert 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 it which, if his mind had been sound, would not have been made."

[66] This third limb of the *Banks v Goodfellow* test is commonly sub-divided into two parts and therefore it is necessary for the plaintiff to establish, on the balance of probabilities that the testator was:

(a) able to comprehend and appreciate the fact he had four children all of whom had a claim to his bounty; and

(b) that there was no disorder of the mind or in modern language no cognitive impairment which affected his decision making in respect of how he wished to dispose of his bounty between those who had a claim to it.

[67] Mr Dunford accepted the testator knew he had four children but submitted that no explanation had been given for the exclusion of three of his four children from his will and submitted it was not enough for the plaintiff to show that the testator wished to benefit her alone. He submitted that it must also be shown that the testator had no cognitive impairment which prevented him from having in mind the claims of his other children. On the basis of the evidence of Dr Series, "real doubt" had been cast on the testator's capacity and accordingly he submitted limb three of the *Banks v Goodfellow* test was not met.

[68] On the basis of the evidence in its entirety, and for the reasons set out below, I am satisfied on the balance of probabilities that the testator had testamentary capacity at the time he executed the will.

[69] First, the medical notes and records show that in 2008 a specialist nurse was satisfied that the testator had the ability to comprehend and as late as 2009 a psychiatrist in Old Age medicine found that the testator could comprehend simple commands. The deceased made a simple will. There was nothing complicated about his affairs and accordingly I am satisfied on the basis of the medical notes and records that in or around 2005 and the testator had the necessary comprehension to make decisions about how he wished to dispose of his property.

[70] Secondly, there is expert evidence given by Professor Passmore that the testator was in the early stages of dementia and in his experience such patients can and frequently do retain testamentary capacity. It was his view on the balance of probabilities that the deceased did have testamentary capacity. Whilst Dr Series did not agree with Professor Passmore his evidence was that he did not know whether or not the deceased had capacity because the medical notes and records did not record the severity of his symptoms in 2005. For the reasons outlined above particularly the evidence in the medical notes and records about the testator's degree of comprehension as noted by the nurse and the psychiatrist in old age I am satisfied

that there is evidence in the notes and records about his capacity and level of comprehension and accordingly I prefer the evidence of Professor Passmore.

[71] If however I am wrong in accepting Professor Passmore's view and wrong in finding that the medical notes and records indicate that the testator had capacity and I accept the view of Dr Series that one cannot determine on the basis of the medical evidence whether the testator had capacity or not as the medical notes do not indicate the level of his symptoms, I am nonetheless satisfied on the basis of the evidence of the solicitors, the Rev. Morrison, Ms Montgomery and the plaintiff, that the testator's symptoms in 2005 were not marked and accordingly, I find that he did have testamentary capacity in 2005.

[72] The testator instructed the solicitor to make his will. He was able to give positive instructions and knew details of his assets. Although the solicitor only spoke to the testator on the telephone and had brief meetings with him when the will was signed, I nonetheless give weight to his evidence because the solicitor was familiar with the testator. He had acted for him in a complex probate matter some months before he drafted the will and had recent opportunity to consider his competence. The solicitor noted nothing untoward during these meetings or when the testator executed the will. The solicitor is very experienced in will making and therefore I would have expected him to be alert to any signs of dementia and to have noted them if present. He did not and accordingly I am satisfied that the professional witness considered the testator had testamentary capacity. His evidence is corroborated by the evidence of the Rev. Morrison and Ms Montgomery and the plaintiff. Whilst Rev. Morrison had limited one to one conversations with the testator it is significant that he is an experienced Minister who frequently visits elderly congregational members with dementia. He noted nothing untoward in a lengthy one to two hour conversation with the testator at the plaintiff's wedding which took place in or around the time the will was executed. Further, whilst the plaintiff's evidence is not independent I nonetheless found her to be an honest witness and I accept her evidence that the testator remained very active and was able to manage his own financial affairs around this time. Accordingly I find that any doubt about the testator's capacity arising from the lack of medical notes indicating the severity of his symptoms in 2005 is dispelled by the evidence of the solicitors, lay witnesses and the plaintiff.

[73] In addition I draw an adverse inference from the fact that none of the defendants gave evidence. If they had evidence to show the testator lacked capacity then such evidence could have been given by them. In the event no-one was called to say positively that the testator lacked capacity. Again, I find the absence of such evidence supports the plaintiff's case that the testator did have capacity.

[74] *Hardwood* at page 289, noted, if a testator:

> "had not the capacity required, the propriety of the disposition made by the will is a matter of no

> importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice of the disposition might cast down some light upon the question as to his capacity."

[75] I find that this will was entirely rational on its face and there was nothing odd or strange in the terms of the will such as might have alerted suspicion or cast doubt upon the testator's capacity. It is important to note that testamentary freedom remains one of the central tenets of our law and testators are therefore free to dispose of their bounty as they wish, even if a testator is eccentric, foolish, moved by capricious, frivolous, mean or even bad motives. This was a case where the plaintiff had sacrificially provided care and attention to her mother and father for most of her life and the testator had promised her that the house would be hers. I consider that in such circumstances the provisions in the will were entirely fair and reasonable. I therefore find that the justice of the distributions in this will, rather than casting doubt upon the testator's capacity, are an indicator of testamentary capacity.

[76] I am therefore satisfied on the balance of probabilities that the deceased did not have any cognitive impairment which affected his ability to comprehend and appreciate that he had four children and that all of them had a claim on his bounty. Rather, I find that he wished to leave his entire estate to the plaintiff to the exclusion of his other children because of the sacrificial services she had rendered to him and his wife and because of the promise he had made to her that he would leave her the home because of her care of him and his late wife and also because he did not want to render her homeless.

[77] In light of the all the evidence including the fact the first two limbs of the *Banks v Goodfellow* test were not disputed; the content of the medical notes and records; the expert medical evidence; the evidence of the solicitor, plaintiff and the other lay witnesses; the fact that the will was entirely rational on its face and the fact the provisions in the will were entirely fair and reasonable, I am satisfied on the balance of probabilities that the testator had testamentary capacity.

Solicitors' Attendance Notes

[78] Before giving my conclusion I consider that it may be of assistance to the profession if I say something about solicitor's attendance notes. Solicitors are busy people and do hundreds of cases and they are often called to give evidence years after the event. In such circumstances memories fade and solicitors may not be able to specifically remember the details of each case. Accordingly, it is very important that they keep detailed contemporaneous attendance notes so they can give accurate reliable evidence. Attendance notes should be dated and state the times involved, state who was present and record comprehensively what was said and done and what advices were given. In probate cases the solicitor should set out specifically how he satisfied him or herself as to the testator's capacity and details of the

testator's estate. Further, it is good practice for solicitors to discuss with testators the claims that others may have on their bounty especially in circumstances where no provision is made for such persons. The solicitor should take a note of the fact that this was discussed and note the reasons why the testator has decided to exclude or reduce the provision made for other potential claimants. In cases where the testator is changing his will detailed notes should be kept recording the testator's reasons for the changes made in the will.

[79] The task of the court is to determine testamentary capacity rather than to rule on professional practice. Therefore, in this case, notwithstanding the fact no attendance note existed of the meeting when the will was executed and the telephone attendance note was not as fulsome as the court may have desired, nonetheless the court was still satisfied as to the testator's capacity.

[80] The court however wishes to impress upon probate solicitors the importance of preparing detailed attendance notes given the role they play in probate actions. This case, like most probate actions, revolved around the determination of factual disputes. The existence of detailed attendance notes can often prevent proceedings being issued and thus obviate the need for the solicitor to attend court and be subjected to cross examination. Where proceedings are contested the existence of such notes not only assist solicitors in giving reliable evidence but also assist the court in determination of the factual disputes.

Conclusion

[81] I therefore grant the will in solemn form and dismiss the counterclaim. I will hear counsel in respect of costs.