THE HIGH COURT

Probate

[2022] IEHC 663

2022 No. 7200

IN THE MATTER OF THE ESTATE OF MARGARET STELLA O'REILLY, DECEASED, LATE OF BELMONT NURSING HOME, GALLOPING GREEN, STILLORGAN, COUNTY OF DUBLIN, FORMERLY OF 20 CLONMORE COURT, OLD BALLYMUN ROAD, GLASNEVIN, DUBLIN 9, RETIRED PHARMACIST, DECEASED AND

IN THE MATTER OF THE SUCCESSION ACT 1965 AND

IN THE MATTER OF AN APPLICATION BY PEADAR MURRAY AND THOMAS SIMPSON, THE EXECUTORS NAMED IN THE LAST WILL AND TESTAMENT OF MARGARET STELLA O'REILLY, DECEASED TO HAVE HER LAST WILL AND TESTAMENT PROVED IN COMMON FORM OF LAW.

Ex tempore judgment of Ms. Justice Roberts delivered on 21 November 2022

1. This is an application in which the executors of the estate of the late Margaret Stella O'Reilly apply to this Court seeking an order admitting the deceased's last will and Testament dated 3 July 2012 to proof in common form.

2. The deceased died on 9 January 2018. At that time (and since 2010) the deceased was resident in a nursing home. The deceased was 80 years old at the date she made her will.

The testamentary capacity of the deceased is an issue in this case as one of the causes of death in her death certificate is "*advanced dementia*" and "*cognitive impairment*". The deceased died almost 6 years following the date of making her will in July 2012 and 3 ½ years after her enduring power of attorney was registered in September 2014. The question arises, given the confirmed cause of death, as to whether the deceased had testamentary capacity at the date of making her will on 3 July 2012.

3. The deceased was a single lady with no children. Her only sibling, her sister, died in August 2011 and indeed this matter appears to be a key reason why the deceased made a further will in 2012, having previously left specific bequests in her earlier will dated 5 September 2008 to her sister Bridget ('Detta').

4. The evidence before this court is that the deceased asked her long-standing friend, Ann Hillery, to telephone the deceased's solicitor, Tom Simpson, as the deceased wished to discuss her legal affairs with Mr Simpson. Ms Hillery's affidavit confirms that this contact was made by her with Mr Simpson's office on 18 May 2012. Ms Hillery avers in her affidavit that she believes from her contact with the deceased that the deceased had testamentary capacity in July 2012. Ms Hillery was a long-standing friend of the deceased, they both having worked together as pharmacists. Ms Hillery is not a beneficiary under the will nor was she a beneficiary under the deceased's previous will made in September 2008.

5. There is a detailed affidavit before the court by Mr Tom Simpson, the solicitor who drafted the will dated 3 July 2012 and who advised the deceased in relation to it. Mr Simpson confirms the contact made with his office by Ms Hillery in May 2012. Thereafter he attended the deceased personally in the nursing home to take instructions from her. Mr Simpson confirms that the deceased was interested in settling more than a

new will and in fact at that time the deceased gave instructions to Mr Simpson on other matters including an advanced health care directive, her VHI policies, putting in place a caretaker's agreement for her apartment in which she was no longer living and possible tax refunds due to her for payments she was making on a monthly basis to the nursing home. At that time the deceased was writing cheques to the nursing home each month and expressed a preference to continue to do this rather than put in place a direct debit as the amount each month was slightly different depending on the pharmacy bill and other activities.

6. Mr Simpson attended the nursing home on at least three occasions and indeed the entire process took approximately two months before the deceased's will and the other documents outlined above were signed by her. This therefore was not a hurried matter or a will that was prepared at the last minute in urgent circumstances. The deceased was alone with Mr Simpson when she gave instructions to him regarding her wishes. There is an affidavit before the court from Mr Kavanagh, then a trainee solicitor with Mr Simpson's firm, who attended with Mr Simpson when the deceased executed her 2012 will. Mr Kavanagh is now a qualified solicitor and has prepared an affidavit for the court in which he confirms that Mr Simpson read out the details of the will to the deceased before she signed it and that Mr Kavanagh was satisfied from this interaction that the deceased understood what she was signing. He also avers to a discussion with the deceased as to the age of one of the beneficiaries who the deceased correctly confirmed to be over 18 years old. This affidavit together with Mr Simpson's averments, confirm the proper and due execution of the July 2012 will in compliance with the requirements of s. 78 of the Succession Act 1965.

7. Mr Simpson is a very experienced solicitor. He knew the deceased personally since 1975 and had acted as her solicitor for in excess of 35 years. Indeed Mr Simpson had made

three previous wills for the deceased. The 2012 will is in many respects similar to the 2008 will and could therefore be considered an update of that will rather than a radical departure from the terms of her earlier will. The significant changes in the 2012 will relate to the fact that the deceased's sister, Detta, had died in the intervening period in 2011. It is also the case that the 2012 will specifically bequeathed the deceased's apartment to Peadar Murray, one of the executors, and his wife Teresa as joint tenants. Under the 2008 will, the apartment would likely have formed part of the deceased's residuary estate as it was not specifically bequeathed to any person. The Murray children did not receive any bequests under the 2012 will, although they had each been bequeathed €10,000 under the 2008 will.

8. Mr Simpson's detailed affidavit confirms that he was not concerned about the deceased's testamentary capacity and that he never received any indication from the nursing home that he should be concerned. He outlines in some detail the manner in which he engaged with the deceased, how she gave her instructions clearly and how she expressed her intentions. Mr Simpson sent a copy of the executed will to the deceased shortly after she had executed it so that she had a copy for her own purposes. It does not appear that the deceased raised any issues or required any changes to be made at that time.

9. Approximately 17 months after executing her will in July 2012 Mr Simson was contacted by Peadar Murray regarding Mr Murray's concerns at the deterioration of the deceased. Mr Simpson attended the nursing home on 1 December 2013 and noted a marked deterioration in the deceased's mental condition and her physical condition. Following medical advice at that time and on Mr Simpson's recommendation as supported by the medical advice, the deceased's enduring power of attorney (which she had completed as part of the tidy up of her legal affairs in 2008) was registered in

September 2014. It was clear that at that time the deceased was unable to manage her affairs and this was the reason for the registration of her enduring power of attorney.

10. The probate office prudently requested an affidavit of testamentary capacity from a doctor treating the deceased at the time she made her will in July 2012. This led to enquiries regarding those doctors and the deceased's medical records at the time. The medical evidence available shows that the deceased probably had a stroke in June 2012 although this was not confirmed or communicated at that time. It appears that the deceased scored quite poorly at a rate of 3/10 on a cognitive assessment test that was carried out on 11 July 2012 which was only one week post executing her will. The deceased's GP, Dr Fiona Murphy, advised Mr Simpson in correspondence that over the years she had noticed that the deceased's mental state could alter, due to a depressive illness she suffered from. Neither the deceased's GP nor the deceased's consultant in old age psychiatry could provide an affidavit as to the deceased's testamentary capacity as at July 2012 as they had not been requested to do so at that time.

11. The deceased's medical records show a diagnosis of vascular cognitive impairment and depression was made on 11 May 2010. A score of 15/27 was achieved by the deceased at that time which indicated significant dementia but no assessment was carried out at that time to determine if the deceased could manage her own affairs. Dr Weyhem, having reviewed the deceased's medical records prior to July 2012 states he is unable to state whether the deceased had testamentary capacity in July 2012 but he confirmed that she had dementia at this time.

12. Dr Crowe, consultant in geriatric medicine has the most contemporaneous assessment notes of the deceased. His notes dictated on 11 July 2012 state "*I feel this patient has cognitive impairment probably due to dementia and depression*". The medical notes from

the nursing home in April 2012 contain references to the deceased being "*confused on and off*" and having low mood. However, in May 2012 she appears "*brighter*" and "*in good form*", but there are still references to occasional "*confusion*", anxiety and the need for reassurance. There is nothing in the notes from the date of the will (3 July 2012) to indicate that the deceased was confused or unable to understand matters on that day.

13. The deceased's GP confirms that the deceased showed signs of cognitive impairment which was aggravated by episodes of severe depression. She says in correspondence "*at no time during her stay can I confirm that she had mental capacity to manage her affairs*". There is however no affidavit before the court from any medical professional that the deceased lacked testamentary capacity in July 2012 albeit that she does appear to have had some dementia and depression at that time.

14. Peadar Murray knew the deceased all his life. He recounts that she suffered from depression and mental health issues for as long as he can remember. Despite these challenges, the deceased held a long and very successful career as a pharmacist and was clearly able to manage her own affairs and did so very successfully. Mr Murray confirmed on affidavit that he had no concern about the deceased's ability to manage her affairs until the latter part of 2013 when he contacted Mr Simpson. There appears to be a disconnect between the deceased's medical condition and what her family were made aware of at the relevant times.

15. There is evidence before the court from Ms Teresa Murray (who is a beneficiary under the 2012 will) of her interactions with the deceased in 2012 and how she believes she was able to manage her own affairs at that time. She confirms from her interaction with the deceased that the deceased was not a particular fan of psychiatrists, given her

dealings with them throughout her lifetime and that it is likely the deceased simply did not particularly engage with cognitive tests given her attitude.

16. There is also evidence from Ms Brede Brophy (who is not a beneficiary under either will) who confirms on affidavit her contact with the deceased in the six months prior to making the will in July 2012. Ms Brophy confirms that she did not notice any issues with forgetfulness or confusion on the part of the deceased. She believes the deceased understood her position at that time and was able to manage her own affairs.

17. There are letters of consent to this application from all beneficiaries who would have benefited under the 2008 Will but do not benefit under the 2012 will, namely the Murray children. There is proof of service of all required documentation on the residual legatees who are the same five named charities as in the 2008 will. No objection is raised by St Francis Hospice who simply noted the contents as sent to them. The Cistercian Order through their solicitors have confirmed their consent to this application. The Irish Guide Dogs for the Blind through their solicitors have confirmed they neither object nor consent to this application. There is no formal response or attendance before the court from the St. Vincent DePaul. The final residuary legatee, namely the Alzheimer Society, provide a very strong consent to this application and advocate for the rights of persons with dementia to be permitted to conduct their own affairs with the relevant support.

The applicable legal principles to the question of testamentary capacity

18. Section 77 of the Succession Act 1965 requires that, to be valid, a will shall be made by a person who "*is of sound disposing mind*". This phraseology was stated by Mr Justice Feeney in *Flannery v. Flannery and Hehir* [2009] IEHC 317 as "*a legislative adoption of the judicial term of art requiring that the testator should know and approve the contents of the will and, at the time of execution of the will, be of sound mind, memory and*

understanding." As with every will duly attested and executed in accordance with the requirements of section 78 of the Succession Act (as this July 2012 will clearly was) there is a presumption of testamentary capacity. In the present case there is no beneficiary or other party challenging the deceased's testamentary capacity.

19. In *Flannery,* the High Court approved the long line of authority identifying the necessary ingredients to establish a sound disposing mind as articulated in *Banks v. Goodfellow* [1870] LR 5 QB 549. This is a threefold test, all elements of which must be satisfied in order for a person to have testamentary capacity. The first such requirement is that the testator must understand that she is executing a will and that this document will dispose of her estate on death. In the present case it is clear that the deceased intended to discuss her legal affairs with her long-standing solicitor and that she requested her friend, Ms Hillery to make that initial contact for her. The court is satisfied from the affidavits that there is evidence the deceased understood she was executing a will and that it would direct how her estate would be administered on her death.

20. The second of the three tests set out in *Banks v. Goodfellow* is that the testator must know the nature and extent of her estate. In the present case the evidence points to the deceased in July 2012 understanding the nature and extent of her estate. She was at that point managing her own cash flow and making payments to the nursing home and was aware of the monthly payments required. She was also paying directly for doctor's appointments. She was aware that she had an apartment that was being used on a temporary basis by the Murray children during their time at university. There is evidence that she reviewed her bank statements and requested that larger print versions be made available for her to facilitate this task.

21. The final limb of the test for testamentary capacity is that the testator must be able to call to mind the persons who might be expected to benefit from her estate and decide whether or not to benefit them. In this case the deceased's will from July 2012 references those people that she wished to benefit from her estate and they are referred to by name. There is a significant overlap between the parties the deceased identified who she wished to benefit in 2012 compared with her previous will in 2008. The 2012 will rationally dealt with changes which had occurred since the date of the 2008 will, primarily the death of the deceased's sister who was to receive a substantial legacy under the 2008 will. It was rational that this aspect of the 2008 will was altered. The deceased named Teresa Murray as a new beneficiary and increased the prior benefit to Peadar Murray with both Teresa and Peadar being given the apartment as joint tenants. The exclusion of the Murray children from the 2012 will would appear to reflect the reality that their parents were now inheriting the apartment and that this would in time benefit the Murray family generally. All of the Murray children have consented to this application.

22. In the circumstances of a duly executed will that is rational on its face and in light of all the evidence before it, this court finds that, despite her underlying depression and dementia, the deceased had testamentary capacity in July 2012 and that she made this will in the knowledge that it would deal with her estate on death as she wished it to. The deceased was an intelligent and independent lady who worked hard all her life to provide for herself in her retirement and to leave something on her death for those close to her and for those charities she regarded so highly. I therefore make an order in terms of paragraph (a) of the Applicant's notice of motion admitting the last will and testament of the deceased dated 3 July 2012 to probate and direct that the Applicants or either one of them have liberty to apply for and extract a grant of probate to the last will and testament

of the deceased dated 3 July 2012 in common form of law. I also direct that the costs of and incidental to this application be deemed costs in the administration of the estate.