# Journal of Elder Law and Capacity

2022 | SPRING

THE LAW SOCIETY OF NORTHERN IRELAND

# Journal of Elder Law and Capacity



---

*Sadly, Heather Semple, Editor of the Journal, died on 9 March 2022. She will be truly missed by the Editorial Panel, her friends and family.*

# Contents

The **Journal of Elder Law and Capacity** is a source of information for a range of practitioners dealing in all aspects of elder law and capacity. Published by the Law Society of Northern Ireland, it aims to have UK and international appeal with coverage on legal issues relevant to elder clients, clients with capacity issues, their families and carers.

---

**Submission of content**

We welcome the submission of articles for the consideration by the Editorial Panel with a view to publication. Authors are asked to contact *Elizabeth.Dowling@lawsoc-ni.org* to obtain a style sheet.

Submission of an article will be held to imply that it contains original unpublished work and is not being submitted for publication elsewhere. All contributions are sent at the author's risk. Please note that where there are references to websites, links to these websites were live at the time of writing.

ISSN 2632-3923

**Disclaimer**

The Law Society of Northern Ireland accepts no responsibility for the accuracy of the contents of the Journal and any views and opinions expressed in the Journal are those of the contributors and are not necessarily those of the Law Society of Northern Ireland, save where otherwise indicated. Although all reasonable care is taken in the preparation of material for publication in the Journal, the Editorial Panel, publishers and contributors accept no responsibility for any loss caused to any person acting or refraining from acting as a result of material contained in or omitted from the Journal. The Journal is not a substitute for professional advice. Readers should satisfy themselves as to the accuracy, completeness, adequacy and currency of the contents of the Journal.



Published by the Law Society of Northern Ireland, 96 Victoria Street, Belfast BT1 3GN

# Some (more) observations on selected aspects of Wills for Northern Ireland Practitioners: The Estate of Brigid Gilhooly and other recent developments

**Sheena Grattan, TEP, Barrister**

**This is an addendum to the writer's recent article on the challenges of the Covid-19 pandemic for will-drafters and case law developments in contentious probate claims in Northern Ireland. It analyses several decisions involving wills which have been handed down since publication of the article, including a detailed judicial examination of costs principles.**

The first issue of the 2020 volume of this publication contained an article by the writer entitled, *'Some Observations on Selected Aspects of Wills for Northern Ireland Practitioners'*.[1] Those familiar with the contents will recall that there were three main 'takeaway' points. First, that in Northern Ireland reported decisions on contentious probate claims (in the strict 'Order 76' sense)[2] are surprisingly rare. Notwithstanding the almost exponential growth in will validity challenges in recent years (especially those based on a plea of lack of testamentary capacity) when the article was published in the early summer of 2020, there had only been nine reported decisions. Secondly, and even more surprisingly, in none of those cases was the will declared to be invalid following a contested hearing. Thirdly, that the Covid-19 pandemic, through which we all still continue to struggle, presents many challenges for the professional will-drafter.

[1] Sheena Grattan, *Some observations on selected aspects of Wills for Northern Ireland practitioners* (2020) JELC 20.

[2] Order 76 (1)(2) of the Rules of the Court of Judicature (NI) 1980 defines a "probate action" as meaning an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for the decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business.

The initial article had been precipitated by the recently published judgment of McBride J in *Guy* v *McGregor*,[3] the first substantive decision on validity disputes for 16 years.[4] One might not have anticipated another reported decision for some time. However, it would appear that Northern Ireland contentious probate judgments share something in common with buses. Just as there had been two cases in quick succession in 2003 and again, albeit on more incidental issues, in 2016, *Guy* v *McGregor* was followed relatively quickly by the decision of McBride J in *McGarry* v *Murphy as the personal representative of Brigid Gilhooly Deceased;The Estate of Brigid Gilhooly Deceased* [5] and, very recently, by a fulsome costs judgment in the same case.[6]

Both the main judgment and the decision on costs in *Gilhooly* should be compulsory reading for all those who prepare wills or advise clients on validity challenges. Both judgments contain detailed but pragmatic and realistic guidance on solicitor's duties, both when taking instructions for a will and when defending a validity challenge, whether as an executor or otherwise (including some welcome clarification on *Larke* v *Nugus* responses).

The actual outcome in *Gilhooly* is less noteworthy. The validity of the will was upheld, although interestingly the learned Judge described her decision on the forgery plea in respect of the solicitor-drafted will as being a 'line-ball' one. The Northern Ireland practitioner still awaits a modern decision in which a will is declared invalid following a contested hearing.[7]

Before we turn to the will of the late Brigid Gilhooly, however, it may be helpful to consider a miscellany of other recent judgments, from both this jurisdiction and England and Wales which will be of interest to all professional will-drafters. All concern the drafting and content of wills rather than substantive validity. We start with a brief update on the dilemmas of will-making in the Covid-19 era, as yet to feature in a reported decision.

---

[3] [2019] NICh 17.

[4] The first part of this article incorporates a table of the nine Northern Ireland decisions. Both 2016 decisions, *In the Estate of Brian McKenzie* ([2016] NI Ch 10) and *Watton and Watton v Crawford* ([2016] NICh 14), are essentially about costs and/or procedure. In one the claim was discontinued. In the other the validity of the will was conceded.

[5] [2020] NICh 15.

[6] [2021] NICh 21.

[7] In practice wills are propounded against by agreement which can now be done as a 'paper' exercise on foot of article 34 of the Wills and Administration Proceedings (NI) Order 1994. This is discussed further at page 18 below, together with the *Estate of James McKeown Deceased* (unreported, 3rd November 2021, McBride J) in which the will of the testator was declared invalid on the ground of lack of capacity, effectively on the application of the rules governing the burden of proof when no defence had been entered.

## Covid-19 pandemic and wills revisited

The challenges that social-distancing, shielding and hospital/care home admissions present for the professional will-drafter in the context of the Covid-19 pandemic were considered in some detail in the previous article, together with illustrations of the creative resourceful of some local practitioners in ensuring that they complied with the will formalities of article 5 of the Wills and Administration Proceedings (NI) Order 1994 (hereafter 'the 1994 Order') while ensuring the safety of their clients, their staff and themselves.

At the time of its going to press the Ministry of Justice were still in discussions with stakeholders including the Law Society of England and Wales, and it was uncertain whether temporary legislation would be enacted and, if so, whether that would extend also to Northern Ireland. By the time of publication of the article the Government had announced that temporary measures would be enacted in England and Wales, made retrospective to 31st January 2020 and remaining in place until January 2022, unless shortened or extended.

The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020[8] has now duly been made under sections 8 and 9 of the Electronic Communications Act 2000, amending the definition of 'presence' in section 9 of the 1837 Act to include videoconferencing.[9] These amendments do not extend to Northern Ireland and there are no plans to introduce similar changes. Northern Ireland practitioners must therefore continue to ensure that they comply with the article 5 formalities, as well as being mindful of the additional risks of challenges to substantial and essential validity of wills prepared in the current climate. These were summarised both in the writer's earlier article and in the guidance issued by the Law Society of Northern Ireland.[10]

The assumption of the English 2020 Order is that section 9 in its original form (that is, in the form that is identical to article 5 of the 1994 Order) does not permit anything other than face to face presence. This was the view expressed by the Law Commission for England and Wales in its 2017 Consultation Report[11] and it is submitted that this represents the correct interpretation of article 5 of the 1994 Order. Time will tell whether a Northern

---

[8] SI 2020/195.

[9] The newly added s 9(2) is very short: '…in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, 'presence' includes presence by means of videoconference or other visual transmission'.

[10] *https://www.lawsoc-ni.org/guidance-on-the-execution-of-wills-during-the-covid-19-crisis*

[11] Law Commission for England and Wales, Making a Will, Consultation Paper 231 (2017).

Ireland court is given the opportunity to make a ruling on the phrase 'in the presence of' and, if so, whether a Judge is prepared to give an expansive interpretation that allows for 'virtual' presence.

In the meantime, it is submitted that any vestiges of doubt that witnessing through a window satisfies the existing article 5 requirements have been removed[12] - so long as there is the fundamental requirement of a 'clear line of sight'. The relevant cases are set out at pages 24 and 25 of the writer's earlier article and to these we can add the additional comfort of the Government Guidance published for England and Wales on 25th July 2020 and updated on 20th August 2020. On the basis of the official Guidance the following scenarios would lead to a properly executed will within the existing Northern Ireland law, provided that the testator and the witnesses each have the requisite clear line of sight: witnessing through a window or open door of a house or vehicle; witnessing from a corridor or adjacent room into a room with the door open and witnessing outdoors from a short distance such as in a garden.[13]

As the temporary amended legislation does not apply to Northern Ireland,[14] it has not been considered in detail in this article. Suffice to say that it has generated considerable debate in both practitioner and academic succession law circles, particularly in respect of the potential loss of privacy and confidentiality and the increased risk of undue influence on vulnerable and isolated testators. No doubt all of these issues will be revisited by the Law Commission when it finally has an opportunity to complete its ongoing wills project and no doubt to consider afresh the desirability of a general dispensing power.

Two final points of interest emerge for the Northern Ireland practitioner from the accompanying Guidance, which is substantially more detailed than the amendment to the legislation itself. Among other matters, the guidance expressly encourages the participants to record the video link meeting if possible. Perhaps the time has come for more practitioners to consider videoing the taking of instructions for wills and the execution of wills as a matter of course (with the permission of the testator, of course).

---

[12] Even the official LSNI guidance sounded a note of caution as to execution through glass.

[13] The Guidance is found at *https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing* .

[14] Although it may be possible that a will executed in Northern Ireland which does not comply with article 5 of the 1994 Order is valid if it complies with the new, temporary English provisions. The Wills Act 1963, which extends to Northern Ireland, provides a potential choice of seven possible legal systems to which reference may be had to validate a will. In addition to the law of the country of execution, there is the law of the country of nationality, domicile or habitual residence either at the date the will was executed or the date of death. In addition, for immoveable property a will be treated as validly executed if the execution complies with the "internal law" of the lex situs.

The Guidance also emphasises that the amendments are very much a last resort and 'where people can make wills in the conventional way they should continue to do so'. On that point, it is worth repeating the advice given in the initial article that those who had no choice but to have wills executed in less than ideal circumstances should consider having the will re-executed as soon as circumstances permit.

## Mistakes in identifying beneficiaries

### Defining family members

> "I'm tellin' you, the Scholar Bentham made a banjax o' the Will, instead o' sayin', 'the rest o' me property to be divided between me first cousin Jack Boyle, an' me second cousin Mick Finnegan, o' Santhry', he writ down only, 'me first and second cousins', an' the world an' his wife are after th' property now."[15]

The historian Professor Theodore Plucknett famously described the law of succession as 'an attempt to define the family in terms of property.'[16] One of the multifarious ways in which succession laws have shaped who is both included within and excluded from family structures has been by the development of a body of principles and presumptions that apply to the construction of testamentary gifts when beneficiaries are defined by a relationship to the testator, rather than named. Well-known illustrations are that the term 'nephew' or 'niece' does not *prima facie* include a nephew or niece by marriage[17] (that is, the nephew or niece of the testator's spouse) and that the word 'issue' *prima facie* means lineal descendants of every degree,[18] again including only persons who satisfy the description by consanguinity and excluding relationships of affinity such as children-in-law and stepchildren.

The older authorities which purport to set out the core meaning of certain descriptions must now be read in light of the Supreme Court decision in *Marley* v *Rawlings*[19] and will invariably always yield to extrinsic evidence of the testator's intention on foot of article 25 of the Wills and Administration Proceedings (NI) Order 1994. Two recent illustrations from the English courts are *Reading* v *Reading*[20] and *Wales* v *Dixon*.[21]

---

[15] Captain Boyle from Juno and the Paycock by Sean O'Casey.
[16] TPT Plucknett, A Concise History of the Common Law, 5th ed., London (1956) at p 711.
[17] *Re Daoust* [1941] 1 All ER 443.
[18] *Re Burnham* [1918] 2 Ch 196.
[19] [2015] AC 129.
[20] [2015] WTLR 1245.
[21] [2020] EWHC 1979 (Ch).

In *Reading* Asplin J, as she then was, held that the term 'issue of mine' in a specific will included step-children, even though the ordinary and natural meaning of the word 'issue' does not include step-children. In *Wales* v *Dixon* Master Teverson construed the reference to nieces and nephews in the will of the late Peter Wales, a childless widower, as including the nieces and nephews of his late wife, as well as his own blood relatives. In applying the principles which emanated from Lord Neuberger in *Marley* v *Rawlings*, the learned Master concluded that the 'context and circumstances' he had to consider were not limited to the other provisions in the will but extended to the background facts known to Mr Wales. The relevant factors included the length of the Wales' marriage (46 years) and that Mr Wales had inherited his wife's entire estate. In addition, several previous wills of the couple were in reciprocal terms with gifts to named nieces and nephews from both sides of the family passing under the substitutionary will. Furthermore, there was no extrinsic evidence as to why Mr Wales might have wished to have excluded his late wife's family some eight months after her death, particularly as there was evidence of a continuing relationship between them.

Master Teverson gave the following warning on the practice of taking instructions by telephone without having had sight of earlier wills (paragraphs 28 and 29, emphasis added):

> The manner in which the Deceased's instructions were taken for the Will greatly increases the likelihood that the Deceased's intention with regard to residue was not understood. His instructions were taken by telephone. The draft will was prepared and sent out on the same day.
>
> The striking feature of the communications between the Deceased and Janice Smith of The Co-operative Legal Services is …. the complete lack of any attempt to establish by name or parent who was intended to receive a share of residue. **This illustrates graphically the dangers of taking instructions by telephone from an elderly widower without sight of his prior will or knowledge of his family tree**. Clause 7 of the Will is badly drafted. It contains grammatical and punctuation errors. It fails to identify by name or parent or family the intended recipients of the gift. The manner in which the Deceased's instructions were taken and the poor quality of clause 7 enhances the scope for giving the words an extended meaning when interpreted against the surrounding circumstances known to the Deceased.[22]

---

[22] Ibid. at paragraph 28. The actual gift sought to benefit the children of the nieces and nephews, rather than the nieces and nephews themselves. However, the will drafters use of apostrophes left something to be desired, referring to 'niece's children' and 'nephew's children'. On one construction there were 7 nieces and nephews. On the other 15.

The additional risks inherent in telephone instructions have already been highlighted in the context of the challenges of the ongoing pandemic. More specifically, it is imperative that all professional will-drafters ascertain from the testator precisely whom they wish to benefit and exercise caution when using generic labels such as children, issue, nephews and nieces.

**Ask the testator to assist in preparing a family tree**

On the subject of the will-drafter requiring knowledge of the testator's family tree, one practical step which might usefully be adopted in all but the simplest of cases is the preparation by the will-drafter of a family tree with the assistance of the testator. One of the criteria of the *Banks* v *Goodfellow* test, revisited below, is that the testator knew his relatives yet so many attendance notes which the writer sees as part of contentious claims do not in themselves assist in establishing that the now deceased testator did know the full extent of his family. Occasionally, there is an allegation that the testator excluded someone inadvertently (raising the alternative claim of rectification as well as the more fundamental lack of testamentary capacity/ lack of knowledge and approval validity claim). Different generations of the family can have the same or similar names.

Moreover, as families become more complex and blended, taking time to sketch out a family tree with the guidance of and at the direction of the testator can be a tactful way of dealing with more delicate issues by providing a prompt to ask various questions. By taking time to probe and enquire and to tease out the various branches of the family the will-drafter has a better chance of satisfying the Judge in any future validity challenge that he took all reasonable steps to establish one of the *Banks* v *Goodfellow* criteria and should avoid some of the more obvious pitfalls as to the precise meaning of the instructions.

**That old hot potato of the mis-described charitable gift**

The writer's own impressionistic view is that gifts to incorrectly named charities or to charities which had already ceased to exist at the date of the execution of the will (or a codicil) still arise all too frequently in professionally drafted wills and that such problems are recurring as often as they did before the inception of the Charity Commission for Northern Ireland (hereafter in the article 'CCNI'). *Knipe* v *British Racing Drivers Motor Sport Charity*[23] is a recent English decision that confirms that the difficulties are not limited to this jurisdiction. Problematic gifts to charities and purported charities have been considered in some detail by the writer elsewhere[24] but it is well worth

[23] [2020] EWHC 3295.

repeating the warning given by Brightman J in *Re Recher,*[25] a case concerning the validity of a gift to the by then defunct anti-vivisection society:[26]

> The will was clearly made under professional advice, although not, I think, the advice of persons now engaged in the matter. I would myself take the view that it is the most elementary duty of a professional adviser in a case such as the present, not only to get the name of the unincorporated association right, but also to confirm that the association is still in existence when the will is made, and not to rely, as presumably this professional adviser relied, on inaccurate information furnished by the client.

**But it is not *always* the fault of the will-drafter…**

Many of the cases discussed in this article have involved situations in which the will-drafter is at least in part responsible for the outcome. The unfortunate reality is that when a professionally drafted will ends up before a Judge for a determination as to its meaning or effect, the focus turns to the role of the will-drafter.

It is worth remembering that testators and their professional advisers are not imbued with the Wisdom of Solomon or supernatural foresight and sometimes circumstances take a turn of events which could not have been predicted. The *Estate of John Marcus Stratford Deceased*[27] is a helpful reminder that sometimes it is necessary and appropriate for an executor to seek a determination from the Court under rule 2 of Order 85 of the Rules of the Court of Judicature Act 1980 and that the events that have happened could not have been prevented or anticipated.

The late Mr Stratford had left an estate in excess of £10 million, including a 3/18 share to 'the Masonic Orphans Welfare Committee of 115 The Mount, Belfast (Charity No XN45446) to be used for its general purposes'. On 1st September 2016, the date when the Testator made his will, MOWC was located at 115 The Mount Belfast and it was registered with HMRC as a charity, with the charity number XN45446. However, MOWC's initial application to CCNI for registration had been unexpectedly declined, with the consequence that MOWC's previous 'registration' with HMRC was suspended in April 2019.

---

[24] Sheena Grattan, *The Charity as Beneficiary and other Elementary Duties* (2017) 1 Folio 19 -29.
[25] [1972] Ch 256.
[26] Association (which was in fact not exclusively charitable) wound up on 1 January 1957; will made just over four months later; testatrix died in 1962.
[27] [2021] NICh 3.

This turn of events presented a number of potential difficulties for the neutral executor. Most immediately, there was the potential inheritance tax liability which would arise if a share of residue valued in excess of £650,000 became chargeable to inheritance tax. The other residuary gifts were all charitable and the testator had no transferable Nil Rate Band or Residence Nil Rate Band. The full terms of the will are not reported in the judgment, but they were unusual and if the 3/18 share of residue was not exempt from inheritance tax, the notoriously complex grossing up calculations of the so-called '*Re Benham* approach' to partially exempt residue may have applied. This would also have had financial implications for the other residuary beneficiaries.

More fundamentally, from a general succession law perspective, there was the matter of whether the gift of the share of residue should, on the proper construction of the testator's will, be construed as a being conditional upon MOWC being charitable. The disputed gift was one of a distinct share of residue and it was common case that if the gift failed on the basis that MOWC was not charitable and the gift on its proper construction was conditional upon it being such, there was a partial intestacy. Fortunately, the sole statutory next of kin was the testator's elderly sister, who had confirmed that should the share pass to her she would redirect it to MOWC or, depending on the outcome, to a new charitable body which carried out similar (charitable) purposes. A different factual scenario would undoubtedly have resulted in a large number of statutory next of kin having to be joined as defendants, arguing that the share should pass to them. Similarly, there would have been additional complications if the elderly sister had lost capacity.

In the event of the court holding both that MOWC was not charitable and that there was no conditionality as to it having to be charitable to retain the gift, the Court would have to have analysed precisely how this ostensibly non-charitable purpose trust should be validated. That conceptual quagmire has not yet been considered by a Northern Ireland court.

With the two-year deadline for securing inheritance tax writing back under section 142 of the Inheritance Tax Act 1984 and its attendant opportunity to ameliorate certain outcomes fast approaching, McBride J facilitated a prompt hearing. In the end, what could have been a very complex situation was resolved when the learned Judge declared that MOWC is and always had been charitable as being for the relief of poverty and consequently it was unnecessary to address any of the other determinations sought in the summons.

The case is an interesting illustration of how a seemingly innocuous will can spawn a multi-layered estate administration due to an unexpected turn of events. The will-drafter had taken care to identify MOWC by its address and

the registration number which had been provided by HMRC (ironically the inclusion of the number giving some legs to the argument that the gift may have been tied to charitable status). Moreover, the will even incorporated a relatively standard automatic 'cy-près' clause which applied when a charity ceased to exist or had amalgamated (but not, on its language, to an organisation which had never been charitable).

Most commentators would agree that the will-drafter could not have done more. If, however, the learned Judge had to consider whether the gift was conditional upon it securing inheritance tax exemption, the Court would have to grappled with the likely intention of the testator in these rather unforeseeable circumstances.

It will be recalled that it is a fundamental principle of the interpretation of wills that the will is read as a whole and that it is appropriate for a court to consider the scheme of the will and what the testator was trying to do. The late Mr Stratford's will was undoubtedly intended to be highly tax efficient (purporting to transfer in excess of £10 million without the payment of inheritance tax), but would the Court have been satisfied that his overarching intention and purpose when making his will was to eliminate inheritance tax entirely? Did this paramount intention trump his desire to benefit an outward looking organisation (even if not charitable at law), that had assisted him in the past?

Inheritance tax as applied to private clients has not been particularly stable of late, with a multitude of piecemeal reforms having been introduced since the inception of the transferable nil rate band in the autumn of 2007. There has already been litigation on the proper construction of nil rate band clauses in light of post-will changes in the law.[28] The counsel of perfection is of course the regular review of wills following any change to the inheritance tax legislation. In *Perrin v Morgan*[29] Lord Atkin famously referred to the ghosts of dissatisfied testators who await on the other bank of the Styx to receive the judicial personages who have misconstrued their wills. The more that a will-drafter can ascertain and record as to the testator's reasons, the more confidence that a future court will have that it is able to give effect to his intentions.

---

[28] See e.g. *RSPCA v Sharp* [2011] I WLR 980 and *Loring v Woodland Trust* [2015] 1 WLR 3238. The Courts have generally preferred the construction that have allowed testators to give as much to their family as possible without the payment of inheritance tax.

[29] [1943] 1 All ER 187 at 194.

## The law does not always lean against an intestacy

The decision in *Re Stratford* underlines that a will-drafter cannot provide for every contingency. However, there are some obvious contingencies that should always be addressed with a testator. As Megarry VC observed in *Re D (J)*[30] in the context of statutory wills, a competent private client solicitor is "one who knows something of ademption and lapse and will include the necessary administrative powers in the will". To state the obvious, people do not always die in the correct or expected order.

It is trite law that if a beneficiary under a will predeceases the testator his share fails, or "lapses" unless there are express substitutionary provisions in the will. The statutory exception contained in article 22 of the 1994 Order is limited to lineal descendants and does not extend to collaterals. It is not atypical for an elderly unmarried testator to leave his residuary estate "in equal shares" between his octogenarian siblings. If one of more of them predeceases him, there will be a partial intestacy. The children of the deceased siblings may, not unreasonably, expect to take their parent's share (instead of taking only a portion of same on the resultant partial intestacy). It may be, of course, that the testator in question intended only his siblings to benefit, but in which case he probably would have wanted a survivorship clause to prevent a partial intestacy.

In the absence of clear attendances as to whom was intended to benefit in the rather foreseeable event of the death of an elderly residuary beneficiary, the aggrieved nephews and nieces have at least the germs of a troublesome negligence action against the will-drafter. The "evidential" hurdle will be in establishing that the testator wanted them to benefit; the "legal" hurdle is for them to establish that they were sufficiently within the contemplation of the draftsman for the duty of care to extend to them. The consequences of lapse should therefore always be explained to testators and instructions taken about substitutionary beneficiaries. At that stage if a testator is adamant that he does not want any substitutionary beneficiaries, a careful note of this should be kept as part of the attendance note.

The *Estate of Mary Alice Smyth*[31] is a useful decision of Humphreys J in which the testatrix had attempted to deal with the consequences of her siblings predeceasing her, but unfortunately none of the four of them survived her. The testatrix had divided her residuary estate between **'**[her] sister Susan Berry and [her] brothers Phil Smith[32] and John Smith and Patrick Smith

---

[30] [1982] Ch 237.
[31] [2021] NICh 16.
[32] Smith was in fact a spelling mistake and the family name was Smyth.

or the survivor or survivors of each of them in equal shares". Susan was predeceased by her husband and children but the three brothers were all survived by several children.

The question for determination was what is meant by the phrase "the survivor or survivors of each of them" as used in the will. There were three competing interpretations presented by the executor: that the term 'survivor' only relates to the named individuals; that the term 'survivor' includes any surviving spouse of the named individuals; that the term 'survivor' includes any surviving issue of the named individuals. The executor was the only party represented before the Court and it is not evident from the judgment as to what arguments were being made by what potential beneficiaries.

The learned Judge referred to Lord Lowry's *locus classicus* in *Heron v Ulster Bank:*[33]

> I consider that, having first read the whole Will, one may with advantage adopt the following procedure:
>
> 1. Read the immediately relevant portion of the Will as a piece of English and decide, if possible, what it means.
>
> 2. Look at the other material parts of the Will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole or, alternatively, whether an ambiguity in the immediately relevant portion can be resolved.
>
> 3. If ambiguity persists, have regard to the scheme of the Will and consider what the testator is trying to do.
>
> 4. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumptions against intestacy and in favour of equality.
>
> 5. Then see whether any rule of law prevents a particular interpretation from being adopted.
>
> 6. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other courts and judges and similar words, rarely is binding

[33] [1974] NI 44.

> precedents, since it has been well said that `no Will has a twin brother' but more often as examples (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts.

Applying these principles**,** the learned Judge was satisfied that the natural and ordinary meaning of a 'survivor' of a list of named beneficiaries means those who are alive at the date of the testator's death and that there was no indication from the rest of the testatrix's Will which gave rise to any need for modification of the plain meaning of the words used. There was nothing to suggest the testatrix intended to benefit either the spouse or the issue of the named individuals, which she could readily have achieved with a straightforward substitutionary gift. The consequence was a partial intestacy.

It will be recalled that in Northern Ireland the presumption that the law leans against an intestacy is now enshrined in statute in article 28 of the 1994 Order. The point has often been made that no man who makes a will intends to die intestate. In fact, over the years the writer has been involved in at least two cases in which the now deceased testator consciously chose to die partially intestate. *Re Smyth* is reminder that any presumption is of limited value and that the starting point remains the plain, ordinary meaning of the words used in the will.

## Rectification of wills

By now most legal advisers will have had some practical experience of the statutory jurisdiction to rectify wills which was introduced over 25 years ago. At common law a doctrine had developed whereby mistakes introduced *per incuriam* could be deleted. However, this remedy was restricted to deleting words and while it was possible to achieve a reasonably satisfactory outcome in some situations, it was of no use whatsoever in a situation where words had been omitted.

In contrast, the statutory jurisdiction found in article 29 of the 1994 Order permits words to be added to a will as well as deleted, so long as the court is satisfied that the will as executed is so expressed that it fails to carry out the testator's intentions in consequence of either a clerical error or of a failure to understand his instructions. Thus, not all sorts of errors are rectifiable.[34] It is well established that rectification is not a remedy which

---

[34] For an illustration of an error falling on the incorrect side of the line see *Kell v Jones* [2013] NLJR 107 in which the draftsman had applied his mind to the drafting and simply 'got it wrong'.

will be granted readily in that a court will only order rectification of a will if there is "convincing evidence" of a testator's intentions.[35]

Importantly also it is not enough to satisfy the court that the will as executed was not what the testator intended; there has to be sufficiently compelling evidence of precisely what the testator intended to include instead. In many situations it is evident that the drafting could not have been intended by the testator but there is insufficiently cogent evidence of what precisely was intended instead.

There are several will rectification claims heard in the Northern Ireland Chancery Court[36] each year, often unopposed. Most are not reported. The decision of McBride J in the *Estate of Patricia Milliken*[37] contains a useful recap of the basic principles as well as some salutary advice on the keeping of attendance notes. As is often the case, the error in *Milliken* lay at the door of the will-drafter and the application for rectification was considered to be the most cost-effective manner in which to address it. By her Will the testatrix appointed her niece as her sole executrix. The relevant part of the Will provided as follows:

> I GIVE, DEVISE AND BEQUEATH my dwelling house … unto my sister … for her life and after her death to my said niece …. All the rest, residue and remainder of my estate I give, devise and bequeath unto my said sister... should she survive me by 30 days.
>
> Should however my said sister predecease me or not so survive me by 30 days then I give, devise and bequeath all my estate unto my nieces [naming both the niece named in the preceding paragraph and another niece [and my nephew …. in equal shares absolutely.

In the events which had happened the late Ms Milliken was predeceased by her sister. The estate was relatively modest, comprising the house valued at a little less than £140,000 and a residuary estate of approximately £42,000.

---

[35] *Re Segelman* [1996] Ch 171.

[36] It is something of a moot point as to whether the Chancery Master has jurisdiction. In England Masters have jurisdiction to rectify wills. Order 32 rule 10 lists those matters in which the Master does not have jurisdiction including the construction of wills (and other instruments). Rectification is not included. If, as often will be the position, a claim requires the construction of a will, the matter will have to be considered by the Judge. If, as is often the case the rectification application is proceeding by consent it is submitted that there is nothing in Order 32 that precludes the Master hearing the evidence and making the Order sought.

[37] [2021] NICh 5.

The question for the court was whether the niece took an absolute interest in the house or whether the house fell within the final clause of the will to be distributed equally between all three nieces and nephew. The nephew and niece who benefited from the residuary estate initially opposed the proposed application for rectification, but withdrew their opposition as soon as proceedings were issued, being prepared to consent to the draft order for rectification which had been served on them. No concession was made by them in respect of the relief sought as to the construction of the will. Accordingly, the case proceeded, in light of the over-riding objective, on the basis that the will on its proper construction gave the house to the residuary beneficiaries. It is submitted that had the matter been tested the learned Judge would have held the house to pass to the niece.

McBride J referred to the well-known three-fold test as set out in *Re Segelman*:

> First, what were the testator's intentions with regard to the disposition in respect of which rectification is sought? Secondly, whether the Will is so expressed that it fails to carry out those intentions. Thirdly, whether the Will is expressed as it is in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given instructions in connection with this Will to understand those instructions.

As noted, rectification requires cogent evidence of the testator's intentions. In *Milliken* that evidence was provided by both the affidavit evidence and oral evidence of the will-drafting solicitor. The learned Judge was satisfied as to the testatrix's intention to leave the house to her favoured niece. It is well-established that the touchstone of a "clerical error" is inadvertence, although reported case law indicates that the term "clerical error" has generally been interpreted expansively by the courts. In any event the *Milliken* scenario fell squarely within the parameters of even the most conservative interpretation of a 'clerical error' and the learned Judge was satisfied that referring to the 'estate' rather than to residuary estate in the final clause arose from inadvertence on the part of will-drafter. However, the following observations are worth repeating in full:

> Unfortunately, [the solicitor] did not keep any notes of the testatrix's instructions or an attendance note. As a result, she found it difficult to recollect precise details of any conversations she had with the testatrix. Although the absence of attendance notes does not mean the court is unable to make a conclusion about the testatrix's intention (See *Re Heak (deceased)* [2002] NIJB 20 per Girvan J at page 21 D and 23 E*)*, the court reminds practitioners of the importance of making detailed attendance notes. They not only assist solicitors as an aid memoire and the court in forming a view about a testator's

> instructions and intentions but in many cases they may obviate the need for proceedings to be issued.

Many rectification claims will not be as straightforward as that in *Milliken* and it is imperative that will-drafters are equipped with the armoury of a detailed attendance note should difficulties arise.

Following the efforts of Lord Neuberger to assimilate the construction of wills with the construction of commercial contracts and *inter vivos* unilateral instruments in *Marley* v *Rawlings*, it is probably only a matter of time until there is appellate consideration as to whether rectification of wills should be assimilated with the equitable rectification of voluntary settlements and other *inter vivos* instruments such as deeds of variation. Lord Neuberger himself opened the door in *Marley* v *Rawlings*. The first tentative indication that the Northern Ireland Chancery Division may be persuadable to such assimilation may be found in the learned Judge's concluding observations on how the Court might exercise its discretion to refuse rectification in any given situation:

> I consider that Article 29 gives a discretion to the court not to order rectification. In my judgment the extent and exercise of the statutory discretion is the same as the court's discretion to grant or refuse rectification under its inherent equitable jurisdiction.

**Time limits for rectification reconsidered**

The time limit for statutory rectification of a will on foot of article 29 of the 1994 Order is in identical terms to the time limit set out for claimants under the Inheritance (Provision for Family and Dependants) (NI) Order 1979 (hereafter in this article 'the 1979 Order'). The primary time limit requires applications to be made within six months of the date of the grant of representation, although the Court may grant leave to apply out of time. Early jurisprudence on the equivalent English provision suggested that the judicial discretion to extend time should be exercised in the same manner as under the family provision jurisdiction.[38]

Over the years the writer has encountered a number of potential rectification claims that were years outside the primary time limit, but where there had been no prejudice because the proposed rectification affected only a remainder interest which had yet to fall into possession. The parallel drawn with the family provision jurisdiction did not seem entirely logical. The recent decision from the English courts of Master Shuman in *Kelly* v

---

[38] *Chittock v Stephens* [2000] WTLR 643.

*Brennan*[39] endorses the fundamentally different nature of rectification claims and family provision claims, the latter 'effectively driving a coach and horses through testamentary intention' whereas the former 'seeks to find the true testamentary intention and give effect to it by rectifying the will." The learned Master concluded that the jurisdiction to rectify wills "is and should be more flexible" than the family provision legislation. In particular:

> A rectification claim is often an alternative to a claim for a declaration as to the true meaning of a will. The latter has no time constraints and significantly no protection for the executor. There is a potential risk that if there was too restrictive approach to the time limit under [article 29 of the 1994 Order] a court may, in trying to achieve a result where the will truly reflected the testamentary intentions, strain too far in in interpretation. That could lead to an executor being exposed many years later for distributing on the wrong basis.[40]

Having reviewed this selection of will cases which touch upon the taking of instructions and drafting, we conclude by considering the most recently reported of the Northern Ireland contentious probate cases, in the *Estate of Brigid Gilhooly*.

## Estate of Brigid Gilhooly

### The facts in summary

The late Brigid Gilhooly ('the Testatrix') was a maternal aunt of both Ms McGarry the Plaintiff and Mr Murphy, the executor Defendant. Ms McGarry and Mr Murphy were cousins. The testatrix made her first will in 2008 aged 91, by which time she had been widowed for 35 years. She made a second will ('the Disputed Will') in September 2011, not long after her 94th birthday. The Plaintiff, who had previously been legally represented, but who was a personal litigant by the time of the hearing, claimed that the Disputed Will was invalid on the grounds of lack of capacity, undue influence and forgery. The terms of the Disputed Will were not that different from the terms of the will made some three years earlier. Both instruments appointed the same executors, one of whom was the Defendant; both instruments left the house and lands to a Malachy and Maureen Quinn and both instruments left the residuary estate to the executors. However, the earlier will had made a number of pecuniary legacies and specific bequests of various chattels, whereas the Disputed Will omitted the bequests of chattels and reduced the pecuniary legacies from £200 to £100. The Plaintiff, who would have

---

[39] [2020] EWHC 245. This decision also explores the previously uncharted territory of private international law principles in respect of rectification.

[40] Ibid. at paragraph 34.

received £200 under the earlier will, received only £100 under the Disputed Will. Paragraph 16 of the judgment appears to suggest that the relief sought by the Plaintiff included that a grant of letters of administration be issued to her, but there is nothing in the judgment to suggest that the Plaintiff was also seeking to challenge the earlier will. It would appear that the Plaintiff was embroiled in High Court litigation over the sum of £100. It may be that the Plaintiff, as a personal litigant, was labouring under the not uncommon misconception that invalidating the most recent will results in an intestacy.

**The decision**

As was noted in the introduction to this article, the validity of the Disputed Will was ultimately upheld by the Court. Notwithstanding the manner in which the solicitor who prepared the Disputed Will handled his retainer, to which we return below, the evidence of lack of capacity within the testatrix's medical notes at the key date was virtually non-existent. The Plaintiff's own expert Dr Todd had opined that the testatrix had testamentary capacity when she made the Disputed Will. The only lay evidence was that of the Plaintiff, whom the Judge acknowledged to be sincere and genuine in her beliefs as to the validity and authenticity of the Disputed Will, but who had very limited contact with the testatrix at the relevant time.

As all probate practitioners will be too well aware, undue influence is a notoriously difficult challenge to sustain. The burden of proof was on the Plaintiff. It was not sufficient that she showed that the Defendant had power to overbear the testatrix's will. The Plaintiff had to show that the power was actually exercised and that the execution of the Disputed Will was obtained by it. The Judge found that there was not a 'scintilla' of evidence of undue influence.

Rather unusually, the plea that came closest to succeeding was that of forgery. While instances of probate fraud are undoubtedly on the increase, forgery cases are very rare notwithstanding a couple of well-publicised criminal prosecutions in recent years. In the writer's experience it is difficult to secure a conclusive handwriting report, often due to difficulties in obtaining a selection of original specimen signatures from the relevant timeframe. Even when it is acknowledged that the alleged signature is significantly different to earlier ones, any discrepancy is often capable of the alternative explanation of a decline in the testator's physical health.

In *Gilhooly* the plaintiff's expert witness, forensic scientist Mr Craythorne, gave oral evidence in which he opined that indentations on the will were made in 2015 and noted various concerns as to how the testatrix's signature on the Disputed Will differed from the specimen signatures which he examined. Although Mr Craythorne concluded that the multiple strokes taken to make

the letters, the incorrect letter designs and the poor writing fluency were indicators that the signature could be a forgery, he accepted that this was really a '50/50' case. He could not reach a definitive conclusion that, on the balance of probabilities, the will was a forgery. The burden being on the Plaintiff, the learned Judge concluded that Plaintiff had not proved that the Disputed Will was a forgery to the requisite standard, adding, however, that she considered this to be a 'line ball" case.

**The legal principles reaffirmed**

The *Gilhooly* case has given another opportunity for a Northern Ireland Court to outline the well-known legal principles that govern testamentary capacity, undue influence and forgery and the relevant burden. The principles in respect of capacity and undue influence were summarised in the writer's earlier article and there is nothing novel or remarkable which emanates from the *Gilhooly* decision. Points that may be worth underlining are McBride J's reiteration of her observations in *Guy* v *McGregor* that 'there is *per se* no hierarchy in the sources of evidence' and her preference for the view that insane delusions should now be regarded as a separate limb of the *Banks* v *Goodfellow* criteria rather than incorporated in the third limb.

Northern Ireland practitioners who are currently involved in a validity dispute in which insane delusions feature should be alert to the consideration of same by Mrs Justice Falk in *Clitheroe* v *Bond*.[41]

There had been some discussion among English commentators that this appeal (from the Master) in *Clitheroe* v *Bond* may change the law of the burden of proof in testamentary capacity cases. In the event Falk J did not address that issue, which was related to the presumption of capacity enshrined in the English Mental Capacity Act 2005 (even though testamentary capacity is still governed by *Banks* v *Goodfellow* and not the MCA 2005). In Northern Ireland the law is well-settled (this side of the coming into force of capacity legislation). It is summarised by McBride J in both *Guy* v *McGregor* and *Gilhooly*, relying on both occasions on the decision of Briggs J in *Re Key*.[42] The burden of establishing capacity at the relevant time is on the person propounding the will. However, there is a rebuttable presumption that a will which is duly executed and which is rational on its face was executed by a testator who had testamentary capacity. If a will is properly executed and is rational on its face the evidential burden then shifts to the objector to raise a real doubt about capacity. If a 'real doubt' is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.

---

[41] [2021] EWHC 1102.
[42] *Ram, Lal v Chauhan* (2017) EW Misc 12 (CC).

As yet, there would appear to be little reported authority on what constitutes a 'real doubt'. In one English case[43] the learned judge held that non-compliance with the Golden Rule and the fact of a non-professionally drafted will were sufficient. The importance of being in a position to shift the burden should not be under-estimated.[44]

In an unreported decision from November 2021 McBride J accepted the writer's submission in an undefended claim in which the claimants sought to propound against the last will that a retrospective report from an expert psycho-geriatrician was sufficient to shift the burden of proof, so long as the opinion of the expert was based on evidence and in the ex tempore judgment suggested that the test may be whether there was something that called for an investigation. While no court likes to determine a case on the burden of proof, if the evidential burden is shifted and those benefiting under the impugned will offer no evidence, the only option open to the court is to declare the will invalid.

The real practical significance of the judgment in *Gilhooly* lies in McBride J's very detailed consideration of a solicitor's duties to take reasonable steps to ensure that a testator has capacity and the learned Judge's very fulsome guidance as to how those duties might be discharged. There is no reason to believe that the same duties do not extend to all professional will-drafters.[45]

**The duties of the will-drafter and the 'Golden Rule'**

> In the case of an *aged* testator or a testator who has suffered a serious illness, there is one golden *rule* which should *always* be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: *the making of a will by such a testator ought to be witnessed or approved by a medical practitioner* who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding.[46]

The above so-called 'Golden Rule' was discussed at some length in the writer's earlier article. The relative lack of judicial guidance from this jurisdiction which was noted at that time has been addressed and Northern Ireland will-drafters now have the benefit of some of the most detailed, yet realistic, guidance found anywhere in the Commonwealth. The extract from McBride J's judgment that elucidates the Golden Rule and what it means in practice is found at paragraph 72 of her judgment and is worth reproducing in its entirety with some key points emphasised:

---

[43] See also *Ledger v Wootton* [2008] WTLR 235.
[44] On the basis of *Esterhuizen v Allied Dunbar* [1998] 2 FLR 668.
[45] Templeman J in *Re Simpson* [1997] 127 NLJ 487.
[46] Templeman J in *Re Simpson* [1997] 127 NLJ 487.

I consider however that this so called "golden rule" is not a rule of universal application and therefore need not be slavishly followed in all cases for the following reasons. Firstly, **the rule is not a rule, it is merely guidance**. Secondly, **failure to follow the rule does not automatically invalidate the will; nor does compliance guarantee validity** - See *Sharp v Adam [2006]* EWCA Civ 449. Thirdly, the golden rule does not define "aged". We live in an age when there are many nonagenarians who continue to act as leaders, mentors and advisors. Most solicitors would find it very tricky if not downright insulting to require such a client to undertake a medical examination when it is clear that they have capacity. I consider that **the duty of a solicitor instructed to make a will is not to follow a "golden rule"; rather, his duty is to take reasonable steps to satisfy himself that the testatrix has testamentary capacity**. This duty **does not dictate that a medical report is required in all cases of an elderly testatrix**. What is required is that **a solicitor must exercise his or her judgement in all cases**. What is reasonable in any particular situation will depend upon all the circumstances including the age and health of the testatrix; the solicitor's knowledge of and familiarity with the testatrix; the testatrix's presentation to the solicitor, and whether there are any "red flags" suggesting a possible challenge to capacity. **Red flags cases include situations where the testatrix is aged over 80 years and is either in receipt of a care package or has had recent hospital admissions or other medical attention; the testatrix is vulnerable because for example she has recently been bereaved; the testatrix is making significant changes to her will; the testatrix's Will fails to make any or reasonable provision for someone who might bring a claim such as a family member; the testatrix is not an existing client of the firm; or the solicitor has some concerns about the testatrix's presentation or otherwise anticipates a challenge to the Will**. In circumstances **where there are any red flags a solicitor would be prudent to exercise more caution**. In such cases, he may consider that the only way he can be satisfied that the testator has testamentary capacity is by obtaining a medical report. **In cases where a client is elderly and not an existing client of the firm the need to obtain a medical report will usually be considered necessary to confirm testamentary capacity** not least because it is now well recognised that some disorders including dementia are not always readily apparent to a non-medically trained person and may not therefore be detected during a one-off consultation to take instructions for a will.

In an increasingly mechanistic, standard-form 'tick-box' era, it is particularly welcoming that the learned Judge emphasises the application of professional judgement, eschewing an indiscriminate targeting of all 'aged' testators and instead setting out a (non-exhaustive) list of red-flags. These should already be familiar to all experienced practitioners. Nothing in the judgment should strike practitioners as controversial or unreasonable. The duty in all cases is to take reasonable steps to ensure that the testator has capacity. How that duty should be discharged will depend on the specific fact situation and in some cases will require a medical report. All competent professional will-drafters should already have been adopting the practices described.

Sometimes testators will refuse to undergo a capacity assessment and the learned Judge acknowledges that this delicate issue needs to be handled sensitively, again emphasising the importance of the solicitor's own professional judgement (at paragraph 73):

> If a testatrix refuses to consent then the solicitor must decide whether he can continue to accept instructions. Again, this is a question of judgement. If the solicitor is otherwise satisfied as to the testatrix's capacity and is satisfied that the testatrix has given cogent reasons for, *e.g.*, changing her will or not making provision for a certain person or persons, the solicitor may decide he can continue to accept instructions.

**Importance of attendance notes (again…)**

In *Guy* v *McGregor* McBride J set out in some detail what an attendance note should cover and the relevant extract from the decision is reproduced in full in the writer's earlier article at page 32. In *Gilhooly* the learned Judge again takes the opportunity to remind practitioners to take adequate attendance notes:

> …. it is extremely important that the solicitor prepares a full attendance note setting out a record of open questions asked and the answers given by the testatrix which satisfied him that the testatrix had the necessary capacity. In addition the attendance note should set out details of the solicitor's familiarity with the testatrix, how the testatrix presented to the solicitor, details of the testatrix's instructions and details of why the testatrix is for example changing her Will and/or excluding family members.

The sin of not keeping adequate attendance notes (or, indeed, any attendance notes) has already been mentioned in this article in the context of rectification. Northern Ireland solicitors may find practical guidance on

all succession law related matters in the Wills and Inheritance Protocol of the Law Society of England and Wales. The Protocol is obviously not binding in this jurisdiction, but it includes much useful material which can be adapted for use in any office and would readily form the basis for an informal in-house training event.[47] The obligations in respect of the keeping of detailed and contemporaneous records are found at Clause 2.2.2. These include making a note of the will-drafter's assessment of testamentary capacity, the questions asked to establish it and the client's responses, with solicitors encouraged to record the actual words used by the client where possible.

**The solicitor's evidence**

Notwithstanding the learned Judge's reminder that there is no 'hierarchy of evidence' and that every case is fact-specific, the reality is that in most contentious probate actions the solicitor who prepared and supervised the execution of the will is the singularly most important witness. In *Gilhooly* McBride J acknowledges that the Court can be expected to give 'great weight' to the evidence of 'an experienced solicitor who is familiar with the testatrix and who conducts a full assessment of testamentary capacity and can prove this by reference to a good attendance note'. This is so even in the absence of a medical report.

Alas, in what can only be described as a judicial excoriation, McBride J concluded that in this case she was able to give 'no weight' to the solicitor's evidence in respect of capacity. The learned Judge found that the solicitor had failed to make any professional assessment of testamentary capacity, thereby not accepting his oral evidence that he had asked relevant questions. Neither his attendance notes nor that of the trainee solicitor who was in attendance recorded any efforts to establish capacity. The litany of red flags which should have caused the solicitor to have concerns included the testatrix's age, that she was not a longstanding client but rather only a passing acquaintance and that she was wishing to make changes to to her previous will. These were circumstances in which the learned Judge considered that it would have been prudent to obtain a report from the testatrix's GP or a consultant geriatrician. Furthermore, although the testatrix was changing her will, the solicitor took no steps to obtain the earlier will and in consequence he did not know the changes that she was making and was unable to make enquiries as to the reasons for the changes.

---

[47] Illustrations of best practice can also be found in the Code for Will Preparation of the Society of Trust and Estate Practitioners (STEP) which applies to all STEP members making wills in England. As yet, there is no equivalent Code applying to STEP members in NI.

Having given judgment in favour of the validity of the Disputed Will, McBride J reserved her decision on costs.[48] The decision on costs also contains much that is of general interest to probate practitioners.

**The decision on costs**

The Plaintiff's submission was that there should be no order as to costs. She did not, it would appear, seek to have her costs, or even a portion of them, from the estate. She relied on various matters including the will-drafter solicitor's failure to comply with the Golden Rule or to respond promptly to her *Larke* v *Nugus* enquiry, the fact that the decision on forgery was a 'line-ball' one, and the fact that the Defendant's legal representatives had failed to enter into discussions with her.

The Defendant sought indemnity costs against the Plaintiff, relying in particular on the learned Judge's finding that there was not a scintilla of evidence in respect of undue influence and that the Plaintiff was not justified in bringing proceedings when the nominal gain to her was only £100. The Defendant denied the charge that he was responsible for the lack of engagement, countering that there had been no meaningful attempt to resolve the case by the Plaintiff herself.

The decision of the Judge was that there should be no order as to costs. As someone who had been unsuccessful in all of her challenges, including a very weak undue influence claim, one might have expected the Plaintiff to have been ordered to pay all of the Defendant's costs or, at best, a proportion of those costs. It will be remembered that the unsuccessful challenger in *Guy* v *McGregor* was condemned in the entirety of the costs[49] notwithstanding some judicial criticism of the will-preparer solicitor for not keeping adequate attendance notes.

The *Gilhooly* decision reminds us that costs will always be at the discretion of the Court and although anyone who embarks upon an unsuccessful contentious probate claim can ordinarily be expected to be condemned with the entirety of the costs, there are various exceptions to this starting point.

---

[48] [2021] NICh 21

**Costs in probate actions generally**

The learned Judge set out the following general principles on the costs of contentious probate claims:

1. Under Order 62 of the Rules of the Court of Judicature Act 1980 costs in contentious probate actions lie at the discretion of the Court;

2. The general rule is that costs follow the event;

3. In probate actions there are two long-standing exceptions to the general rule. These exceptions, set out in *Spiers* v *English* and applied in *Kostic* v *Chaplin* continue to guide the Court. They are:

    - If the testator or persons who have been interested in residue are the cause of the litigation the costs come out of the estate;
    - Where the circumstances lead reasonably to an investigation of the matter the costs will be borne by those who have incurred them rather than out of the estate;

4. These two long-established 'probate exceptions' are neither exhaustive nor rigidly prescriptive and they do not fetter the discretion of the Court to take other circumstances into account;

5. Costs may be ordered to be assessed on either the standard or the indemnity basis.

Costs were considered in the writer's earlier article and the material covered there is not be duplicated here, save to underline the point that costs have been increasingly likely to follow the event in that the judicial trend has been to narrow the two well-established specific 'probate' exceptions.[50] The costs decision in *Guy* v *Gregor* was illustrative of this.

It is submitted that *Gilhooly* has not altered this general position. However, the decision does provide a helpful illustration of the type of factual scenario that might justify a departure from the general principle. It should be remembered that it is always for the unsuccessful party to show cause why the general rule should not apply. That *Gilhooly* involved an unsuccessful undue influence claim only serves to underline that there are no blanket rules and every case deserves to be considered on its merits.

---

[49] That aspect of the case is not reported.

[50] See in particular *Vegetarian Society v Scott* [2013] EWHC 4097 and *Breslin v Bromley* [2015] EWHC 3760.

The conventional wisdom has been that anyone who unsuccessfully asserts undue influence will be condemned in the costs of the entire action.[51] No doubt the Defendant expected to be awarded his costs against the Plaintiff, in light of the Judge's finding that there was not a scintilla of evidence in support of the Plaintiff's undue influence claim and believed that the only real matter for debate was whether the costs could be assessed on the indemnity basis.

While most practitioners who have experience of contentious probate claims will be familiar with the two well-established costs exceptions (set out at 3 above), the fact that these categories are neither exhaustive nor prescriptive has been less well documented. The learned Judge set out the following non-exhaustive list of factors as being ones that a Court can be expected to consider:

- Whether the party has succeeded in part of his case;
- Whether any *Calderbank* offers have been made;
- Whether *Larke v Nugus* letters have sent and whether these have been properly answered.

In deciding whether an investigation was reasonable it is clear that the Court will closely examine the evidence available to the parties. An investigation may be justified at the outset when the parties are 'in the dark', but there may come a time when pursuing the challenge is no longer reasonable. The English Courts have been creative in making hybrid or phased orders and it is evident that the Northern Ireland Chancery Court sees the merit in such an order in appropriate cases.

Unlike proprietary estoppel and 1979 Order claims in which the Court has a wide discretion as to quantum and, indeed, the nature of the remedy generally, contentious probate cases are in the 'all duck or no dinner' category. If the case runs to trial the Judge will have the binary choice of propounding for or against a particular will. In the writer's experience this has tended to limit the use of *Calderbank* offers and McBride J's reminder that reasonable offers can still have a part to play in respect of costs is a timely one. In Northern Ireland virtually all contentious probate claims come within the High Court jurisdiction. Yet often the estate is relatively modest and the reality is that the quantum of costs and who bears them is as significant to the parties as the determination on the validity of the will. To quote directly from the learned Judge:

> Even if an investigation is justified there remains a public interest in encouraging sensible settlements and therefore if a party makes a

[51] See e.g. the comments of Girvan J in *Re Thompson (Deceased) (Costs)* [2003] NI Fam 4.

> reasonable offer which the court determines the other party should have accepted the court may condemn that party in costs or reduce the percentage of costs payable

McBride J cites as an authority the decision of Lewison J in *Perrins v Holland*.[52] In *Perrins*, Lewison was satisfied that the second exception applied and 'all other things being equal' he would have allowed costs to fall where they lay. However, he went on to order the losing party to pay costs on the sole ground that he had rejected a *Calderbank* offer which would have given him something from the estate.[53]

On the entirety of the facts before her, McBride J concluded that it was reasonable for the Plaintiff to issue her capacity challenge in light of the suspicions that had arisen due to the Plaintiff's own observations of the testatrix, the domiciliary care that she was receiving and the fact that the testatrix had latterly been diagnosed with dementia. These concerns had been exacerbated by the solicitor's failure to take proper steps to assess capacity at the time of the execution of the Disputed Will. Similarly, it was reasonable to investigate the allegation of forgery. On the other hand, it was not reasonable to pursue the claim of undue influence on the evidence, but the learned Judge was satisfied that this plea played a very minor part in the proceedings and did not require the calling of any additional witnesses. Moreover, the Plaintiff was entitled to continue with the proceedings to trial, the solicitor's post-proceedings response to the *Larke* v *Nugus* letter not ruling out the need for further investigation of various matters.

Addressing the Defendant's concern that this costly litigation was pursued over the sum of £100, the learned Judge referred to the important principle of establishing a potential forgery.

On the fact that the amount at stake was £100, the Judge referred to the important principle of forgery, concluding that the disproportionate cost did not deprive the Plaintiff of her right to a hearing, particularly in the circumstances that no offer was made to settle the case. One wonders what order the learned Judge would have made if the Defendant had offered the Plaintiff £100 in open correspondence terms at an early part of the proceedings.

---

[52] [2010] EWCA Civ 1398.

[53] This aspect of the decision was upheld on appeal.

**The costs of the defendant**

And what of the legal costs incurred by the Executor Defendant? Ordinarily, of course, an executor will be entitled to his costs out of the estate if acting reasonably and the reader is referred to the writer's earlier article for the caveats to this principle. The last word may not have been heard on the issue of whether the estate of the late Mrs Gilhooly will be left to bear the costs that the executor Defendant incurred in defending the litigation in order to have the Disputed Will admitted to proof in solemn form. In any event, that was never going to be a matter for the learned Judge in the context of the proceedings before her.

**A postscript on *Larke v Nugus***

The learned Judge's efforts to elucidate the scope and extent of a will-drafter solicitor's obligations under *Larke* v *Nugus* are to be welcomed. This aspect of the decision will be considered in more detail in the next edition of this journal as Part II of the writer's article on the Solicitor Executor.[54]

*Larke* v *Nugus* requests were slow to take off in Northern Ireland but Horner J's judgment in *Watton and Watton* v *Crawford* generated something of an epidemic, such that the Non-Contentious Business Committee of the Law Society of Northern Ireland issued Guidance for its Members. It is noted in passing that the Law Society of England and Wales has recently revised its own Guidance on *Larke* v *Nugus* to take account of various concerns that had been raised as to whom precisely the duties apply.

The main 'takeaway point' for solicitors from the decision in *Gilhooly* is that properly focused *Larke* v *Nugus* requests should be answered meaningfully, accurately and promptly. It is submitted that accuracy is key and if it takes more time to provide a full, accurate response this should be requested. Failure to provide an adequate response may have costs implications for the solicitor in question, whether he is continuing to act in the litigation or otherwise (and there will be more on conflicts of interest on the next occasion).

However, in the writer's experience some of the purported *Larke* v *Nugus* requests being made at present are inappropriate or misconceived. It is important to remember that *Larke* v *Nugus* requests are confined to contentious probate actions (in the Order 76 sense) and do not extend to proprietary estoppel claims, will construction proceedings or 1979 Order cases. There may be merit in the view that all of those types of estate dispute

---

[54] Part I is found at (2020) 2 JELC 54.

could benefit from more meaningful pre-action discovery procedures, but that is an entirely different debate.

McBride J also helpfully reminds us that *Larke* v *Nugus* requests apply only if there is 'a serious dispute', a concept on which there is as yet no reported decision. They were never intended to facilitate fishing expeditions and it is submitted that solicitors should not breach confidentiality in a context which is outside the strict parameters set by the original *Larke* v *Nugus* decision. The point was made in the writer's earlier article that the distinction between a will-drafter solicitor's obligation to provide a statement if the *Larke* v *Nugus* conditions are met and the rights of an executor to waive the legal professional privilege of a deceased testator and/or to release documents belonging to the deceased has often been blurred. In *Gilhooly* McBride J also usefully reminds practitioners of the importance of addressing requests to the correct person.

## Conclusion

The period since March 2020 has been an uncharacteristically eventful one for wills and estates cases in the Northern Ireland Courts. This article has managed to include reference to all of them, save for the decision of Humphreys J in the *Estate of Mary Teresa Toner Deceased*[55] which provides direct Northern Ireland authority on the burden of the payment of legacies in solvent estates.[56] Probate practitioners await an equally busy time ahead as the first Covid-19 related challenges start percolating through the system. More generally, it has been estimated that worldwide 15 trillion dollars will pass to younger generations during the next decade.

Increased longevity and the attendant decline in cognitive function will inevitably mean that validity disputes will continue to increase year on year. There has been an increasing tendency to characterise contentious probate litigation as being just another type of dispute between individuals about property, with only a small remnant of the historic 'supervisory' jurisdiction of the ecclesiastical courts remaining. Yet that is not the entire story. The willingness of Ms McGarry to risk being

---

[55] [2021] NICh 12. For completeness it is noted that there has also been the first Court of Appeal consideration of the doctrine of proprietary estoppel (*Graham v Graham* [2021] NICA 25).

[56] The learned Judge held that pecuniary legacies are not governed by the order set out in Part II of the First Schedule to the Administration of Estates Act (NI) 1955. In practical terms if there is a partial intestacy ('property undisposed of by will' for the purposes of the statutory order), the legacies are paid from the residue as a whole rather than out of the partial intestate share. Debts are payable out of the partial intestate share unless there is a contrary intention in the will.

condemned in High Court costs for the value of a £100 legacy from her aunt reminds even the most cynical estates lawyer that sometimes it is the principle that motivates litigants. The *Gilhooly* decision is a salutary reminder that probate disputes are a distinct category from other litigation. The remnant may be small, but it is still there. In reviewing the policy considerations which underlie the exceptions to costs which apply in contentious probate cases in *Kostic* v *Chaplin* Henderson J noted that the two rules were;

> …designed to strike a balance between two principles of high public importance, the first being that 'parties should not be tempted into fruitless litigation by the knowledge that their costs will be defrayed by others', and the other being that 'doubtful wills should not pass easily into proof by reason of the cost of opposing them.[57]

If it is accepted that, as a matter of policy, testamentary freedom is to be the cornerstone of our system of intergenerational transfer of property, it is incumbent upon our legal system to ensure that wills are neither challenged too readily nor invalid wills admitted to proof by default of challenge. The reality is that foisting all contentious probate claims into the High Court makes challenge unrealistic in many estates. The introduction of procedures similar to those in some Commonwealth jurisdictions which allow a preliminary low-cost threshold assessment of capacity issues may go some way towards addressing an obvious lacuna in our succession law.

---

[57] *Kostic v Chaplin* [2007] EWHC 2909.

# Joint Bank Accounts and Survivorship

## Dr David Capper, Queen's University Belfast

### Introduction

This article considers the following scenario, from the particular perspective of an elderly person or someone on the cusp of capacity. *A* deposits money in a bank account with bank *C*. Either at the same time as opening the account or later, *A* takes steps to have *B* named as a person entitled to benefit from the account by way of survivorship. This means that the survivor of *A* or *B*, who will more often than not be *B* if *A* is an elderly person, will be entitled to the balance standing to the credit of the account on the passing of the other party. This may mean that *B* becomes entitled to a very substantial sum of money, most, if not all, of which came from *A*, on *A's* passing. There is also the possibility that if *B* is given the right to make withdrawals from the account on a personal basis, that is to say, not simply as the agent of *A* and for *A's* benefit alone, that *B* could exhaust or significantly deplete the account before *A's* passing, perhaps depriving *A* of much needed cash during *A's* final years.

Joint bank accounts where *A* contributes all the money and *B* takes by survivorship have enjoyed an almost hallowed status in Irish history.[1] Usually these have been deposit accounts, but the same legal analysis would apply to joint current accounts. Regarding the latter *B* may be making more withdrawals and even paying into the account but ultimately taking by survivorship a lot of money that came from *A*. So, in this article no distinction will be drawn between joint deposit accounts and joint current accounts. The issues the article is dealing with are those which arise where *A* makes a substantial deposit in a bank account and *B* acquires a right to benefit from that account by right of survivorship and also during *A's* lifetime.

It may be asked why *A* should want to enter into a transaction like this. If the ultimate intention is that *B* takes the credit balance of the account on *A's* death, would it not be better for *A* to leave the account to *B* by will? This would obviate the risk that *B* drains the account of money *A* needs for

[1] On this see D. Capper, 'Survivorship Rights in Joint Deposit Accounts' (1996) 47 N.I.L.Q 281.

necessaries during *A's* lifetime.[2] One reason for adding *B* to the account may be to obtain *B's* assistance in the management of money, such as by allowing a younger relative or friend to pay for those necessaries by drawing upon the account. But this does not require *B* taking the credit balance by survivorship after there is no need to pay for those necessaries any longer. *A* may want to make a gift to *B* without the publicity that can accompany the reading of a will and may also wish to avoid inheritance tax on the account and its effect upon *A's* estate.[3] In some cases *B* has acquired an eyebrow-raising sum of money on *A's* death.[4] The consequences of opening a joint account with survivorship rights are significant enough to require procedures capable of protecting *A* from exploitation, *A's* beneficiaries from the loss of their rightful inheritance, and the State from the loss of revenue that legislation has decreed is its due. Even where *A* loses nothing during his or her lifetime and *A's* beneficiaries do not have the strongest moral claim on the estate, the frequently casual way in which *B* acquires a very large sum of money should not be treated as an insignificance.

**How Should a Joint Account with Survivorship Rights be Set Up?**

The issues relating to joint bank accounts and the right of survivorship, in the context of elderly persons and others on the cusp of capacity, will be examined through the Privy Council decision in *Whitlock v Moree*.[5] This decision, although not technically binding on the courts in Northern Ireland, adopts a radically new approach to determining whether *B* is entitled to take the balance of the account on *A's* death by right of survivorship. In order to explain the significance of this new approach some explanation of fundamental principles and the previous approach is required.

Providing *B* with a right of survivorship cannot be achieved just by *A* placing money in a bank account in the joint names of *A* and *B*. Decisions from

---

[2] A lifetime transfer of land at a grave undervalue was set aside in *Rooney v Conway* [1982] 5 N.I.J.B, in part because the 82-year-old transferor's understandable wish to acknowledge the help and support received from the much younger transferee, could have been met more satisfactorily through a testamentary gift.

[3] In this context it is worth noting the decision of the Supreme Court of Ireland in *Lynch v Burke* [1995] 2 I.R. 159, overruling the decision of the Supreme Court of the Irish Free State in *Owens v Greene* [1932] I.R. 225 that the right of survivorship was void as a nuncupative will.

[4] In *Whitlock v Moree* [2017] UKPC 44, the case extensively analysed in this article, B obtained the sum of $190,000 in addition to testamentary gifts from A.

[5] *Whitlock v Moree* [2017] UKPC 44. For commentary see M. Baldock, 'Case Note – *Whitlock v Moree* [2017] UKPC 44' (2018) 24(5) Trusts and Trustees 456; D. Capper, 'Survivorship Rights in Joint Deposit Accounts – a Matter of Construction?' (2018) The Conveyancer 395; S. Hunter, 'Joint accounts – what's yours is mine and mine is yours?' (2018) Private Client Business 103, contains some useful material on the lower court judgments.

Australia,[6] Canada,[7] England,[8] and Singapore,[9] have adopted a resulting trust approach to this question. They have rationalised the deposit of money in the account by *A* as a gift of the legal title to the deposit by *A* to *A* and *B*. Assuming no presumption of advancement from *A* to *B*, on *A's* death *B* would hold the balance of the account on resulting trust for *A's* estate. It seems eminently plausible and intuitively right, but there is a flaw in the analysis as several commentators have pointed out.[10]

The mere deposit of money in a bank account by *A* creates a debtor and creditor relationship between the bank *C* and *A*. *A* has loaned money to *C*, which *C* must repay and otherwise deal with in accordance with the banking contract between *A* and *C*. *C* assumes no obligations to *B* in the absence of a contractual relationship with *B*, which the mere depositing of money by *A* cannot create. *B* cannot be a creditor of *C* as *B* loaned no money to *C*. Courts have shown reluctance to allow legal theory to scupper apparently useful banking transactions that give effect to the intentions of the parties but this approach, with respect, is rather dangerous. Fundamental legal concepts like debt, obligation, property and trust, should not just be bent and stretched to ensure a desired result. If courts do that, they blur the meaning and effect of these concepts, causing uncertainty and diminishing the effectiveness of these concepts when applied in other contexts.

To affect a transfer of the bank account from *A* to *A* and *B* the transfer has to be a separate act on *A's* part. The resulting trust analysis can be applied if *A* first makes the deposit with *C* in *A's* own name, and then later effects a transfer to *A* and *B*. So if *A* were to decide to make a gift of the beneficial interest in the account in favour of *B*, *A* could do this with an account that was already in existence. Absent advancement the presumption of resulting trust in favour of *A's* estate would arise but *B* could rebut this on proof that *A* intended to make a gift to *B*. How the presumption of resulting trust can be rebutted will be returned to below but for now it can be said that the difficulties involved in rebutting the presumption assist

---

[6] *Russell v Scott* [1936] 55 C.L.R 440 (HCA).

[7] *Niles v Lake* [1947] S.C.R 291 (SC); Pecore v Pecore [2007] 1 S.C.R 795 (SC); *Madsen Estate v Saylor* [2007] 1 S.C.R 838 (SC).

[8] *Aroso v Coutts & Co* [2002] 1 All E.R (Comm) 241 (Ch.D); *Re Northall* [2010] EWHC 1448 (Ch); *Drakeford v Cotton* [2012] EWHC 1414 (Ch), [2012] 3 All ER 1138.

[9] *Low Gim Siah v Low Geok Khim* [2006] SGCA 45; *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] SGHC 119, [2008] 4 S.L.R 783.

[10] J. Willis, 'The Nature of a Joint Account' (1936) 14 Can. B. Rev 457; M.C. Cullity, 'Joint Bank Accounts with Volunteers' (1969) 85 L.Q.R 530; J.C. Brady, 'Succession – The Adequacy of Joint Deposit Accounts as Will Substitutes' (1990) 12 D.U.L.J 155; D. Capper, 'Survivorship Rights in Joint Deposit Accounts' (1996) 47 N.I.L.Q 281; U. Woods, 'Joint Deposit Accounts and the Conditional Gift Theory' (2002) 37 Ir. Jur 281; J. Lau Jia Jun, 'Legal and Beneficial Entitlement to Joint Bank Accounts with Volunteers' (2018) 33(3) Banking and Finance Law Review 345.

the case for the more contractual approach to this problem that *Whitlock v Moree* adopted.

The decision in *Whitlock v Moree*

*A*, a man named Francis Lennard, was a widower in his mid-90s when the events that are the subject of this case occurred. He had been a successful businessman and had enjoyed a long-standing friendship with *B*, a man named David Moree who was in his mid-60s. By *A's* will dated 19 October 2009, he left his home in Nassau, Bahamas and a pecuniary legacy of $55,000 to *B*. Pecuniary legacies of $75,000 were also left to the Bahamian Salvation Army and the Bahamas Humane Society. The residue of *A's* estate was divided between *B* and the appellants (Dorothy Jack and Norman Whitlock). *B* and a lawyer named Mr Pinder were named as executors.

The opening of the joint bank account occurred on 20 November 2009. *A* and *B* visited *C* (the First Caribbean International Bank (Bahamas) Ltd) for the purpose of joining *B* to *A's* existing bank accounts. The credit balances on all *A's* existing accounts were consolidated into one account in the joint names of *A* and *B*. The banking agreement relating to this account, signed by both *A* and *B*, was recorded in a document headed "Personal Account and Services Application". The first page of this document contained several printed boxes in which the name and certain other details relating to the "First/Sole Applicant" (*A*) were entered in handwriting. In another box on this page headed "State purpose of account" an unidentified bank official had written "to pay utilities". The second page of the document contained some details about the "First Joint Applicant" (*B*). The next page and a half contained 23 printed terms covering matters like "1. Basic Terms", "4. Security", "9. Overdraft and Credit Limit", and "23. Jurisdiction", most of which had little or no significance to *A* or *B*. The one that did was clause 20 which provided thus: -

> "JOINT TENANCY: Unless otherwise agreed in writing, all money which is now or may later be credited to the Account (including all interest) is our joint property with the right of survivorship. That means that if one of us dies, all money in the Account automatically becomes the property of the other account holder(s). In order to make this legally effective, we each assign such money to the other account holder (or the others jointly if there is more than one other account holder)."

There was no other documentary evidence relating to the account and no bank official gave evidence about its creation. *B's* evidence, that it was explained to both account holders that *A's* personal account was converted into a joint account so that *B* would succeed to the credit balance on *A's* death, was rejected by the trial judge as self-serving. It may be observed

at this stage that had *A's* existing accounts been transferred into the joint names of *A* and *B* this would have been effective to pass the legal title to the account to *A* and *B*, subject to a rebuttably presumed resulting trust for *A* or *A's* estate.

*A* executed a codicil to his will on 12 January 2010 revoking the legacies in favour of the Salvation Army and the Humane Society. This increased the amount in residue to the advantage of both *B* and the appellants. *A* died on 18 February 2010, when the credit balance on the joint account stood at $190,000, all contributed by *A*. *B* attended the bank on 11 March 2010 and reconstituted the joint account into the joint names of himself and his wife.

The issue before the courts in this case was whether *B* was beneficially entitled to the balance of the account on *A's* death or held a bare legal title only with the beneficial interest held on trust for *A's* estate. The lower courts followed the conventional resulting trust analysis explained above. The trial judge held that *B* had not rebutted the applicable presumption, but the Court of Appeal held that he had. The issue before the Privy Council was the appropriateness of the Court of Appeal overturning the trial Judge's decision on an essentially factual question. Had the Board confined itself to this question it seems likely that the trial Judge's decision would have been restored. It could also have found for the appellants on the ground that there had been no effective transfer of the account from *A* to *A* and *B* because of the absence of any separate act of transfer, but as will now be explained it took a much more radical approach to deciding the appeal.

The Privy Council unanimously rejected the resulting trust test in favour of one involving simply the interpretation of the contractual documents. In this case that meant the "Personal Account and Services Application" form signed by *A* and *B* on 20 November 2009. The unanimity in approach, however, did not extend to the interpretation of this document. The majority (Lord Briggs, with whom Lady Hale and Lord Sumption agreed) held that *B* was entitled to the balance of the account by survivorship, while the minority (Lord Carnwath, with whom Lord Wilson agreed) held that the document did not bear this meaning.

Lord Briggs' approach to interpretation drew heavily upon the decision of the House of Lords in *Stack v Dowden*[11] in relation to beneficial interests in family property. Beneficial interests reflected the legal title unless there was clear evidence that the parties intended something different. Lord Briggs regarded the meaning of clause 20 above as perfectly clear. The words "JOINT TENANCY", "our property with the right of survivorship", and "if one

[11] [2007] UKHL 17, [2007] 2 A.C 432.

of us dies, all money in the Account automatically becomes the property of the other account holder(s)" would, he argued, be understood by any ordinary Bahamian private bank customer as having the effect of passing the beneficial interest in the account to the survivor on the death of the other account holder.[12]

Lord Carnwath attached greater weight to the nature of the document itself. It was a standard form banking document intended principally to regulate the relationship between the bank and its customer(s). Its principal purpose was not to determine who became entitled to the balance of the account on the passing of one of the joint account holders. The bank would want to know to whom the balance on the account should be paid on the death of one of the account holders but other than that it would not have been interested in where the beneficial interests lay.[13] Looking at the layout of the document and its wording, clause 20 was to be found in a one and a half page section containing several other provisions that had nothing to do with the account holders' beneficial interests.[14] He doubted whether ordinary people would regard the language of clause 20 as suitable for making a large personal gift.[15] The handwritten words of the bank official "to pay utilities" certainly pointed away from this construction.[16]

Discussion of *Whitlock v Moree*

Making the survivorship question a matter of contractual interpretation is a huge improvement on the resulting trust test. The theoretical flaws with this, at least so far as putting a new bank account into joint names is concerned, have already been pointed out. Adding *B* to an already existing account can be understood as a transfer of the chose in action from *A* to *A* and *B* but the practical problems involved in trying to rebut the presumption of resulting trust apply with equal force here.

To rebut the presumption of resulting trust a potentially wide-ranging enquiry might have to be embarked upon. Evidence of anything *A* said to bank officials or to others about his or her intentions in opening the joint account would be sought. *A* is dead by this stage of the enquiry so cannot provide any direct assistance and evidence from *B* will often be treated with the same scepticism shown by the trial judge in *Whitlock v Moree* itself. Evidence of any explanation *A* was given about the effect of opening the

---

[12] *Whitlock v Moree* [2017] UKPC 44, at [47].
[13] *Whitlock v Moree* [2017] UKPC 44, at [55].
[14] *Whitlock v Moree* [2017] UKPC 44, at [84].
[15] *Whitlock v Moree* [2017] UKPC 44, at [86].
[16] *Whitlock v Moree* [2017] UKPC 44, at [89].

joint account would certainly be informative but if the account was opened a long time ago there may be nobody who can provide this evidence. Enquiries might have to be made as to why *A* might want to benefit *B* in this way, particularly in the context of the provision made by *A* for *B* and others in *A's* will. These enquiries do not always yield particularly informative evidence and they can obviously involve significant expense. Readers of this journal will be aware of legal proceedings that cost more than the value of the estate in question.

The contract interpretation approach would render pre-contract statements made by the parties inadmissible in accordance with the decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*.[17] Evidence about any explanation the account holders received about the effect of the transaction would be irrelevant in relation to interpretation.[18] More objective evidence of surrounding circumstances or the objectives of the transaction might be admissible under the contextual approach to interpretation developed in *Investors Compensation Scheme v West Bromwich Building Society*[19] and subsequent cases. It seems tolerably clear that this approach to determining survivorship issues will be much cheaper and simpler than the resulting trust approach followed previously. The Board's advice does not in terms abolish the resulting trust test in cases where *B* is added to an existing account in *A's* name, but it would seem to make sense to follow the same approach in all cases.

With respect to the interpretation of the "Personal Account and Services Application" it is considered that the minority judgment presents the stronger argument. In agreement with Mark Baldock[20] there was insufficient clarity in the language of the bank account opening document to justify the conclusion that Mr Lennard intended to make such a very large gift to Mr Moree, who was already handsomely benefitting from Mr Lennard's testamentary provision for him. In agreement with Lord Carnwath this was a very different kind of document than one stating who the legal owners of residential property are. When people are buying a house, they know that the title documents are of direct relevance to the division of property interests. They do not make the same assumption in opening a joint bank account. It must also be remembered that this was really the first case

---

[17] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C 1101; *Whitlock v Moree* [2017] UKPC 44, at [29].

[18] *Whitlock v Moree* [2017] UKPC 44, at [30]. This might be relevant if it were argued that the document was vitiated by mistake, non est factum, fraud, duress, undue influence, or misrepresentation, or if rectification was claimed.

[19] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R 896, [1998] 1 All E.R 98 (HL).

[20] Mark Baldock, 'Case Note – *Whitlock v Moree* [2017] UKPC 44' (2018) 24(5) Trusts and Trustees *456*.

in which an apex court anywhere in the common law world took this approach to the determination of the survivorship question. Assuming, as presumably we must, that this transaction was entered into in accordance with the law as it was understood to be at that time, nobody would have thought that the "Personal Account and Services Application" would be afforded the significance the Board attached to it. The trial judge and the Court of Appeal proceeded to analyse the entitlement to the balance of the account in accordance with the law of trusts. If the Privy Council wanted to signal a new approach it should have made clear that great care would have to be taken in future to ensure that the bank account opening documents specified precisely where the beneficial interest in the joint account was to go on the passing of the first of the joint account holders. The process followed in *Whitlock v Moree* was simply far too casual.

The Way Forward

If the bank account opening document, or the document transferring an existing account from *A* to *A* and *B*, is to be dispositive of the beneficial interest in a joint account then the procedure for executing these documents will have to be tightened considerably.

To begin with some comment should be made about the document itself. Its purpose must be clear, that it is much more than just a document regulating the banker-customer relationship. It must be explicit that an essential purpose of the document is to provide that the survivor of the joint account holders is to be entitled to the entirety of the beneficial interest in the account. This cannot be done if the main dispositive clause is number 20 and surrounded by a host of other clauses dealing with entirely different issues. This dispositive clause must be elevated to the top of the document and be prominently displayed so that everyone knows what the document is for. Then there is the language of the document itself. The language must be understood as entitling the survivor to the beneficial interest in the account. In arguing that clause 20 would be understood by any Bahamian private bank customer as passing the beneficial interest in the joint account Lord Briggs appears to have suggested that private individuals would not distinguish between legal and beneficial interests.[21] Whatever the truth of this statement the consequences are just too drastic for it to be accepted. In *Whitlock v Moree* Lord Carnwath referred to the decision of the High Court of Singapore in *Lim Chen Yeow Kelvin v Goh Chin Peng*[22]

---

[21] See Mark Baldock, 'Case Note – *Whitlock v Moree* [2017] UKPC 44' (2018) 24(5) Trusts and Trustees 456, on this point.

[22] *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] SGHC 119, [2008] 4 S.L.R 783, referred to in *Whitlock v Moree* [2017] UKPC 44, at [77].

where the agreement read: "In the event of death of a joint account holder … the amount standing to the credit of the joint account shall be held *for the benefit* and to the order of the survivor(s)" (emphasis added). This is much clearer although it could, and preferably should, be made clearer still.

Then there is the procedure to be adopted in the execution of these joint accounts. It should be remembered that a gift of the size Mr Lennard was held to have made to Mr Moree is capable of emptying or at least drastically changing the complexion of a testamentary estate for which a will complying with the formalities of the Wills Act was made. The casual way in which Mr Moree was able to augment handsomely the already generous provision Mr Lennard had made for him in his will has to cause concern. There is considerable risk that an elderly person who thinks they are getting a friend's help to pay the bills will disinherit their relatives and confer a staggering windfall benefit upon the friend without understanding that this might happen. There is also the risk that *B* will empty or deplete the account during *A's* lifetime, depriving *A* of money the latter needs to live on and obtaining the survivorship right in advance. Undue influence by *B* is a clear and obvious risk. There is a real need to design a suitable procedure for the protection of vulnerable persons in *A's* position. The analogy with the procedure designed in the *O'Brien*[23] and *Etridge*[24] cases for the protection of vulnerable sureties comes to mind. The State's entitlement to inheritance tax should not be avoided in this extremely casual manner.

However, the difficulty here is how to generate the right cases to enable the courts to lay down the legal doctrine required. Banks have no security interests to enforce so lack obvious incentive to bring cases to court and have law 'made' to regulate the making of these transactions. It seems like the kind of litigation that would most likely clarify what needs to be done would be challenges by personal representatives and beneficiaries to *B's* right of survivorship. If we focus on the kind of discussion that takes place between *A*, *B*, and *C* at the bank when the joint account is opened, can it be said that the bank assumes any legal responsibility to *A*? The bank's standard form contract will be used so the bank will have to give accurate advice and information about its effect. A duty of care would arise and inaccurate statements would constitute a breach of duty. The bank is a party to the contract so inaccurate statements could also be misrepresentations allowing *A's* estate potentially to seek rescission of the banking contract or a damages remedy under section 2(1) of the Misrepresentation Act (NI) 1967. It does not seem appropriate to fix the bank with liability for *B's* undue influence. The situation is very different from *O'Brien* and *Etridge* because the bank

---

[23] *Barclays Bank Plc v O'Brien* [1994] 1 A.C 180 (HL).
[24] *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 A.C 773 (HL).

derives no benefit, such as a mortgage or charge, from the transaction. So, to challenge the gift to *B*, personal representatives and beneficiaries would have to bring proceedings against *B* to require the latter to re-transfer any sums received from the joint account on the ground of *B's* undue influence.[25]

To obviate the risk of misunderstanding about the effect of the transaction being entered into, a detailed record of the explanation provided to joint account holders about the meaning and effect of the transaction they are executing would be needed. Banks were reluctant to provide this kind of explanation in *O'Brien* and *Etridge* suretyship transactions, so the task was farmed out to solicitors. If this were to be the practice for joint bank accounts, the cost involved in opening one of them would definitely rise. But less is at stake here for banks than in suretyship transactions so it may be that they would be willing to assume this responsibility, passing on the cost in higher banking charges for opening and maintaining the account.

## Conclusion

*Whitlock v Moree* is a useful step forward in the quest for a better way of regulating joint accounts with a right of survivorship. The theoretically flawed and practically problematic resulting trust framework of analysis seems to be on the way out. Treating these bank account opening documents as contracts is a much more satisfactory way of ascertaining the existence of a right of survivorship. But for this new approach to work properly the account opening document must be drafted in such a way as to make it obvious that disposing of the beneficial interest in the balance of the account on the death of one joint account holder is what the document is intended to do. In addition, there needs to be a proper procedure for entering into these transactions, so that everybody understands what is being done and the risk of a younger person acquiring a windfall benefit at the expense of the deceased's testate or intestate beneficiaries is avoided. The risk of *A* being deprived of money needed for living expenses and the casual avoidance of inheritance tax should also be borne in mind. Although the law is in a better place than where it was before *Whitlock v Moree*, much work remains to be done to address the new problems this generally helpful decision gives rise to.

---

[25] In this connection see *Hammond v Osborn* [2002] EWCA Civ 885 where an elderly pensioner first allowed the defendant to make withdrawals from his bank account to buy necessaries for him and then signed over the account to her. His personal representatives succeeded in requiring the defendant to return the money on the ground of undue influence.

# In Death There Are No Guarantees: Disinherited Children and Family Provision Claims

**Professor Heather Conway***

## Introduction

Recent decades have seen a subtle shift in the passing of wealth between generations. Increased life expectancies mean that older people are consuming more of their own capital as they live for longer, and not just in rising living costs or high residential care fees when this becomes a necessity.[1] For many members of the so-called baby-boom generation who are active and in good health, SKI-ing (or 'spending the kids' inheritance') has become a conscious lifestyle choice as they travel the world and enjoy life to the full rather than saving money to pass on to their adult children.[2] The latter may find that, as a result, they inherit less than envisaged when the distributive contents of a parent's will are revealed. However, a reduced inheritance is doubtless preferable to receiving nothing at all - though this is something that is unlikely to happen simply because of parental outgoings and spending habits in later years.

In August 2021, the actor Daniel Craig announced that he would not be giving his children a substantial inheritance, preferring to spend his money or give most of it away before he dies.[3] Other high-profile figures who have made similar statements include Nigella Lawson, Sting and Bill Gates, who see this as good parenting by incentivising their children to work hard and vast sums of inherited wealth doing them 'no favours'. Of course, such sentiments are laudable when the children in question have had the lifetime

* Professor of Property Law and Death Studies, School of Law, Queen's University Belfast.

1 A report published in March 2021 suggested average costs of around £35,000 per year- see Care Homes For Older People UK Market Report 31ed - LaingBuisson (accessed October 2021).

2 See K Rowlingson and S Mackay, *Attitudes to Inheritance in Britain* (2005). The research- which was funded by the Joseph Rowntree Foundation- interviewed over 2,000 participants, and found that only a quarter would limit their spending in order to pass wealth to their children. Whether the financial and lifestyle impacts of the coronavirus pandemic have altered this remains to be seen.

3 Craig apparently finds the concept of inheriting vast sums of money 'distasteful'- see James Bond star Daniel Craig says he will not leave children substantial inheritance as he finds practice 'distasteful' | UK News | Sky News, 18 August 2021 (accessed October 2021).

advantages of growing up in a wealthy family and can still trade on a famous parent's name and connections after his/her death. However, disinheriting children is not within the exclusive realms of the rich and famous, even if the reasons for doing so differ significantly.

Social convention dictates that children are regarded as the natural recipients of parental bounty, after the individual in question has provided for any surviving spouse or partner.[4] Research carried out by the author over a decade ago, which involved interviewing older people and focus groups studies in Northern Ireland, revealed a very strong sense of parental obligation towards adult children, and leaving them 'what was left', even if participants disliked the notion of allowing challenges to a will.[5] The same study also revealed that the trend was very much towards an equal distribution where there was more than one child (and regardless of their respective positions in life). Parental decisions to leave different amounts to their children can open up a proverbial can of worms, creating all sorts of tensions between the surviving siblings and even where parents are acting with the best of intentions.[6]

This article, however, focuses on situations in which a parent makes a conscious decision to leave their adult child(ren) nothing. There are numerous reasons why this might occur. At the negative end of the emotional spectrum, there may have been a long-term estrangement or falling out, or parental disapproval of a child's lifestyle choices.[7] Disinheritance can also be a punitive measure for some sort of slight or misconduct (whether real or perceived).[8] On a more considered approach, there may be other beneficiaries - usually a surviving spouse or long-term partner - who take priority.[9] A parent may simply feel that adult children have already received enough as a result of substantial lifetime gifts,[10] or it might be a simple case

---

[4] See e.g. J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000).

[5] H Conway and L Glennon, *"To Give Or Not To Give?": The Transmission of Wealth on Death by Older Persons* (September 2010), Report for the Changing Ageing Partnership, School of Law, Queen's University Belfast. One specific finding was that there was no inclination to preserve assets so that adult children received a larger inheritance.

[6] For example, helping a child who is not as financially secure as their siblings, or rewarding a child who looked after their parent(s) in later years. Nevertheless, inheritance inequalities are often viewed as favouritism and as posthumous signs of who the parent loved more- see H Conway, *"'Where There's a Will': Law and Emotion in Sibling Inheritance Disputes"* in H Conway and J Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart Publishing, Oxford, 2016) 35.

[7] Both these things were apparent in *Ilott v The Blue Cross* [2017] UKSC 17 while estrangement was also a key factor in *Re Creeny* [1984] NI 397.

[8] As in *Re McGarrell* [1983] 8 NIJB where the deceased had spent the last year of his life in residential care against his wishes, which may have prompted the decision to exclude his only daughter from his will.

[9] As in *Ames v Jones* [2016] 8 WLUK 256 and *Re H (Deceased)* [2020] EWHC 1134 (Fam).

[10] *Miles v Shearer* [2021] EWHC 1000 (Ch).

of the testator wanting their wealth to go somewhere else (for example, to a charity).[11] Whatever the explanation, a disinherited son or daughter may be minded to challenge their exclusion from a validly executed will. The discussion that follows looks at the likelihood of such wills being successfully challenged under the family provision jurisdiction, and the advice that practitioners should give clients when drafting a will to this effect in order to reduce the scope for future litigation.

## I. Testamentary Freedom versus Family Provision

In common law systems, any reference to a 'disinherited' child is a misnomer since there is no legal obligation for parents to provide for their children (or for anyone else) on death. Testamentary freedom[12] allows a testator to decide the post-mortem fate of their wealth and to pass it to persons of the testator's choosing.[13] However, absolute freedom of testation is something of a legal myth, not least because of the family provision jurisdiction which contemplates claims against a deceased person's estate.

As is well-known, the Inheritance (Provision for Family and Dependants) (NI) Order 1979[14] allows specified relatives and dependants of the deceased to challenge a will (or intestacy distribution)[15] if it failed to make "reasonable financial provision"[16] for that particular individual - defined as what is needed for the applicant's "maintenance" in all applications, except those brought by a surviving spouse or civil partner.[17] Potential claimants[18] are listed in art 3(1) of the 1979 Order, with "a child of the deceased" included under art 3(1)(c)[19]

---

[11] As in *Ilott v The Blue Cross* [2017] UKSC 17 though a desire for charitable giving was not the primary motivation! Practical matters to be addressed when dealing with charitable bequests are set out in S Grattan, "Charities as Beneficiaries and Elementary Duties" [2017] 1 *Folio: Northern Ireland Conveyancing and Land Law Journal* 19.

[12] Defined by Leslie as the "right to distribute property upon death solely according to the dictates of one's own desires, unfettered by the constraints of society's moral code or the claims of others"- M Leslie, "The Myth of Testamentary Freedom" (1996) 38 *Ariz L Rev* 235, 235.

[13] The use of the term 'testator' is gender neutral throughout this article, unless the facts of a particular judgment indicate otherwise.

[14] Modelled on the Inheritance (Provision for Family and Dependants) Act 1975 in England and Wales. For an overview, see G Douglas, "Family Provision and Family Practices – The Discretionary Regime of the Inheritance Act of England and Wales" (2014) 4 *Oñati Socio-Legal Series* and R Hedlund, "The End to Testamentary Freedom" (2020) 41 *Legal Studies* 55.

[15] The focus here is on challenges to wills, and the extent to which the testator's intent can be overridden by the courts.

[16] The basis of all claims under the relevant legislation- 1975 Act, s 1(1); 1979 Order, art 3(1).

[17] 1975 Act, ss 1(2)(a)-(aa) and 1979 Order, art 2(2) for a surviving spouse or civil partner. For all other categories of claimant, see the 1975 Act, s 1(2)(b) and 1979 Order, art 2(2). The concept of 'maintenance' is not defined in the statute and has instead been discussed in the case law- see below.

[18] While 'claimant' is the more usual term today, the word 'applicant' appears in the legislation and both will be used interchangeably here.

[19] Section 1(1) of the 1975 Act, and s 1(1)(c) for a child of the deceased.

and the range of possible orders set out in art 4.[20] For all applications, courts should adopt the two-stage test set out by the Supreme Court in the well-known case of *Ilott v The Blue Cross and Others*:[21] "(1) did the will/intestacy make reasonable financial provision for the claimant and (2) if not, what reasonable financial provision ought now to be made…?"[22] In addressing each question, a number of statutory factors must be evaluated. General factors include the financial resources and future needs of the applicant and any beneficiaries of the estate, the size of the estate, and "any obligations and responsibilities which the deceased had towards any applicant...or towards any beneficiary".[23] Specific factors differ for each category of applicant;[24] for children, the only factor listed is the "manner in which the applicant was being, or...might expect to be, educated or trained".[25]

In short, children of any age can bring a family provision claim against a dead parent's estate. The jurisdiction is a discretionary one; there is no guarantee that an award will be made. It should also be stressed (again) that there is no 'one size fits all' approach to these cases, and that individual judgments are inherently fact-specific. Having said that, a number of basic principles can be identified from the case law, and these form the basis of the discussion below. Before turning to adult children, however, it is worth looking briefly at infants and minors where the outcomes are much more predictable.

**II. Infants and Minors**

Family provision claims on behalf of infants or children are rare. Those testators who are minded to exclude their child or make minimal provision for them would be strongly advised to reconsider - and regardless of the state of the parent-child relationship, or the absence of lifetime financial support by the parent.[26]

Until recently, one of the few reported cases on the subject was *In Re Patton*.[27] The claimant children were twins - a boy and a girl - aged 11 at the time of

---

[20] 1975 Act, s 2.

[21] [2017] UKSC 17; [2017] 2 WLR 979. The case was formerly listed as *Ilott v Mitson*.

[22] [2017] UKSC 17 at [23] and affirmed more recently in Northern Ireland by McBride J in *Noble v Morrison* [2019] NICh 8.

[23] 1975 Act, s 3(1); 1979 Order, art 5(1).

[24] 1975 Act, ss 3(2)–(4)); 1979 Order, arts 5(2)-(4).

[25] 1975 Act, s 3(3); 1979 Order, art 5(3).

[26] For completeness, it should be pointed out that a successful family provision claim is extremely likely where a parent's will was drafted before their child was born and consequently made no provision for them. For a recent illustration, see *Re Ubbi (Deceased)* [2018] EWHC 1396 (Ch) where the court awarded two children (born in 2012 and 2014) a lump sum payment of almost £400,000 from their late father's estate (valued at £4.5 million), where the father's last will had been drafted in 2010 and left everything to his wife. Divorce proceedings were pending between the deceased and his wife when he died in 2015; at this stage, the deceased had been living with the claimant children's mother for over a year.

[27] [1986] NI 45.

their father's death in 1984. The deceased, who owned a small farm near Killyleagh in County Armagh, had been in an 'on-off' relationship with the children's mother since 1971, but had shown little interest in the children and rarely spoke of or saw them (though the mother had secured a court order for weekly maintenance payments). His actions in life were mirrored on death when he made no provision for the twins, leaving his entire estate - then valued at around £47,000 - to other family members. In deciding that reasonable financial provision had not been made under the 1979 Order, Carswell J (as he then was) stated that "a child's financial needs should rank very high in the order of priorities, and…should normally rank well before the needs of other beneficiaries".[28] The children were awarded a lump sum of £10,000 each from the deceased's estate.[29]

Fast forward 35 years, and the decision in *Re R (Deceased)*[30] suggests that, while much may have changed in the interim, the financial obligations that parents have towards their children - and the court's willingness to extend these 'beyond the grave' - have not. The deceased had two children, J and H, who were aged 15 and 14 respectively at the date of their father's death in 2018. After the deceased and the claimants' mother had divorced in 2012, the children had relocated to Scotland with their mother and her new husband. The children had weekly telephone calls with their father until these stopped sometime in 2014; sending birthday and Christmas presents also stopped in 2016.[31] The deceased paid no child support, and the children were looked after financially by their mother and step-father. When he made his final will in 2018, the deceased left his entire estate (worth somewhere between £519,081 and £720,481)[32] to his parents and his new partner of seven years. He specifically recorded that, having been unable to make contact with them for over three years, he did not want his children "to be a part of my family's life on my death"[33] and was leaving them nothing. Ruling that reasonable financial provision had not been made, the court held that neither the deceased's lack of contact with his children, nor the fact that someone else was maintaining them financially, defeated

---

[28] [1986] NI 45 at 51.

[29] The references, in the judgment, to the children being illegitimate and the potential implications on the outcome of any family provision claim (for example, how the court would have evaluated the claim if the deceased had left "a widow and a family of lawful children" as well) seem strange when reading *Re Patton* now. Of course, so-called illegitimate children have long been since treated in the same way as legitimate children for inheritance purposes in Northern Ireland and elsewhere.

[30] [2021] EWHC 936 (Ch).

[31] For the purposes of the family provision claim, the court made no finding on who was to blame for contact ceasing.

[32] There was conflicting evidence over certain share valuations, which were a significant part of the estate assets.

[33] [2021] EWHC 936 (Ch) at [33].

the claim; such factors might influence the value of any award, but "only in the most exceptional circumstances would…the court accept that the obligation to maintain had been completely severed."[34]

However, in assessing the value of the award, the court stressed that the claimants' mother could not expect the entire burden of maintaining the children to shift to the deceased's estate. Having evaluated the statutory factors under the 1975 Act, and discussed the concept of maintenance, the court ordered the deceased's estate to pay 50% of the children's living expenses at home from the date on which the claim was issued until each child had completed their undergraduate degree. Additional sums were awarded to cover costs of certain school fees (but not university fees), and other outgoings (e.g. a second-hand car for each child, and 50% of post-university housing costs).

In both *Re Patton* and *Re R*, the respective fathers made a conscious decision to leave nothing to their children; in both cases, the respective courts altered the intended outcome.[35] For adult children, as we will see below, no provision can be deemed reasonable financial provision under the 1975 Act or 1979 Order, but what is true for an adult child is not true for someone under the age of 18 or who is still completing their university or vocational education. The likelihood of a court finding that reasonable financial provision has not been made, and a fairly significant financial award being made, must be regarded as considerable.

**III. Adult Children**

Of more relevance to the older client who is making a will, and to those advising them, is the position of adult children. At the risk of categorising potential applications while doing exactly that, family provision claims involving adult children can be split into two broad categories:

(1) those involving disabled or "otherwise dependent"[36] adult children;
(2) those involving so-called 'independent' adult children i.e. an adult son or daughter who is economically self-sufficient (or, at least, capable of earning their own living), and who was not financially dependent on a deceased parent before death (even if in financial need).

---

[34] [2021] EWHC 936 (Ch) at [79].

[35] In both cases, it is also worth noting that the deceased also left nothing to the respective mothers which might have (indirectly) benefitted the children financially.

[36] To borrow the descriptor in S Grattan, *Succession Law in Northern Ireland* (Belfast, SLS Legal Publications (NI), 1996) p 197.

### 1. Disabled or Otherwise Dependent Adult Children

The first category is relatively straightforward. Failure to provide for a disabled adult child[37] or an otherwise dependent son or daughter (for example, one who was being financially maintained by their parent prior to death) is likely to trigger a successful family provision claim.[38]

A recent case which seems to sit more within this category than the second one discussed immediately below is *Re H (Deceased)*[39] though the court did not use the term 'disability' at any stage in its judgment. The claimant, a 50-year-old daughter who suffered from a debilitating mental illness, had received nothing under her father's will. The daughter, who had been estranged from her parents, was unable to support herself and her two children; her 80-year-old mother was the sole beneficiary of the £554,000 estate but had severe health problems and was worried about the cost of residential care. The court awarded the daughter almost £140,000, basing the amount on her current financial needs (which included £17,000 for ongoing costs of therapy and £32,000 to compensate for loss of universal credit because of the award) and assisting her recovery to facilitate a return to work in a few years' time. However, it refused to give the daughter a sum to purchase a new property, given the financial needs of the mother for her lifetime.

### 2. Independent Adult Children

This second category is the more troublesome one. Over 40 years after the 1979 Order (and the corresponding 1975 Act) came into force, claims by independent adult children are still contentious and difficult to predict; they are also one of the most frequently occurring types of family provision dispute. There are a number of reasons for this, including the absence of any pre-existing financial tie between parent and child and the fact that such claims are limited to maintenance. The lack of any *specific* statutory guidance is also an issue: the manner in which the applicant was being/

---

[37] Something that seems unlikely since one assumes that most parents would be at pains to ensure that a disabled child's financial needs were taken care of. The aforementioned decade-old research carried out here in Northern Ireland (see n 5 above) supports this, with parents of disabled children determined to provide future care for their child and to look at who would be remunerated for undertaking this responsibility on the parent's death.

[38] See e.g. *Re Debenham (Deceased)* [1986] Fam Law 101 (successful family provision claim by the deceased's 58-year-old daughter, who was physically disabled, had epilepsy and had been left a very small sum in her father's will (the father had rejected his daughter's efforts to establish a relationship with him)). Contrast this with *Wright v Waters* [2014] EWHC 3614 (Ch) at n 48 below.

[39] [2020] EWHC 1134 (Fam).

expected to be educated or trained will not be relevant in the vast majority of independent adult child claims, meaning that the general factors listed in the legislation will assume greater importance. And according to the recent judgment of McBride J in *Noble v Morrison*,[40] the weight attached to each one depends on the factual circumstances, though one or two of these factors could have "magnetic or even decisive influence on the outcome".

As noted at the beginning of this article, parental disinheritance may not be the norm here in Northern Ireland, but it is not unheard of. In the two reported judgments dealing specifically with the issue back in the early 1980s - *Re McGarrell*[41] and *Re Creeny*[42] - the courts ruled in favour of the respective applicants, finding that reasonable financial provision had not been made for an adult daughter and an adult son who were both in financial need.[43] English courts have, unsurprisingly, dealt with a larger volume of claims by disinherited adult children, including a number of cases decided after the Supreme Court ruling in *Ilott v The Blue Cross*.[44] The following section focuses on the latter and the 'direction of travel' post-*Ilott*, something that will be of interest to both private client practitioners and the Judiciary here in Northern Ireland.

**(a) Independent Adult Children and the Ruling in *Ilott***

Before reviewing these cases, a brief overview of *Ilott* and the 'take-away' messages from the Supreme Court judgment is useful.[45] The facts are well-known: the deceased's will left a net estate of £486,000 to three animal charities that she had no lifetime connection to, and made no provision for her only child following a long and enduring period of estrangement that had been triggered when the daughter left home as a teenager and married a man that her mother disapproved of. The daughter was in financial need: she had not worked since the birth of the first of her five children in 1983, her husband worked part-time, and the family lived in a 3-bedroom property

---

[40] [2019] NICh 8 at [51].

[41] [1983] 8 NIJB.

[42] [1984] NI 397.

[43] In *Moffatt v Moffatt* [2016] NICh 17 the issue was whether an excluded adult child could get permission to bring a late application, while other NI cases have dealt with siblings contesting how much they received under a parent's will (see *McKernan v McKernan* [2007] NICh 6 and *Noble v Morrison* [2019] NICh 8). The number of reported judgments is not an accurate yardstick for legal challenges by independent adult children - both here in Northern Ireland and elsewhere - given that many family provision claims will settle.

[44] [2017] UKSC 17.

[45] For a more detailed analysis see H Conway, "Adult Children and Family Provision Claims in the Supreme Court: The Saga Concludes" [2017] 2 *Folio: Northern Ireland Conveyancing and Property Law Journal* 45 and B Sloan, "*Ilott v The Blue Cross* (2017): Testing the Limits of Testamentary Freedom" in B Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing, Oxford, 2019) 301.

rented from a Housing Association and were dependent on state benefits to meet basic living expenses. Following a lengthy and protracted appellate process that involved six separate judgments, the case ended up in the Supreme Court which restored an earlier award of £50,000 to the daughter.

It is important to stress that the Supreme Court was looking solely at the quantum issue, so the issue of whether the deceased's will had failed to make reasonable financial provision was (disappointingly) not up for consideration. However, the judgment set out a number of general principles applicable to family provision claims:

- Testamentary freedom is important in cases involving contested wills. This was clear from Lord Hughes' opening statement that "English law recognises the freedom of individuals to dispose of their assets by will…in whatever manner they wish".[46] As a result, will-makers (and those advising them) might be more confident that personal choices will be respected.

- Conduct has always been a relevant factor in family provision cases,[47] and the Supreme Court ruling did not alter this: conduct is an important, but not usually decisive, factor.[48] While family provision claims should focus on whether reasonable financial provision has been made for a particular claimant, the reasonableness or otherwise of the testator's actions in excluding a particular individual can be taken into account[49] - though a family provision claim will not succeed just because the deceased may have acted unreasonably or spitefully. However, the Supreme Court did stress that awards should not become "rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased". [50]

- Maintenance means just that; according to Lord Hughes in *Ilott*, it "cannot extend to any or every thing which it would be desirable

---

[46] [2017] UKSC 17 at [1].

[47] Courts are required to look at the "conduct of the applicant or any other person" under s 3(1)(g) of the 1975 Act and art 5(1)(g) of the 1979 Order.

[48] For a case in which conduct was a decisive factor, see *Wright v Waters* [2014] EWHC 3614 (Ch). The deceased's 64-year-old, wheelchair-bound daughter failed to establish that reasonable financial provision had not been made for her when she was excluded from her mother's will. Despite living in necessitous circumstances, and no other beneficiary having a particular need for the estate, the court held that the daughter's conduct a decade earlier in refusing to return investment monies that her mother had given her, and in writing letters disowning her mother and wishing her dead, outweighed all other factors.

[49] According to the Supreme Court, this could be factored into conduct under s 3(1)(g) of the 1975 Act (art 5(1)(g) of the 1979 Order), or perhaps the deceased's obligations and responsibilities towards the applicant under s 3(1)(d) (our art 5(1)(d)).

[50] [2017] UKSC 17 at [17].

for the claimant to have" and must "import provision to meet the everyday expenses of living".[51] Thus, the maintenance threshold should act as a natural check on any judicial temptation to make an overly generous award, and significant legacies or life-changing sums should not be expected. However, provision of housing can constitute maintenance in some cases.[52]

- Nominated beneficiaries (such as the charities in *Ilott*) do not have to justify their selection nor do they have to demonstrate some sort of financial need (even though their needs will be highly relevant in practice). It is enough that they were chosen by the deceased, in a clear expression of testamentary intent.

As regard claims by independent adult children, the ruling in *Ilott* indicated that expectations would need to be tempered in light of the decision to reinstate an earlier award of £50,000 for the Court of Appeal's decision to award the daughter £143,000.[53] While their Lordships did not suggest that independent adult children will *never* succeed, the clear inference was that claims by adult children who were financially independent from their parents (or, at least, capable of earning their own living) should be treated cautiously and that successful claimants could expect much less generous awards than the one made by the Court of Appeal.

**(b) The Post-*Ilott* Landscape**

One of the first post-*Ilott* cases involving a disinherited adult was *Re Nahajec (Deceased)*.[54] The deceased's will left an estate worth almost £270,000 to a close friend; his daughter, who was born in 1985, was the only child from his second marriage and claimed under the 1975 Act.[55] The father-daughter relationship had been marked by periods of estrangement: the father had cut himself off from his family when he separated from the claimant's mother in 1996 until the daughter contacted him in 2007; they were on good terms until 2009 when the father disapproved of his daughter's choice of boyfriend and ceased all contact until his death in 2015 despite his daughter's repeated attempts to reconcile. Having executed his final will,

---

[51] [2017] UKSC 17 at [14]. This affirms the fairly restrictive interpretation in previous case law- see e.g. the comments of Browne-Wilkinson J (as he then was) in In *Re Dennis (Deceased)* [1981] 2 All ER 140 at 146 describing it as "payments which...enable the applicant...to discharge the cost of his daily living at whatever standing of living is appropriate to him".

[52] As occurred in *Noble v Morrison* [2019] NICh 8- see below.

[53] And with the option to draw upon a further £20,000- [2015] EWCA 797; [2016] 1 All ER 932.

[54] County Court (Leeds) [2017] 7 WLUK 399 (18 Jul 2017).

[55] The deceased's son from his first marriage (who was unable to work because of ill-health and a disability) had also made a claim under the 1975 Act; this had been settled by a payment of £22,000. His other son from his first marriage had not made any claim.

the deceased also left a note explaining his decision to leave nothing to his children, stating that he had "not seen or heard from any of [them] in the last 18 years", that he believed they had "no interest in me or my welfare" and were all "of independent means and…[were] to my knowledge, sufficiently independent of means not to require any provision from me".[56]

The daughter was living alone in rented accommodation and had payday loan debts of £6,600; she worked part-time as a retail assistant on a zero hours contract and also at a veterinary surgery for over 20 hours per week despite only being paid for 9 hours (she worked extra hours to gain experience, in the hope of becoming a qualified veterinary nurse). In assessing her claim, HHJ Saffman acknowledged that the court's task was not to ask whether the deceased had acted unreasonably but whether the will - looked at objectively - produced an unreasonable result. Judicial attention then turned to the statutory factors, assessing both the general factors and the child-claimant specific factor linked to education or training. Working through the former, the court paid particular attention to sections 3(1)(a), (c) and (g).[57] The daughter was clearly in financial need and was living a "rather frugal existence";[58] she also genuinely believed that qualifying as a veterinary nurse would put her on a much more stable financial footing.[59] The defendant, as sole beneficiary of the estate, had some resources but was not well off. Turning to category (g), the court likened the daughter's application to a moral claim on the estate, and placed the blame for any estrangement on the father as a "stubborn and intransigent and insensitive…man who found it hard to forgive people who disagreed with him"[60] and had rebuffed his daughter's numerous attempts to rekindle their relationship. There was also an important reference to the letter that had accompanied the deceased's will, and its specific reference to his children being of sufficiently independent means not to require any provision from him; looking at the daughter's financial circumstances, it was "difficult to see how this description could sensibly be applied to her".[61]

Despite being an independent adult child, the daughter had established that her father's will did not make reasonable financial provision for her. In assessing the value of the award, the court focused on the s 3(1) factors, but also s 3(3) (the manner in which the daughter was being or might expect to be educated or trained). This is a comparatively rare instance of the court

---

[56] County Court (Leeds) [2017] 7 WLUK 399 (18 Jul 2017) at [4].
[57] Articles 5(1)(a), (c) and (g) of the 1979 Order.
[58] County Court (Leeds) [2017] 7 WLUK 399 (18 Jul 2017) at [35].
[59] The daughter had inherited £16,000 on her mother's death in 2013 but had used this to set herself up in rented accommodation and to pay off some debts.
[60] County Court (Leeds) [2017] 7 WLUK 399 (18 Jul 2017) at [59].
[61] County Court (Leeds) [2017] 7 WLUK 399 (18 Jul 2017) at [60].
[62] 1979 Order, art 5(3).

taking account of this factor in an independent adult child claim, though entirely appropriate on the facts. HHJ Saffman had considered it as part of the first stage test (failure to make reasonable financial provision), and in the quantum issue - at both stages based on the daughter's reasonable and realistic aspiration to train as a veterinary nurse. However, s 3(3) did not ultimately assist the daughter in this case:

> The subsection requires the court to have regard to the manner in which the applicant was being or in which **she might expect** (my emphasis) to be educated or trained. At the time of the deceased's death the applicant was not being trained and there is no cogent evidence that she might have expected her father to meet the cost of education and training at any future date. It seems to me that the way in which this particular subsection is drafted requires the court to have regard to the manner in which the claimant herself might have expected to be educated or trained. It is not a question of whether it would have been reasonable for a deceased person to contribute towards a claimant's education or training, the question appears to be whether the claimant expected it from the deceased person.

On the facts, the daughter clearly did not expect this from her father though her desire to become a veterinary nurse was relevant under s 3(1)(g). Assessing this and the other s 3(1) factors, HHJ Saffman reached a final figure of £30,000 which represented 11.3% of the estate; though significantly less than the £59,000 sought by the daughter, this would allow her to clear her debts[63] and work towards her qualification.

Despite its fundamentally different factual matrix, the decision in *Miles v Shearer*[64] shows how a testator's stated (and more palatable) reasons for excluding their adult children can be a significant factor. Two adult daughters, then aged 39 and 40, applied for reasonable financial provision from their father's £2.2million estate, of which his second wife was the principal beneficiary. The claimants' parents had funded their private education, gap years and university courses; more importantly, the deceased had gifted the first claimant £177,000 and the second claimant £185,000 to invest in property, when he sold a property in London in 2008. At the same time he told both daughters that they would receive no further financial assistance from him, setting out his reasons in a letter to them. The relevant parts read:

---

[63] A sum that merely allowed the daughter to do this was rejected by the court as being too low.

[64] [2021] EWHC 1000 (Ch).

> Last night you mentioned money a number of times…I really do not want there to be any surprises/disappointments on this subject. But the fact that you mention it so often means that it may already be a subject of friction, or that it could become a subject of friction in the future.
>
> First, your mother has half of my money (including my pensions). So I have less to spend/invest/waste/pass on.
> Second, [my wife] and I intend to live for a long time and we intend to spend all of our money. It would be wrong for you to have any expectations, and in any event there is not likely to be very much to pass on.
> ……
> Fifth, over the last 35 years or so I have spent a great deal of money providing the family lifestyle … I have also provided substantial deposits for both [of you]…I am delighted that you are now earning a decent salary and well done to you for that. But from now on you are on your own financially. I would not approve of it any other way.
>
> You can expect the odd present (probably a lot smaller than you might think appropriate) and my love, company, advice and support etc. I hope that you will take this in the right way and we can put this subject to rest.[65]

In refusing the application, the court noted that both claimants had funded their own lifestyles since 2008. Focusing in particular on the deceased's obligations and responsibilities towards his daughters under s 3(1)(d),[66] Sir Julian Flaux C began by stating that there was "no legal obligation on a parent to maintain an adult child" and that this particular factor was "concerned with obligations and responsibilities which the deceased had immediately before death, not in the past".[67] Both daughters might have enjoyed an affluent lifestyle until their parents' divorce, but they could not have expected this to continue indefinitely - and the deceased had no financial obligation towards them immediately prior to his death. Following substantial gifts in 2008, the deceased had made it repeatedly clear that they could not expect any further financial assistance from him; this "disclaimer of responsibility militate[d] against his having any obligations or responsibilities towards either claimant at the time of his death".[68]

---

[65] [2021] EWHC 1000 (Ch) at [25].
[66] 1979 Order, art 5(1)(d).
[67] [2021] EWHC 1000 (Ch) at [102].
[68] [2021] EWHC 1000 (Ch) at [111].

Finally, for now, there is the decision in *Re Mohammed (Deceased),*[69] another case of ongoing estrangement. The mother left a net estate worth close to £400,000 to her elder daughter, and nothing to her younger daughter who brought a family provision claim.[70] The claimant had been estranged from her mother for a decade, though the underlying reasons were unclear: the judgment mentioned the mother's disapproval of her daughter's attitudes to motherhood (the claimant had two children) and the claimant having moved to Trinidad in 2009 to be near her father (now deceased, he had left his family and moved there some years earlier) though she returned to live in England in 2011. Aged 52, unable to work because of underlying health reasons[71] and reliant on universal credit payments as her main source of income, the daughter sought an award of £128,000 to meet her current and future financial needs which she based on a figure of £10,000 pa. Large sections of the judgment focused on the claimant's financial circumstances and outgoings, though the court found that she had made a "conscious attempt…to understate her income and overstate her outgoings"[72]- including telling the court that she had spent and gifted to her daughters a £45,000 inheritance from her paternal grandmother.

Deputy Master Glover found that the claimant had not established a lack of reasonable financial provision. In assessing the general factors, emphasis was placed on the daughter's financial needs under s 3(1)(a), and to the fact that she was not living with a monthly deficit and had sufficient resources to meet both her outgoings and to "provide a safety net for unforeseen expenditure or 'life's little luxuries'".[73] This was unlikely to change in the foreseeable future. Looking at any physical or mental disability of any applicant under s 3(1)(f),[74] it was possible that the claimant here was suffering from one or both of these things, though there was no independent medical evidence to this effect. However, her needs as presented to the court could be met from her own resources and did not give rise to any maintenance requirement that should be met from her mother's estate.

These three cases are something of a 'mixed bag': there are no discernible trends (which is hardly surprising), though two of the three claims were rejected by the courts in question. That is significant in itself, as is the outcome in *Re Nahajec (Deceased)* which resembled the factual matrix in *Ilott* and where the award made was still a relatively modest one.

---

[69] [2021] EWHC 2532 (Ch); [2021] 7 WLUK 742.

[70] The deceased had three children and left nothing to her son as well. The reasons were not stated in the judgment, and there was no reference to a family provision claim by the son.

[71] The claimant had been a practising lawyer. No independent evidence was submitted in respect of the ongoing health issues.

[72] [2021] EWHC 2532 (Ch) at [110].

[73] [2021] EWHC 2532 (Ch) at [138].

[74] 1979 Order, art 5(1)(f).

**(c) The Northern Ireland Dimension?**

Over the years, courts in Northern Ireland have tended to be more generous towards independent adult children than their English counterparts.[75] Disinherited sons or daughters living in 'necessitous circumstances' have been awarded a share of their parent's estate where this was left to more distant relatives,[76] or to another sibling following a lengthy period of parent-child estrangement.[77]

The only post-*Ilott* judgment has been the decision in *Noble v Morrison*[78] where an adult daughter challenged an equal distribution of her father's estate between herself and her two siblings. Once again, the claim was successful: there was evidence of financial dependency; the claimant's sister and brother had both accepted that reasonable financial provision had not been made for her; and the judgment is more significant for making an award of housing as maintenance and the creative way in which McBride J achieved this.[79] For independent adult children in Northern Ireland who receive nothing under a parent's will, the proverbial 'lie of the land' is still unclear where that son or daughter is minded to bring a family provision claim. If the *Ilott* principles are followed and testamentary freedom is respected, then it should be more difficult for this particular category of claimant to succeed, especially where an adult son or daughter is 'comfortably off' or (capable of) supporting themselves financially. However, being in financial need does not guarantee that an award will be made; and even if there is a slightly higher chance of success in this jurisdiction, an independent adult child should not expect a large sum.

---

[75] Something that Horner J acknowledged in *Moffatt v Moffatt* [2016] NICh 17 at [19].

[76] In *Re McGarrell* [1983] 8 NIJB the deceased made a charitable gift of one-third of his estate with the remainder passing to the husbands of two of his nieces. His daughter did not work and was living in rented social housing with her husband and four children aged from 12 to 20.

[77] In *Re Creeny* [1984] NI 397 the applicant was the deceased's 57-year-old son estranged son who had quarrelled with his father over the running of the family business and moved to England in 1972 where he lived with his wife and eight children. The deceased's will left everything to his daughter, who had never worked, was married to a successful dentist and was living in an affluent area of Belfast with the couple's three children.

[78] [2019] NICh 8. See H Conway and S Grattan, "Family Provision: A New Approach to an Old Dilemma" (2021) *Trusts and Estates Law & Tax Journal*, 8 pp (online publication).

[79] For a previous illustration of a generous approach to an adult child who had received less than her siblings, and where the deceased mother had made her reasons for this clear, see *McKernan v McKernan* [2007] NICh 6.

**Conclusion: It's Good to Talk…?**

Family provision claims are likely to succeed where a parent leaves nothing to young children, or to their disabled or otherwise dependent adult offspring. Claims involving independent adult children are very unpredictable, though the Supreme Court ruling in *Ilott* with its emphasis on testamentary freedom and maintenance meaning just that, may have tipped the balance in favour of those who are defending the deceased's will.

So what advice should be given to older testators who, for whatever reason, have decided to leave nothing to their independent adult child(ren)? Of course, there is no way of safeguarding the will against potential future claims, just as there is no way of predicting what the final outcome would be if an aggrieved son or daughter applied under the 1975 Act or 1979 Order. Setting out clear reasons for a decision to 'disinherit' is something that should be encouraged, though these must be informed and accurately reflect key factual elements such as the child's financial circumstances, previous financial support from parent to child etc. Conduct will be taken into account, and estrangement or relationship breakdown can be an important factor as can one party's unrequited attempts to reconcile.[80]

Two final points are also worth bearing in mind. First, while no provision can constitute reasonable financial provision, the testator might nevertheless consider leaving a small legacy to the child(ren) in question, which would then be factored into any family provision claim (alongside all other relevant circumstances).[81] Second, where families are on 'speaking terms', testators should be encouraged to have difficult conversations with their adult children in advance and to explain their reasons for passing their assets elsewhere. Of course, testators (and especially older ones) may be reluctant to do this, for fear of rows, rejection or relentless pressure to change one's mind. However, there is always a possibility that these conversations might have a salving effect and prevent future litigation that exposes family tensions in a public setting, dissipates the estate and takes a huge emotional toll on all sides.

---

[80] In this respect, *Re Nahajec* contrasts sharply with *Ilott*.

[81] A useful illustration is *Wellesley v Earl of Cowley* [2019] EWHC 11 (Ch) where the £20,000 that the deceased left his daughter from an estate valued at £1.31 million was deemed reasonable financial provision, in light of the daughter's 30-year estrangement from her father, his disapproval of her consumption of alcohol and drugs and the fact that the daughter could have worked had she sought the necessary support for her ADHD. The court also rejected the daughter's argument that any claim should be assessed on the basis of a percentage value of the estate; this was an inappropriate marker and something that would undermine testamentary freedom.

# Funding adult social care

## Les Allamby*

**This article examines the recent Government proposals for funding adult social care and the sorry tale of inaction in the face of funding inequities and resource shortages between funding social care in the community and care in residential settings. It focuses on the position in Northern Ireland and the differences between funding care in the community and in residential settings, and recent developments which have effectively eroded the option of receiving support for continuing care in a residential setting in Northern Ireland. The wider issues of funding that the proposals raise in Northern Ireland, the lack of a legal rights perspective that applies in practice and the latest developments, namely, the publication of a consultation document on the reform of adult social care by the Department of Health (NI), are also examined.**

### Introduction

On 7th September 2021 the UK Government published its long-awaited policy paper *"Build Back Better: Our Plan for Health and Social Care"*[1]. In practice, the plan continues to be pushed back despite attempts to herald the paper as the route towards fundamental reform. In essence, the Government intends to introduce a new £86,000 cap on the amount everyone in England will have to pay for personal care over their lifetime. The intention appears to be that the cap will be based on the Care Act 2014 that applies to England. Based on this legislation, money spent on meeting an individual's personal care needs will count towards the cap, but not the spending on daily living costs including accommodation.

In addition, from October 2023 the means-test for accessing funding through local authorities' social services departments will become more generous. The limit on capital where a person must meet his or her costs in full will rise from the current £23,250 to £100,000. Individuals with savings of between £20,000 and £100,000 will have to contribute something towards care (on a tariff basis of £1 for every £250 above the lower limit as under the current

* Les Allamby is a solicitor, former director and chief commissioner at the NIHRC.

[1] *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015736/Build_Back_Better-_Our_Plan_for_Health_and_Social_Care.pdf .*

means-test). The assessment of savings will include other assets including property where a person continues to need to live in his or her own home. In effect, there is no sign of any change in the current rules save for an overall cap on lifetime care costs and a more generous upper capital limit. On 17th November 2021, the UK Government further announced that the cap applied only to payments made by an individual and not contributions made by local authorities. Further, an overall cap of £200 will be placed on daily living costs (i.e. the contribution paid for accommodation).[2]

**Funding Levy**

The policy plan outlines an ambition to work with devolved administrations to establish a joint programme of work to share best practice across the United Kingdom. A White Paper with further details for England was then published in December 2021.[3] Additional funding of £36 billion across the UK over the next three financial years is to be made available for health and social care paid from a national insurance levy by adding 1.25% on to national insurance contributions paid by working age employees, and the self-employed, with a similar contribution paid by employers. The new levy will apply from April 2022 and from April 2023 it will also apply to individuals above State pension age who remain in work.

The plan does not set out how the money raised will be divided between health and social care, though it is clear that it is designed to relieve pressures on both systems of care. However, further details revealed that for England the lion's share will go to health, with social care receiving only £5.4 billion of the £30.3 billion allocated to England. The levy is to be paid across the UK with the revenue raised to be shared with Scotland, Wales and Northern Ireland, with by 2024/2025 an additional £300 million coming to Northern Ireland. Meanwhile, the Department has estimated a £1.8 billion gap in funding for health and social care for 2022/2023. The division between health and social care will be a matter to be determined locally.

While the policy paper seeks to argue that the funding levy is a fair approach to raising money, it effectively is significantly regressive, particularly when compared to raising money through income tax. As Table 1 illustrates, earnings beyond £50,000 lead to a significant reduction in national insurance contributions.

---

[2] Statement made by Gillian Keegan, Minister of State, 17th November 2021 UIN HCWS 399.

[3] People at the Heart of Social Care: Adult Social Care Reform, White Paper.

**Table 1:**
**National Insurance contributions for employees and self-employed for 2022/2023**

| Earnings | Employees Class 1 rates | Self- employed Class 2 and 4 rates |
|---|---|---|
| Under £9,880 (£12,570 from 6 July 2022) | nil | nil (up to £6,725) from £6,725 - £11,908 £3.15 a week |
| £9,880 - £50,270 (£12,570 from 6 July 2022) | 13.25% | 10.25% plus £3.15 a week |
| More than £50,270 | 3.25% | 3.25% plus £3.15 a week |

The approach in the plan is significant for Northern Ireland in that the means-test for residential and nursing care is largely based on the English rules though funding of care provided in the community diverges radically. In January 2022, the Minister for Health, Robin Swann MLA, published a consultation document *"Reform of Adult Social Care"* seeking comments by 18th May 2022.[4]

What the UK Government policy plan failed to address was the inequities created within the different funding regimes created for social care in the community and for care in a residential or nursing care home setting. The difference in approaches is even more marked in Northern Ireland where charging for care in the community is much less prevalent than in the rest of the United Kingdom. This has led to "perverse incentives" to choose care based on financial exigencies rather than on need. Alongside this, the longer term need to effectively finance both care in the community and residential settings as people live longer remains just out of reach despite a significant number of reviews both in Britain and locally.

**Previous attempts at funding reform across the UK**

One of the first actions of the newly formed Labour Government in 1997 was to set up a Royal Commission on Long Term Care for the Elderly. The Commission was the response to the Labour Party manifesto commitment to devise a fair system of long-term funding. The purpose of the Commission

[4] Reform of Adult Social Care. Department of Health (NI) Consultation Document, 26th January 2022.

was to *"examine the short and long-term options for a sustainable system of funding of long-term care for older people, within their own homes and in other settings; and recommend how, and in what circumstances the cost of such care should be apportioned between public funds and individuals."*

Two years later, the Commission published its Report and recommendations.[5] The key recommendation was a new system of care funding encompassing the principle that the costs of personal care as defined should be met by the State, whether provided in a residential or home setting. The provision of such care should only occur after a professional assessment process. The cost of accommodation and personal expenses should be met by individuals as well as the State with means-tested support for those on low incomes. Four years on, the Commission published a statement charting progress, noting that while changes had occurred through implementation of some of the ancillary recommendations, the core recommendation had not been addressed, save in Scotland, where from July 2002 nursing and personal care have been State funded in residential settings on a flat rate basis and free domestic personal care was introduced.[6]

In England, Wales and Northern Ireland, limited changes to the care funding system were introduced. The Northern Ireland Assembly endorsed the principle of free personal care but appeared to be unable to go further on grounds of lack of available resources. The Commission noted that the response in England, Wales and Northern Ireland "*had not addressed the deep-seated issues of inequity, hardship and the need for a principled approach across the United Kingdom."*[7]

Shortly after coming into Government in 2010 the Conservative and Liberal Democrat Coalition Government set up a Commission on Funding for Care and Support headed by Andrew Dilnot. The Dilnot Commission's Report was published in July 2011.[8] It took a different approach to the earlier Royal Commission by not recommending free personal care, but instead proposed an overall cap on an individual's liability to fund the cost of personal care, excluding living costs, during a lifetime in a residential setting. The overall cap was suggested as falling between £25,000 and £50,000 with the Report recommending it be set at £35,000. This cap would cover payment made towards care at home, as well as in a residential setting. In addition, individuals should make a standard contribution to cover general living costs of between £7,000 and £10,000 a year. Moreover, the capital limit after

---

[5] With Respect to Old Age: Long Term Care – Rights and Responsibilities. TSO, 1999.
[6] Long term care: Statement by Royal Commission, September 2003.
[7] Ibid, p.15.
[8] The Report of the Commission on Funding of Care and Support, July 2011.

which individuals fund their own care should be raised from £23,250 to £100,000. These recommendations came with a hope that a market would develop for financial products to insure individuals against the cost of their contribution. As with the Royal Commission, the proposals were fully costed. The Government's response to the Dilnot Commission also had a familiar ring in that the principles of the Commission's approach were accepted for any new funding model, but a way to resource the proposals would need to be found. Whether the UK Government's paper in September 2021 is the beginning of that approach remains to be seen. While the Dilnot Commission proposals would not have ended the inequities between funding arrangements between residential care and care in the community, it would have nonetheless significantly ameliorated the worst excesses of the differences.

Moreover, the Report, like its predecessor the Royal Commission, encouraged greater integration of health and social care. The integration of health and social care, and clearer definitions of what constitutes a health care need and social care need, would have helped tackle the running sore of boundary disputes between means-tested social care and free continuing health care. With local authority social services departments providing the former and NHS and health authorities providing the latter, where the line falls has significant implications for individuals as to whether care is paid for or not, as well as for the budgets of local authorities and NHS health authorities.

An apogee of the implications can be seen from the Court of Appeal decision in *R v North East Devon Health Authority ex p Coughlan*.[9] Pamela Coughlan was severely disabled following a road traffic accident and was living in a nursing home which she had been told would be her home for life. The Health Authority decided to close the home on financial grounds and transfer her care to the local authority social services department. The Health Authority took the view that her needs were now for social care rather than health care and, as a result, the care would be means-tested leaving Ms Coughlan to contribute to the costs of her care. Ms Coughlan challenged this approach, and the Court of Appeal ruled that both general and specialist nursing care were the responsibility of the NHS. The Court of Appeal held that where the primary need is a health need, then responsibility for funding remains with the Health Authority, even when the individual has been placed in a home by a local authority. The judgment concluded that the vast majority of people in nursing homes should have care funded by the NHS unless those health care needs are ancillary to the overall care needs where responsibility can be passed to social services.

---

[9] [1999] EWCA Civ 1871

Unfortunately, with no precise legal line drawn through caselaw and in the absence of a statutory definition of a primary health care need, the question of what constitutes a health care need and a social care need remains subject to interpretation. Subsequent caselaw has come no closer to a definitive outcome in recognition that cases normally turn on their particular circumstances (see, for example, *R (Grogan) v Bexley NHS Care Trust*[10], and *R (Green) v South West Strategic Health Authority*[11], which reached different conclusions on whether the Secretary of State's guidance on eligibility criteria for NHS continuing health care was lawful or not.)

In practice, identifying health and care needs remains a matter of subjective interpretation despite the Department of Health and Social Care introducing a "*National Framework for NHS Continuing Care and NHS-funded Nursing Care*" which was most recently revised in October 2018.

**Paying for care and proposals for reform in Northern Ireland**

Unlike the rest of the UK, health and social care has been integrated since 1973 following the enactment of the Health and Personal Social Services (NI) Order 1972.[12] While administrative and oversight arrangements have been modified through legislation since, the essential integration remains in place.

Paradoxically, during the 1980s, the concern was that there was a financial incentive to enter residential care rather than remaining at home. This drove the-then Department of Health and Social Services and Public Safety (DHSSPS) to publish in 1990 the paper *People First: Community Care in Northern Ireland for the 1990s*, setting out a vision for community care. One of the six core objectives was to develop domiciliary care services to enable more people to remain at home. The desire to transform the provision of social care was never matched by the resources to realise the objective.

In 2002, the DHSSPS undertook a review of community care in an attempt to reboot the objectives of *People First*. A further review looked at the case for introducing charges for domiciliary and other care services. This review got as far as recommending and developing a means-tested charging regime. However, the flaws identified by Law Centre (NI) in the financial assessment process which took no account of family size in deciding how much a person should be charged led to the proposal being subsequently abandoned. By 2008, the DHSSPS were openly admitting in evidence before the Northern Ireland Public Accounts Committee that *"the aspirations of*

---

[10] [2006] EWHC 44 (Admin).
[11] [2008] EWHC 2576 (Admin).
[12] 1972 NI 14.

*the policy remained valid but accepted that some of its aims had not been achieved"*.[13] The failure to adequately enable social care provision has knock-on consequences elsewhere including delayed discharge from hospitals and other care due to the absence of sufficient readily available packages of care in the community.

As a result, a plethora of reviews and reports have been commissioned and published. One of the most significant was the DHSSPS-commissioned review by John Compton of health and social care. *Transforming Your Care* was published in December 2011. The wide-ranging review included reconfiguring how money was spent with a transfer of monies (£83 million) from hospital funding to primary, social and community care alongside transitional funding to enable the new service to be implemented.

The DHSSPS responded to *Transforming Your Care* by issuing a consultative document in 2012 alongside a post-consultation report from the Health and Social Care Board. While money for the transition was made available, it came through in-year spend offering little scope for long-term planning. As a result, these monies were diverted into other short-term priorities rather than meeting the core transformation recommendations. An indication of the pace of change can be gleaned from the October 2016 launch of the (now) Department of Health NI's strategy and action plan *Health and Well Being 2026: Delivering Together*[14] which sets out its desire to build on the strong foundations laid by *Transforming Your Care* and the (then) recently completed Bengoa's Expert Panel Review *Systems Not Structures.* Now, more than halfway through the strategy and action plan, there appears to be limited evidence that the familiar mantra of both reviews that there is *"an unassailable case for change"* and *"the existing model of care is not fit for purpose as one looks to the future"* is any closer to being fundamentally realised.[15]

The Reform of Adult Social Care consultation document was launched on 26th January 2022. Its builds on another report, *"Power to the People"*, produced by Des Kelly and John Kennedy published in December 2017[16]. The consultation document is wide-ranging, encompassing the aims of

---

[13] Report into Older People and Domiciliary Care, Public Accounts Committee of the Northern Ireland Assembly. February 2008 para.10

[14] *https://www.health-ni.gov.uk/sites/default/files/publications/health/health-and-wellbeing-2026-delivering-together.pdf*

[15] *https://www.health-ni.gov.uk/sites/default/files/publications/health/expert-panel-full-report.pdf* Chapter 2

[16] *Power to the People: Proposals to reboot adult care and support in NI. Expert Advisory Panel on adult care and support*, DoH (NI), December 2017

building a stable, sustainable adult social care system, improving workforce planning retention and development, supporting carers more effectively, a renewed focus on prevention and early intervention, the desire to keep people in their own homes whenever possible and improving the level of choice and autonomy people have over decisions made to meet care and support needs.

Of particular interest to the legal profession is the proposal to introduce legislation to support the reform of adult social care with the aim of overhauling the current legislation contained in a number of statutes. The new legislation is intended to include legal duties:

- To provide preventative and early intervention services,
- To sustain, promote and protect social well-being in the provision of adult social care services,
- To provide information, choice and control of service provision to service users and family carers,
- To provide equitable access to assessment of need and services to meet eligible assessed needs for service users and family carers,
- For new criteria for service eligibility for service users and family carers,
- To provide independent advocacy for service users and family carers,
- To enable authority for market regulation, if required, and
- To enable authority for any additional powers of inspection, if required.

Whether these duties will be directive or permissive remains to be seen.

On charging arrangements for domiciliary and residential care, the Department promises no change to the current arrangements pending a detailed review. The review will make recommendations for future arrangements, including changes to the cap and floor threshold. Nonetheless, the document recognises the current inequity between charging for domiciliary care and residential care.

The question of "top up" fees is also addressed. "Top up" fees occur where a care home charges more than the "going rate" paid by Health and Social Care Trusts ostensibly to cover additional services or the particular preference of the individual being cared for. In practice, such rationales rarely apply and "top up" fees operate to deal with the difference between what a Health and Social Care Trust is willing or able to pay and what a care home normally charges. The "top up" fees can vary from £30 to £200 a week and it is expected to be paid by a third party, normally, a family member. The Department has committed to review third party "top up" fees as another of its proposed actions.

**Arrangements for paying for social care**

The arrangement for charging and paying for social care are very different between England, Wales, and Northern Ireland. In England, funding arrangements between central and local government assume that local authorities will raise income through charging for social care. Given wider funding exigencies (though local authorities do have a discretion whether to charge for services), in practice most social care provision is subject to a means-tested charging regime. In paying for care and support at home a savings limit is applied, normally in line with the arrangements for residential and nursing care. Where savings are above £23,250 then the full cost of the charges is levied, while savings between £14,250 and £23,250 are assumed to generate a tariff income of an extra one pound a week for every £250 (or part thereof) towards paying for care. There are normally rules around what can be disregarded from capital, including the property a person lives in and discretion to decide whether to take into account savings or income which has been deliberately disposed of in order to avoid paying for social care. In calculating income, local authorities in England disregard Disability Living Allowance (DLA) and Personal Independence (PIP) mobility components. However, Attendance Allowance and DLA care and PIP daily living components are counted as income, though individuals can offset expenditure on other disability-related needs not being met by the local authority.

In addition, local authorities must ensure a person needing care retains a minimum level of income which, for example, is £189 a week for a single person with different figures for a couple alongside additional sums allowed where a person is receiving Carer's Allowance or where other particular circumstances apply. Normally short-term, limited periods of care for rehabilitation to prevent hospital admissions or resettlement following discharge from hospital are free for up to six weeks though this can be extended.

Where the primary need is for health care in a person's home, then the NHS is responsible for this and the service is provided free of charge as a continuing health care need. This will include, but is not limited to, community-related district nursing, physiotherapy, and speech therapy. The framework for charging is set out in statutory guidance for care and support under the Care Act 2014 with local authorities having some discretion to develop their own approach to charging within the parameters set. Initially, the Care Act 2014 outlined an intention to meet one of the Dilnot Commission's recommendations by introducing in April 2016 an overall cap of £72,000 on payments made towards social care by individuals over 65. This reform was delayed until April 2020 and ultimately scrapped.

In Wales, paying for care services is found in the Social Services and Well Being Act 2014[17] and associated guidance. The Welsh Government required local authority social services departments to raise income to pay for services provided. As a result, local authorities charge for social care based on a financial assessment which must ensure that a person retains a minimum amount to pay for daily living costs. A maximum limit of charging for non-residential care is also set currently at £100 a week and no charge is made for health services. For residential care, where a person has savings of over £50,000 (including the value of the home), then he or she is expected to pay towards the full cost of care.

The arrangements for paying for social care at home are very different in Northern Ireland. Article 15 of the Health and Personal Social Services (NI) Order 1972[18] provides that the Department can make arrangements to provide social care, including the delegation of arrangements for service provision to other bodies. In addition, Article15(4) gives a discretion to recover charges for provision.

In practice, unlike in England and Wales, charges are not levied for domiciliary care. Charging for domiciliary care is governed by Circular HSS (SS) 1/80.[19] No charge is made to individuals though there is discretion to do so through a rudimentary means-tested system which is not deployed in practice. The charging arrangements for domiciliary care are very different from those that apply to residential and nursing home care where the savings limit of £23,250 and tariff income between £14,250 and £23,250 apply. Other services, such as rehabilitation to restore independence, are free for six weeks along with those services that a Trust is legally obliged to provide based on other legislation.

The implications for the provision of care have become increasingly clear as funding has been squeezed ever more tightly for Health and Social Care Trusts. Local Trusts are expected to conduct an assessment of needs for services and then provide services accordingly. Care needs are normally placed in one of four categories:

- critical
- substantial
- moderate
- low

---

[17] 2014 anaw 4.
[18] 1972 NI 14.
[19] *https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/circular-hss-ss-home-help-2015_1.pdf*

The chances of receiving care for moderate or low care needs have become increasingly unlikely and even identified substantial care needs can also be difficult to negotiate. Despite what should be a formal written legal process of assessing and identifying need and objectively deciding the resources available to meet those needs, in practice a more informal negotiation often occurs where the need, resources available and what care family members or others can provide are conflated as part of a single negotiation process.

**Continuing care in Northern Ireland**

Until recently, the question of what constitutes a health care and a social care need remained as unclear in Northern Ireland as in England and Wales. Continuing health care is the term used to cover social care needs which are primarily driven by a health care need. The Department of Health (NI) has not, to date, drafted guidance of what constitutes such needs when conducting any assessment of need. In practice, the integration of health and social care services meant that the boundary disputes in England and Wales as to whether an NHS Health Authority or a local authority social services department pays for the provision of a service rarely arises, though which budget such needs are met from is significant to the budget holders. Moreover, the limited range of charging for social care at home means that the issue is also less significant in Northern Ireland. Of more importance in Northern Ireland is care in a nursing home or residential care setting particularly when a person is funding his or own care. In this circumstance, a continuing health care need must be paid for by a Health and Social Services Trust while a social care need is subject to a means-tested charge. As in England and Wales, self-funders in nursing homes receive a payment of £100 a week to cover the cost of providing nursing care. This is a payment made directly to the provider.

In June 2017 the Department of Health launched a consultation into continuing health care.[20] At this point, only 43 people were assessed as eligible for continuing health care in Northern Ireland. The consultation followed a Departmental Review which outlined the difficulties Health and Social Care Trusts faced in applying Departmental guidance. The consultation outlined four options while indicating its preferred option, namely, to introduce a single eligibility criteria question – *"can care needs be properly met in any other setting other than a hospital?"* Where residential or nursing home accommodation was deemed appropriate then the normal means-tested arrangement apply, including the payment of £100 towards nursing costs in a nursing home setting.

---

[20] *https://www.health-ni.gov.uk/consultations/continuing-healthcare-northern-ireland-introducing-transparent-and-fair-system*

In February 2021 the Department of Health (NI) published its analysis of responses.[21] A number of concerns were raised by those responding, including that the option canvassed effectively abolishes continuing health care. Nonetheless, the Department opted for the single eligibility criteria approach on the grounds of its simplicity and the guarantee of consistency of approach across the Health and Social Care Trusts.

In May 2021 the Department issued circular HSC (ECCU) 1/*2021 "Continuing Healthcare in NI: Introducing a Fair and Transparent System"*[22]. The Circular outlined that the single eligibility criteria question for continuing healthcare, namely *"can your care needs be properly met in any other setting than a hospital?"* is applicable from 11th February 2021 onwards. In a Northern Ireland Assembly debate on 14th September 2021 the Minister for Health Robin Swann confirmed that he had set up a Working Group to consider guidance on the new arrangements and that 72 people are in receipt or continuing health care and those individuals will continue to receive their support.

**The value of a rights-based approach**

Any transformative change to the delivery and provision of social care will need effective long-term financing and a shift of emphasis away from the current arrangements where individuals seeking social care have neither a sense of rights and entitlements nor practical involvement in shaping and identifying care and provision in partnership with providers.

Reports have occasionally dipped their toes in the water in endorsing a rights-based approach. In 2015, the Commissioner for Older People published "*Prepared to Care? Modernising Adult Social Care in Northern Ireland".* Recognising the patchwork quilt of legislation, circulars, and guidance in adult social care it noted that many older people and their carers were unaware of their entitlements and how to access services. Following a legislative review, the Report recommended a new single legislative framework for adult social care with accompanying guidance for implementation based on human rights principles.

Moreover, in 2017 the Department of Health (NI) published a Report it commissioned from an expert advisory panel on adult care and support to develop proposals for change.[23] The Report devoted a chapter to putting the citizen at the heart of adult care and support services noting that *"the expert*

---

[21] *https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-cont-healthcare-analysis-of-responses.PDF*

[22] *https://www.health-ni.gov.uk/sites/default/files/publications/health/doh-hsc-eccu-1-2021.pdf*

[23] Op cit. footnote 17

*advisory panel wishes to emphasize at the outset the fundamental importance of a human rights approach in which people with care and support needs enjoy the same entitlement to quality of life and well-being as other citizens"*[24]. In effect, the Department of Health and Health and Social Care Trusts already talk about placing the individual at the heart of services through its commitment to "personalisation" of care and other principles. Turning such concepts into meaningful practice will need not only commitment, but a clear rights framework and the necessary resources. This would apply to both direct payments provision where a person is given a budget to pay for his or her own care as well as provision organized directly through the Health and Social Care Trusts.

An example of sketching out a framework of what a rights-based approach would look like can be seen in the Northern Ireland Human Rights Commission's inquiry into health care in Accident and Emergency Departments published in 2015.[25] During the public evidence giving sessions, Chief Executives often appeared quizzical when responding to questions about the adoption of a human rights-based approach. However, once it was outlined that it entailed putting the human rights of everyone, including staff, patients, carers and other family members, at the heart of services based on a reciprocal right to respect and dignity, openness and transparency and non-discrimination, Chief Executives stated that such approaches were largely in place, although not worded in the language of human rights. The core values of a human rights-based approach, including fairness, dignity, equality, respect, and autonomy, sit comfortably with the aims of health and social care provision.

In the case of Emergency Department care the Commission's Report identified nine principles to begin with, including good quality care and ensuring the dignity and well-being of patients, good terms and conditions for staff, equality, non-discrimination and equity in enabling access to care, transparency and communication around developing individual services and wider policies, participation of users and staff in decisions impacting on them at both individual and policy level, and finally, open and effective governance.

The Report recommended a pilot within at least one Trust to look at what adopting a human rights-based approach would look like in practice. Work commenced between the Belfast Health and Social Care Trust and the Commission which ultimately foundered on an unwillingness of senior clinicians to participate on the grounds that there were already sufficient

---

[24] Op cit Ch 3 p.25

[25] *Human Rights Inquiry: Emergency Health Care* 2015. See Ch 4 p.117 onwards.

safeguards and accountability mechanisms in place through professional and medical regulatory requirements. This seemed at odds with earlier work of the British Institute of Human Rights which concluded that among the reasons to adopt a rights-based approach in health and social care was that it supported health and social care staff in meeting their professional and ethical obligations, improved decision-making processes, and reduced litigation and complaints.[26]

A more fruitful alliance between the Commission and the Northern Ireland Public Services Ombudsman resulted in a human rights manual to aid decision-making for staff at the Ombudsman's office.[27] The manual was adapted and rolled out more widely after being picked up by the International Ombudsman Institute and Equality and Human Rights Commission in Britain.

What a rights-based approach will do if combined with funding and other fundamental reform is ensure that the values regularly articulated by the Department of Health and its constituent bodies are translated into a clear and accessible framework within which those values can be effectively articulated and measured.

**Conclusion**

This article has sought to chart the sorry tale of attempts to initiate fundamental reform in funding adult social care in both a community and residential care setting. The reforms which required significant long-term investment have always been dashed on the rocks due to political unwillingness to make long-term financial decisions. The goal should be to ensure a level playing field so that individual decisions on what a person needs by way of long-term care are based solely on need and not on how care is funded and charged for. The disparity between charging for care in the community and a residential setting is more stark in Northern Ireland than in England and Wales. The recent closing down of arrangements to fund primary health care needs through continuing care, particularly in a residential and nursing home setting, has highlighted the disparity once again.

The long-term answer lies in funding care across the United Kingdom through progressive changes to the overall taxation system. This prognosis is hardly new – in 2003 the Royal Commission's statement on long-term care in follow-up to its original Report set out that "*we acknowledge unreservedly*

---

[26] Human Rights and Health and Social Care, British Institute of Human Rights 2011.
[27] *Northern Ireland Public Services Ombudsman Human Rights Manual* 2014.

*that the Commission's proposal would cover people at all levels of income and wealth, in exactly the same way as, for example, schools, hospitals, and libraries are provided free to all by the State from general taxation. This is part and parcel of living in a progressive society in which "need" for public provision is measured not simply in financial terms but as part of wider social inclusion as is matched by a progressive tax system. We believe that this is in the best tradition of social policy in the country*".[28]

In some ways, the current work of the Fiscal Commission chaired by Paul Johnson which is examining the case for increasing tax varying powers could arguably be as important as the policy document on the future of social care arrangements recently published by the Department of Health (NI). Will the Department's document finally herald a sea-change in how social care is financed and delivered? The Reform of Adult Social Care honestly acknowledges that the estimated costings for proposed actions and the availability of funding will inform the future strategy and its implementation. Based on recent history and the funding released to date I am not holding my breath.

[28] Long-term care statement by the Royal Commission, September 2003, para 41.

# Medical Considerations: Advance Decisions to Refuse Treatment/Advance Directives

## Dr Barbara English

**This short article seeks to extend the knowledge base of the solicitor involved in drafting and witnessing an Advance Decision to Refuse Treatment (ADRT) - also referred to as an Advance Directive or Living Will - in order to optimise the likelihood that the ADRT will prove effective in ensuring the client's wishes are carried out. It provides background information on the relevant IT systems used in healthcare settings to inform treatment decisions, and the steps the client needs to take to have the ADRT registered on these systems.**

### Background

In her article published in the Winter 2020 edition of the Journal of Elder Law and Capacity, Linda Johnston, TEP, addresses the purpose and legal practicalities in relation to the drafting and execution of Advance Decisions to Refuse Treatment/Advance Directives. As a medical practitioner whose clinical role focuses on older people and those with suffering from progressive dementias, I welcome the increasing awareness of these documents among the general public and the medical and legal professions. Too often issues related to the medical treatment of the non-capacitous individual in life-threatening and end of life circumstances remain guided not by the patient's wishes but by those of family members who may or may not know, or be able to represent, that person's pre-existing viewpoint. Recent medical experiences as a result of the Covid-19 pandemic have highlighted the pressures and pitfalls of 'best interest' decision-making with even more limited access to the person's previous wishes and values.

### Capacity to make an Advance Decision to Refuse Treatment/Advance Directive

An Advance Decision to Refuse Treatment (ARDT) can specify the circumstances in which an individual refuses a particular treatment, and/or specify the treatments the individual refuses in all circumstances (most commonly treatments refused for religious or spiritual purposes). In most cases there will be no doubt about the capacity of an individual approaching

his or her solicitor for assistance in drafting an ADRT. In some cases it may be helpful to request formal assessment of the person's capacity to make the advance decision, for example, if there is a possibility that the advance decision may be challenged in the future. As with other decisions, there is the risk of duress or undue influence impacting on the person's decision making. In the context of illnesses associated with potentially extended periods of disability and dependency the person may be or feel under pressure to "protect the inheritance" by making decisions that would in effect reduce the financial impact of care home fees. As always, interviewing the client privately, addressing the issue and recording the response in attendance notes is to be recommended.

**Storing and Sharing an ADRT**

Once drafted and witnessed, the appropriate storing and sharing of a valid ADRT is the next key step in ensuring that the client's wishes are carried out. A copy of the document should, as usual, be held by both client and solicitor. There is a strong case for widespread sharing of the existence of the ADRT with family members (particularly those whose views would otherwise have been likely to be sought in the event of best interest decision-making at a point of future incapacity) so that such individuals would be able to signpost healthcare professionals to the document. In addition, however, it would be wise to inform the client of steps that he or she can take proactively to ensure that the ADRT is readily available on the medical information systems commonly accessed by doctors and other healthcare professionals in both primary care and hospital settings.

It is increasingly common practice in Northern Ireland for those with long term health conditions to have something called a Key Information Summary record (KIS) completed with their GP and stored on the GP electronic record system, but any adult can simply request that a KIS is completed by his or her GP. The Key Information Summary record is held at the individual's GP practice and is only shared with other healthcare professionals involved in care with permission. Usually a KIS record will include:

- relevant medical history, including any long-term conditions
- list of care plans or self-management plans
- preferred treatment arrangements
- resuscitation status
- **Advance Decision to Refuse Treatment (ADRT) in place**

In Northern Ireland GPs will ask for their patient's consent for a Key Information Summary to be shared on another electronic system called the Northern Ireland Electronic Care Record (NIECR). NIECR is a computer

system that Health and Social Care staff routinely use to access information on an individual's medical history and therefore a completed *and shared* KIS with a ADRT is a highly effective means to ensure the information/ document is readily and reliably available to relevant professional involved in the individual's treatment and care, including end of life care. The current Covid-19 pandemic has greatly increased the completion and sharing of KIS records in Northern Ireland.

Similar systems exist in Scotland and in England and Wales. Scotland also uses a KIS, while in England and Wales the same type of document is known as "Additional Information in the Summary Care Record", again generated in the GP electronic notes and shared with permission on multiple nationally accessible clinical systems.

**Related Matters: Advance Statements/Record of My Wishes Document**

Whilst it is important to be explicit that a valid ADRT is legally binding and specifies (the clue is in the name) the refusal of **specific treatments** in the future, it may be helpful to be able to advise the client of additional measures he/she can take to **guide** wider aspects of his or her future health or social care in the event of a loss of capacity. An Advance Statement (sometimes known as a Record of My Wishes document) is **not** legally binding, but those taking a best interest decision should take the contents into account. The Statement can be used to record wishes and preferences about future care, for example, where the person would like to live, whom they would wish to have visit, and whether the person would prefer to die at home or in hospital. It can be used to explain how the person balances quality of life against length of life. At a more day to day level the Statement can include things like food preferences, activities enjoyed and moral and political views. Such information is helpful to health and social care professionals and is also of assistance to those who have been appointed as attorney under a Lasting Power of Attorney for Health and Care.

**Finally - keeping it current**

As a medical practitioner I would make the comment that for some individuals - even the well-informed - making an ARDT and or an Advance Statement at the point of diagnosis of a chronic illness, the experience of living with that illness turns out to be different to what was anticipated. It is important to note that just like other legal documents an ARDT should be kept up-to-date and amended or revoked in response to changes in circumstances and attitudes. While it is prudent to use foresight, the benefit of 20/20 hindsight can still be applied whilst the individual retains the capacity to do so.

# Book Review

## Power of Attorney: The One-Stop Guide: All you need to know: granting it, using it or relying on it, Sandra McDonald (2021).

**Andrew Kirkpatrick, TEP, Murray Kelly Moore**

Powers of attorney have been a growing area for a number of years and have been covered in their entirety by Sandra McDonald in her new book which was published last year. Sandra McDonald was the Public Guardian for Scotland for 14 years between 2004 and 2018 and now works as an independent advisor on mental capacity issues throughout the United Kingdom.

The book covers Powers of Attorney in Scotland, Lasting Powers of Attorney in England and Wales, and includes details on the new Lasting Powers of Attorney regime which is awaiting introduction in Northern Ireland. The principles across the three jurisdictions are broadly similar even if the law differs in some ways. The author deals equally with all three jurisdictions throughout the publication which makes it accessible for readers no matter where in the United Kingdom they are based.

Sandra McDonald's work as the Public Guardian for Scotland, in addition to her own experience of acting as attorney for her father, provide an interesting perspective from both sides of the fence in the process. The result is a book which is a very practical and readable guide. It is written to be read by potential donors (or granters), attorneys and advisers. It is deliberately not academic or legal in its tone but there is still plenty of value in it for legal practitioners as well as other professionals in this field. The book is structured so as to walk the reader through the entire process chronologically.

Throughout the book there are short case studies to illustrate the point being made. These are particularly useful when contextualising the issues being discussed and assisting the reader to consider the practical implications of the decisions being made.

Textbooks can usually be expected to provide a comprehensive list of the law and the necessary procedures. Unusually, and to the benefit of the book and the reader, there is also a section on the myths of why people do not make a Power of Attorney and also some of their misconceptions when

they do enter the process of making a Power. This is a particularly helpful section for practitioners to remind them that clients need these myths to be addressed and the book helps to do this in a very clear and concise manner.

As a practitioner based in Northern Ireland, I found the Health and Welfare Power of Attorney section to be of interest as this type of Power is not yet in force in Northern Ireland and it is beneficial to learn from the experiences in other jurisdictions before I have a client in front of me who wishes to make such a Power. On the downside, there is only a very brief paragraph on the use of Powers of Attorney abroad and I would have welcomed more detail on this issue given the proximity of the Republic of Ireland, and also the increasing number of clients who are resident in non-UK jurisdictions for at least part of the year.

The book is full of tips and pointers and different readers will, of course, pick up on different sections; however, my interest was taken by the suggestion of appointing a supervisor of the attorney so that there is reporting and accountability without the need for an application to the Court with the time and cost that is involved in that process. Use of a supervisor is perhaps more widespread in England and Wales currently but it is something that I will certainly consider using in my own practice.

The book contains a very interesting section on who should be appointed as an Attorney and the limitations of it being an immediate family member, especially if that family member is not capable of doing the job for any reason. There is also a very practical guide to supporting decision making and respecting rights which is not an area which is covered as efficiently in the more traditional type of textbook. Similarly, there is a very helpful section on recognising the signs of abuse by attorneys which has clearly been informed by the author's years as the Public Guardian for Scotland.

In summary, Sandra McDonald's book is not a typical legal textbook, nor was it intended to be. It is very practical and is written in a manner which is very easy to understand and accessible for everyone. It is a valuable resource for client and practitioner alike.


WCAC2022
7TH WORLD CONGRESS ON ADULT CAPACITY
Enhancing Autonomy, Support & Protection

## Come to Edinburgh! – a live, in-person, event –

## 7th World Congress on Adult Capacity Edinburgh 7-9 June 2022

---

The World Congress on Adult Capacity (WCAC) is a global event, normally held biennially, which provides:

- a focus for developments of human rights-driven provision for people with mental and intellectual disabilities,
- a powerful springboard for future research, reform and practical delivery, and
- an opportunity to share and discuss worldwide practical experience and initiatives across the huge range and variety of relevant disabilities, in many cultural settings.

Scotland is honoured to have been awarded the opportunity to be only the second European country ever to host this international event, which will take place in Edinburgh 7-9 June 2022. It will be a live event, thus offering the widely longed-for opportunity to meet old contacts in person, to network with new contacts, and actually to meet people you may only have seen on screen up to now.

The timing of the event is ideal, as countries worldwide have been considering further development of their systems, including the ongoing task of giving full effect to the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The CRPD adopts a social/human rights approach to disability. It gives impetus to the movement away from predominantly medicalising the care and treatment of persons with mental and intellectual disabilities, towards requiring States to remove obstacles to, and to actively support, full rights enjoyment and participation in society by persons with such disabilities.

The outline programme for the Scottish event, which can be found on the *WCAC website*, shows the breadth of international speakers. You will see that the emphasis is on continuing and developing ways to give effect to

the paradigm cultural shift required, away from systems which emphasise safeguards against unjustified intrusions in the lives of persons with mental disabilities, towards developing ever better ways of actively supporting and protecting the exercise of legal capacity to ensure individual autonomy on an equal basis with others. Above all, this event offers the total interactive ambience of a live event, in which people from all over the world, and from a wide range of backgrounds, can share ideas and experience informally as well as in formal sessions. You will hear the views of experts, and in a range of parallel sessions you will have opportunities to question them, and to probe their views of the strengths and any challenges of their ideas and existing systems. You will have time to chat and glean ideas from like-minded colleagues across the world who face some of the same dilemmas as you. You could set yourself the objective of identifying key take-home messages that are particularly relevant for you.

Interest has already been expressed from international attendees in the legal, social, health, and academic sectors, as well as from people with lived experience and their carers.

We have commitments so far from 19 countries across four continents, so you will hear internationally renowned expert views. The June timing follows international requests to be able to combine the Congress with opportunities to enjoy Edinburgh and Scotland at that time of year. The venue is the International Conference Centre in Edinburgh. It holds a large number, but expressions of interest to date suggest this will be a sell-out, and of course we may have to reduce numbers to comply with social distancing requirements, so we would urge you, if you are interested in attending, to book now to secure your place. *Register here* to attend.

THE LAW SOCIETY OF NORTHERN IRELAND

# The Law Society of Northern Ireland ('the Society')

# Non Contentious Business Committee Practice Note 2021/1

Issued by the Non Contentious Business Committee to provide guidance in relation to the issue of the charging and agreement of professional fees by a solicitor in an estate where that solicitor is also acting as the sole executor (hereinafter called the "Solicitor-Executor"). This guidance also extends to all estates where a "Solicitor-Executor" has control as executor and includes estates where more than one solicitor or principal in a solicitor's practice is appointed as executor regardless of whether the practice is a sole trader, partnership, a limited liability partnership or a limited liability company or if the "Solicitor-Executor" is a trustee company owned or controlled by such a solicitor or solicitor's practice.

**Practice Note 2021/1**

The Society will consider whether a solicitor has complied with this guidance in any relevant matter before the Society concerning the professional practice or conduct of a Solicitor-Executor. A Solicitor-Executor may be asked by the Society to justify a decision to deviate from this guidance.

This guidance uses the terms "must," and "should" throughout to contextualise how to understand the various directions.

The terms have the below meanings:

**Must** – a requirement or other mandatory provision. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or regulations.

**Should** – good practice for most situations. These may not be the only means of complying with the requirements and there may be situations where the suggested course of action is not the best course of action. If

you do not follow the suggested course of action, you must be able to justify why your alternative course of action is appropriate, in the particular instance.

The Committee hereby directs that:

1. The Solicitor-Executor must take all necessary steps to ensure the professional fees proposed to be charged are reasonable in accordance with all relevant legislation, published guidance and case law.

2. The basis upon which the professional fees are to be calculated and the Solicitor-Executor's terms of business should be sent to the residuary beneficiaries at the outset of the administration of the estate.

3. The Solicitor-Executor should take particular care in the event that he/she is aware or ought reasonably to be aware that any residuary beneficiary is a vulnerable person and/or may be unaware of appropriate charging rates. In such event the Solicitor-Executor should consider whether it is also appropriate to advise such a residuary beneficiary to seek independent legal advice in relation to the proposed professional fees at the outset of the administration of the estate.

4. The Solicitor-Executor's consideration of the matter, his/her decision and the reasons for his/her decision whether it is appropriate so to advise such a residuary beneficiary should all be appropriately recorded.

5. If such independent legal advice is sought by such a residuary beneficiary, it ought to be paid for by that residuary beneficiary and not by the estate.

**11 November 2021**

# Casenotes

**Inherent Jurisdiction : Move to Care : Contact**

**In the Matter of AK**
**[2021] NI Fam 9**
**High Court of Justice in Northern Ireland – Keegan J –**
**Judgment delivered 18th March 2021**

This case involved an 18 year old woman with severe disabilities. The Health & Social Care Trust brought an application for declaratory relief which was opposed by AK's mother and step-father.

AK was born prematurely at 28 weeks. She has cerebral palsy, is PEG fed and has a severe learning disability. AK is also wheelchair-bound and has mobility issues which have developed as she has got older. She is a statemented child who attends a special school.

These proceedings came after AK was hospitalised with severe dehydration and abdominal pain with her urea and sodium levels at potentially life-threatening levels. AK's mother and step-father had cared for her at home with the support of social services but neglect had been confirmed in AK's care in the past. These issues had become worse as AK got older. AK's mother was noted as having a learning difficulty herself and AK's step-father as having a serious lung condition. The house in which they had lived until shortly before the hospitalisation was also considered to be unsatisfactory both in relation to hygiene and the maintenance of proper care. The family had moved to a new property but this house required substantial work to be suitable for AK's care and also for the complex medical needs of AK's step-father.

The application by the Trust for declaratory relief sought the following:

(i) A declaration that AK should be placed in residential care rather than return home after a hospital stay. That residential care placement had been identified.

(ii) To authorise the deprivation of liberty.

(iii) To regulate contact between AK and her family should residential care be the preferred option.

It was agreed during the hearing that the issue of deprivation of liberty was to be dealt with under a separate application pursuant to the Mental Capacity (NI) Act 2016 and this application was duly made.

The Court considered whether it had jurisdiction to hear the other issues raised and the engagement of Article 8 ECHR in the requirement for declaratory relief in relation to the residential care and also the contact issues.

The three questions which the Court considered it must decide were as follows:

(a) Is the patient capable of making a decision regarding the particular issue put before the Court?

(b) If so, is the plan/treatment proposed in the best interests of the patient?

(c) Is the intervention necessary and proportionate pursuant to Article 8 ECHR?

**HELD**

Keegan J held that question (a) was non-controversial and easy to answer. It was agreed between all parties that AK does not have capacity to make this type of decision. She was assessed as operating at an age of between 10 months and 1 year old.

On the question (b), the Judge held that a short-term placement in residential care was in AK's best interests. This would give time for her to recover and an assessment of her medium to long-term care plan to be carried out. This care plan should, it was directed by the Judge, consider a form of shared care, respite care if she did return home and appropriate works to the family home to allow suitable care in that setting.

Keegan J was not satisfied with the Trust's proposal for contact in the residential care home of once a week for the family. More was required, particularly in light of the self-isolation requirements that AK would have to undergo due to COVID-19 restrictions upon entering the home.

The Judge did recognise the care and attention that have been given to AK during her life by her mother and step-father and that they have done the best that they can for her but as AK's needs become more complex, there should be a plan for what is in her best interests going forward.

An interim declaratory order was therefore made.

## Rectification of a will

**In the Estate of Patricia Milliken (Deceased)**
**Lisa Nelson as the Personal Representative of Patricia Milliken (Deceased) v Rosemary McDermott and Barry Nelson**
**[2021] NICh 5**
**High Court of Justice in Northern Ireland – McBride J –**
**Judgment delivered 20th April 2021**

This This case involved the plaintiff as executrix of the will of Patricia Milliken deceased seeking a determination on the proper construction of the testatrix's will in particular in relation to the gift of her dwelling house. The plaintiff sought an order for rectification of the will so as to give effect to what she believed was the testatrix's true intentions.

The testatrix had left her will dated 27th June 1997 appointing the plaintiff (formerly called Lisa Fleming) as executrix and the will had been drafted as follows:

> "I appoint my niece Lisa Fleming….to be the sole executrix of this my Will…. I GIVE DEVISE AND BEQUEATH my dwelling house at 19 Ardgreenan Gardens, Belfast unto my sister Valerie Wilhelmina Wade for her life and after her death to my said niece Lisa Fleming. All the rest, residue and remainder of my estate I give, devise and bequeath unto my said sister Valerie Wilhelmina Wade should she survive me by 30 days.
>
> Should however my said sister predecease me or not so survive me by 30 days then I give, devise and bequeath all my estate unto my nieces Lisa Fleming and Rosemary McDermott and my nephew Barry Nelson in equal shares absolutely".

The testatrix was predeceased by her sister Valerie Wilhelmina Wade.

The question for the Court was whether the plaintiff takes an absolute interest in the house or whether the house falls within the final clause of the will and was to be distributed equally between the three residuary beneficiaries.
The plaintiff relied on rectification rather than interpretation at the hearing and the matter was considered on this basis.

Evidence was taken from the solicitor who acted on behalf of the testatrix and drafted the will. No attendance note of the meeting was kept by the solicitor but the solicitor gave evidence showing the structure of her

drafting was to deal with the specific gifts first then the residuary estate and therefore it was the testatrix's intention to leave the house as a specific gift and not include it in the residue. The solicitor submitted that it was a clerical error on her part and that the words "rest, residue and remainder" should have been included in the residue clause to make it clear that the house was not included.

**HELD**

McBride J held that by failing to insert the words "rest, residue and remainder", the solicitor had failed to give effect to the testatrix's true intentions. It was further held that the will as drafted was in consequence of a clerical error due to inadvertence on the part of the solicitor within the terms of Article 29 of the Wills and Administration Proceedings (NI) Order 1994.

The test in Article 29 is that the Court may order a will to be rectified and the Judge exercised her discretion under that Article and ordered the will to be rectified to specify that the house be given to the Plaintiff as a specific gift and not fall in to residue.

**COMMENT**

This case is a reminder for solicitors to take care when drafting wills and also of the importance of keeping good attendance notes. Whilst in this case the outcome was not affected, the case would not have arisen without the initial inadvertence in drafting of the solicitor.

## Table of Cases Referred to

**Table of Cases Reported**

## Table of Primary legislation

**Table of Secondary Legislation**

## Index

Published by The Law Society of Northern Ireland