



Will-making in Irish nursing homes: Staff perspectives on testamentary capacity and undue influence



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ABSTRACT

Allegations of lack of testamentary capacity or of undue influence are grounds for many disputed wills. Some people who make (or change an existing) will are resident in a nursing home. A substantial proportion of this population have cognitive or communication difficulties or are physically frail, and concerns regarding testamentary capacity or undue influence may be more likely to arise as a result. A questionnaire examining the experiences and views of staff regarding will-making by nursing home residents was posted to the Directors of Nursing of a random sample of 148 of the approximately 600 nursing homes in the Republic of Ireland and 81 responded. Over 10% of respondents reported seeing cases where they felt a resident who lacked capacity was visited by a solicitor or where a resident was placed under undue pressure to make or change a will or both. In most such cases, staff felt they could do little to intervene. In general, responses to the questionnaire suggested staff misunderstanding of the confidential nature of the relationship between a solicitor and a client and that respondents had an exaggerated view of the power and responsibility of doctors and of family members to influence residents' decisions and interactions with solicitors regarding will-making. This study suggests the need for improved Guidelines for staff regarding will-making in residential care including advice on how to proceed where concerns including undue pressure arise.

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1. Introduction

"A son can bear with equanimity the loss of his father, but the loss of his inheritance may drive him to despair" (Machiavelli, *The Prince*, Chapter 27).

1.1. Wills and freedom of testation

A person's power to determine who should inherit his or her property has been a central aspect of succession law since the 19th century (Probert, 2016). The scope and range of this power vary. Some jurisdictions, e.g. the United States and England and Wales, have tended to be more protective of freedom of testation, although even these jurisdictions now allow a testator's family members to make a court application if they consider that they were not properly provided for (Probert, 2016). Many European jurisdictions are more restrictive, imposing stringent and absolute legal obligations to benefit spouse and children

(Hayton, 2002). Ireland fits between the two dominant models (Mee, 1991). A testator's entitlement to dispose freely of his or her assets is restricted by the entitlement of his or her spouse to a 'legal right share' (of one half of the testator's estate if there are no children and one third of the estate if there are children). A testator's children do not have any automatic entitlement to a share although they can make an application to court on the basis that the testator has failed in his or her 'moral duty' to make proper provision (Succession Act 1965, s. 117).

While the proportion of the testator's estate available to be disposed of by will varies across jurisdictions, there is much more consistency in the approach to the enforcement of wills. As summarized by McCarthy J in the Supreme Court of Ireland, '[i]t is a fundamental matter of public policy that a testator's wishes should be carried out, however, at times, bizarre, eccentric or whimsical they may appear to be' (Re Glynn Dec'd, 1989). The basis for this public policy is not immediately clear. Many commentators have debated why we care so much about respecting the wishes of the dead given that the dead are (insofar as we know) wholly unaffected by the failure to give effect to their wishes (Brazier, 2002; Feinberg, 1984; Harris, 2002; Pitcher, 1984; Sperling, 2008). Arguably, the most persuasive grounding for the obligation to respect testamentary dispositions lies in an adherence to 'the practice of promise keeping' (Brecher, 2002) and to the harm which the living would suffer if they were unable to dictate how certain matters should

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be dealt with after their death (Donnelly & McDonagh, 2011; Harris, 2002; McGuinness & Brazier, 2008).

In a more practical sense, a court finding that a will is invalid has one of two results. If the testator has made a prior will (which has not been destroyed), this will (which would have been revoked by a valid new will (Succession Act 1965, s. 85(2)) will be revived. If there is no prior will, the testator is treated as if s/he had died intestate and his or her estate is distributed in accordance with the applicable statutory provisions for distribution on intestacy. In Ireland, this means for example, that if a person has a spouse but no children, the spouse inherits the entire estate, while if there is a spouse and children, the spouse inherits two-thirds of the estate and the children share the remaining third equally between them (Succession Act 1965, s. 67).

1.2. Disputes about wills

It has been said that disputes about inheritances accounted for about two thirds of all civil litigation in ancient Rome (Kelly, 1976). More recently, research from the United States suggests that between 0.25 and 3% of all wills lead to litigation, although only about 1% of challenges are successful (Horton, 2012). While wills are not challenged to the same extent in other jurisdictions, disputed wills regularly come before the courts in the United Kingdom and Ireland. Media reports from both the UK and Ireland indicate that such disputes are rising (Murphy, 2014; Palin, 2015). For example, Ministry of Justice figures from England and Wales show that the High Court heard 178 probate disputes in 2014 compared with 97 in 2013 (Bryant, 2016). Moreover, the true number of contested wills is likely to be much higher given that only a small minority of cases ever reach the courts. Contested wills are not just expensive, but they also give rise to significant human costs, including painful family disagreements and ongoing family feuds.

Although wills may be contested on several grounds (including uncertainty in language or objects and failure to comply with formalities), among the most common grounds identified in US empirical studies are allegations that the testator lacked capacity to make the will or s/he was subject to undue influence at the time the will was made (Ryznar & Devaux, 2013; Schoenblum, 1987). In a recent Consultation Paper, the Law Commission of England and Wales identified several possible ways to reduce contestation of will on these bases (2017). The methods considered included the introduction of a certification regime, whereby a testator could have his or her capacity certified by a professional (healthcare, legal or social work) or by an independent mental capacity advocate at the time the will was made and/or the introduction of an accreditation scheme for doctors performing capacity assessments. Although the Law Commission stopped short of recommending the introduction of a formal certification scheme (2017: 46–47), it is highly likely that testators and their legal advisors will increasingly draw on advance certification to minimize the possibility of successful contestation.

Most of what we know about contested testamentary capacity and alleged undue influence emerges from cases before the courts, and these inevitably provide a limited picture of how wills are made in practice. There is limited information available about how testators actually go about the process of making wills, the pressures they encounter or about the role of healthcare professionals in this process. This article draws on a study of nursing staff working in Irish nursing homes, to shed light on the will-making process. While the discussion focusses on the position in Ireland, the issues which arise are relevant across all jurisdictions in which will-making is a social and legal phenomenon.

1.3. Aim of study

This study derived initially from an impression that will-making can be a source of uncertainty and anxiety for nursing home staff who may be unsure of the different roles and responsibilities of solicitors, doctors and staff and of residents and their families. We were concerned to ascertain how will-making in nursing homes happens, the extent to

which nursing home staff are involved in the process; and, the prevalent views and beliefs among nursing home staff about will-making. We also sought to determine the extent to which staff in nursing homes had encountered practices in respect of will-making which gave rise to concern and how they had addressed these.

2. The legal framework

To understand the study in its legal and social context, it is necessary to set out core aspects of the applicable legal framework. Although issues regarding testamentary capacity and undue influence (as well as fraud) may frequently 'merge into one another' in practice (In the Estate of Fuld, 1968) they have distinctive legal bases and need to be examined separately. The discussion here concludes by considering the application of the 'Golden Rule' (regarding contemporaneous evidence by a medical practitioner) in Ireland.

2.1. Requirements for testamentary capacity

The Succession Act 1965 requires that, to be valid, a will must be made by a person who is of 'sound disposing mind' (s. 77(1)). The foundational test to determine whether this is the case remains that laid down in the English case of *Banks v Goodfellow in 1870*. The testator, Mr. John Banks, had a history of mental illness and had been confined in an institution in 1841 (some 24 years before his death). He remained delusional after his release, believing that he was pursued by devils and evil spirits and by a person called Featherstone Alexander. He was however entirely capable of conducting his business affairs and was described as being careful with money. At trial, the jury found him to have testamentary capacity and this verdict was upheld by the Court of Appeal. In an early adoption of the functional approach to capacity, the Court affirmed that testamentary capacity must be determined on the basis of the task to be performed at the time it has to be performed. The test as set out by Cockburn CJ had four aspects. The testator must have the capacity to understand:

1. That s/he making a will and the effect of his or her testamentary disposition;
2. The extent of his or her estate and the property which can be disposed of by the will;
3. Those who have claims on his or her estate; and
4. His or her understanding must not be impaired by any disorder of the mind or delusions.

There has been some uncertainty regarding whether the third and fourth elements of the test should be applied together as a single test or whether they should be applied separately (Law Commission, 2017: 26–27; Reed, 2016). On one view, the fourth element of the test simply provides further detail on the third element (Reed, 2016: 170). However, in *Sharp v Adam*, the England and Wales Court of Appeal held that the test should be seen as having four elements, with the fourth element being 'concerned as much with mood as cognition' (2006: [93]). The testator in this case was significantly physically disabled because of multiple sclerosis and was taking 'a large cocktail of drugs' for pain and depression (2006: [26]). He disinherited his daughters, with whom he had had a good relationship and instead left his most of his estate to the managers of his stud farm. The Court of Appeal agreed that the irrationality of the testator's decision to disinherit his daughters could justify the trial judge's finding that the testator lacked capacity. Even though the testator met the cognitive aspects of the standard, his disease had essentially poisoned his mind against his daughters (2006: [94]).

The Irish courts have on several occasions reiterated the applicability of the test in *Banks v Goodfellow* in Ireland (Flannery v Flannery, 2009; O'Donnell v O'Donnell, 1999; Scally v Rhatigan, 2010). This will continue to be the case even after new capacity legislation commences because

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