

THE CIRCUIT COURT

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

[2020 No. 06299]

BETWEEN:

SEAMUS CONROY

PLAINTIFF

AND

CORMAC Ó'CEALLAIGH

DEFENDANT

Judgment of His Honour Judge John O'Connor delivered on the 20th day of December 2021

1. Introduction:

1.1 The plaintiff, Seamus Conroy [Mr Conroy], in these proceedings seeks an order from this court, admitting to probate in solemn form, a document dating the 17 April 2018 as the last will of Joseph Kavanagh ["Mr Kavanagh"], deceased, together with a revocation of the will of Mr Kavanagh dated 28 August 2014, which was admitted to probate in common form on the 22 January 2020. The plaintiff also applies for accounts and enquiries as appropriate. In this regard, Mr Conroy claims he is the sole executor of a will dated 17 April 2018 and entitled to the house contents and net proceeds from the sale of Mr Kavanagh's dwelling house.

1.2 The defendant, Mr Cormac Ó'Ceallaigh, is an executor and solicitor of the will dated the 28 August 2014 and alleges fraud and undue influence by the plaintiff in regard to the said will of the 17 April 2018.

1.3 In separate proceedings, Mr Ó'Ceallaigh, as plaintiff, requires an order from the court seeking Mr Conroy, as defendant, to account for all monies received from Mr Kavanagh. This matter was subject to various court applications, court orders and undertakings furnished to the court.

1.4 The Court heard testimony from the following persons over three days:

- Ms Rita Cahill – as to due execution of the will
- Mr Derek Nangle – as to due execution of the will
- Mr Derek Reddy – as to capacity
- Mr Nicholas Duffy – as to capacity
- Mr Seamus Conroy – plaintiff
- Ms Oonagh Cusack – partner of the plaintiff
- Mr Alan Harmon – undertaker
- Ms Elaine McGuirk – niece of the deceased's spouse and a beneficiary under the will dated 28 August 2014
- Mr Cormac Ó'Ceallaigh – defendant and solicitor of the deceased
- Mr Paul Leonard – Accountant, Expert Witness

2. **Background Facts:**

2.1 Joseph Kavanagh was born on 13 August 1931 and died a widower without issue on 20 August 2019. By common synthesis of evidence, the late Mr Kavanagh was a modest but very good man, whose passions in life were religion, sport (specifically watching snooker and golf), and current affairs. He was a teetotaller. He lived for many years with his wife, Frances, in a small dwelling house located on Swords Street in Dublin. Prior to his retirement, he worked as a printer and his wife, Frances, worked

as a shop assistant. They were a close couple who regularly went to Lough Derg, otherwise known as St. Patrick's Purgatory, on penitential pilgrimages. They also regularly visited Knock Shrine, a Marian Shrine located in County Mayo and attended mass every day in the Catholic Church on Aughrim Street, Dublin, which was located five minutes walking distance from their house. They also gave regular stipends to charities.

2.2 Mrs Kavanagh was admitted to the Mater Hospital in 2013, and shortly thereafter in September 2013, she was transferred to St Mary's Hospital in the Phoenix Park in Dublin. In this respect, Mrs Kavanagh was classified as a dependent older person and therefore she remained in that hospital until her death on the 27 December 2016. While she was a patient in hospital, Mr Kavanagh regularly visited his wife. He was in receipt of a contributory old age pension from the Irish State. His solicitor was Seán Ó'Ceallaigh, whose practice was located in Phibsborough, near where he lived. Mr Ó'Ceallaigh's son, Mr Cormac Ó'Ceallaigh, solicitor, commenced acting for Mr Kavanagh in 2013.

3. Will dated 28 April 2014:

3.1 On the 28 April 2014, Mr Kavanagh made a will whereby he appointed the said Mr Cormac Ó'Ceallaigh as sole executor of his will. He devised the contents of his house to his wife's niece, Elaine McGuirk, and the residue of the whole estate to his wife, Frances, provided she survived him by 30 days and if she didn't so survive him, the estate was left 80% to various charities and 10% to each of his wife's nieces, one of whom was Elaine McGuirk.

3.2 There is no attendance note by the solicitor of the instructions received for the will.

4. Will dated 28 August 2014:

4.1 Mr Kavanagh made a subsequent will on 28 August 2014 whereby he again appointed the said Cormac Ó'Ceallaigh as sole executor of his will. He devised the contents of his house to his wife's niece, Elaine McGuirk, and the residue of the whole estate to his wife, Frances, provided she survived him by 30 days and if she didn't so survive him, the following provisions were made:

60% to named charities, 10% to a niece of his wife and 30% to his wife's niece
Elaine McGuirk

4.2 There is no attendance note by the solicitor as to the instructions received for the will.

5. Title deeds of the dwelling house:

5.1 On the 20 March 2018, Mr Kavanagh called to the offices of Cormac Ó'Ceallaigh and Co. Solicitors and collected his title documents and signed a receipt. Mr Cormac Ó'Ceallaigh furnished an attendance note for the 20 March 2018, but only drafted towards the end of 2019, which stated:

"He [Mr Kavanagh] had telephoned at 2.32pm and came in after 3.30pm. He was looking for his deeds. I [Cormac Ó'Ceallaigh] enquired what for and he said he needed to use them to borrow money. I was a bit taken aback as no bank would advance him a loan at his age, he seemed agitated and under pressure, kind of like a look of fear in his eyes, he was on a mission and needed his deeds. I tried to slow him down and find out what was going on, he looked dishevelled, I did not want to upset him so I gave him his deeds and got him to sign a receipt for them."

6. Evidence as to due execution of the will:

6.1 Ms Cahill stated she lived next door to Mr Kavanagh for almost sixty years and for most of that period had known Mr Kavanagh. She described how he went to mass every day and of his involvement with the Legion of Mary. She described how Mr Kavanagh worked as a printer by occupation and his wife, Frances, worked as a shop assistant in a grocery shop. She stated she did not know Mr Kavanagh's relations. She attended the funeral of Frances Kavanagh when she died.

6.2 On the day the alleged will of the 17 April 2018 was signed, she informed the court that Mr Kavanagh knocked on her window and asked her to come into his house to sign his will. When questioned on Mr Kavanagh's demeanour, she said it was "*day to day*". She entered Mr Kavanagh's house and sat alongside Mr Kavanagh on a sofa in the front room. Leaning on a book, she signed the alleged will. Ms Cahill told the court she did not see the contents of the document she was signing as she wasn't looking. She was only concerned with signing the document. She testified that she could have read the will if she wished, but she did not do so. Ms Cahill did not see Mr Kavanagh's signature on the document. She further testified that she did not see Mr Kavanagh sign the will. After she signed her name she handed the will to Mr Nangle who had arrived and then she left the house. She did not see Mr Nangle sign the will.

6.3 Derek Nangle is a self-employed taxi-driver. He states he knew Mr Kavanagh before Mr Conroy came to know him. He testified that he would have seen "*Seamus and Joe eating together*". He further testified that when he stepped in to act as a taxi driver whilst Mr Conroy was away, it was always Mr Conroy who paid him.

6.4 He testified that on the 17 April 2018, he drove to Mr Kavanagh's house, knocked on the door and entered the house where both Mr Kavanagh and Ms Cahill were present. Mr Nangle then testified that in the presence of himself and Ms Cahill, Mr Kavanagh filled out the will document and signed the will. Mr Kavanagh then handed the alleged will to Ms Cahill who also signed it and then Mr Nangle signed

the document. He testified that all three signatures were done in the presence of each other in the room.

6.5 The evidence of Mr Nangle contradicts Ms Cahill's evidence and I will return to this later in my judgment.

7. Evidence of Seamus Conroy:

7.1 Mr Conroy's occupation is that of a taxi driver and this was also the case in connection with his dealings with Mr Kavanagh. He previously worked as a photographer for an Irish Newspaper for ten years. Later, after being made redundant, he worked as a freelance photographer and then obtained a taxi licence. He testified to the court that he currently has some medical issues which he stated results in memory loss. He said he first met Mr Derek Nangle, also a taxi driver, outside the Aisling Hotel, in the course of their work as taxi drivers.

7.2 According to Mr Conroy, he first met Mr Kavanagh in early August 2015 when he flagged down his taxi on the North Circular Road. He brought Mr Kavanagh to St. Mary's Hospital in the Phoenix Park, waited for him while he visited his wife Frances Kavanagh and then brought him home. He charged in total €30 for the whole trip. Mr Kavanagh was delighted with the fare as he stated it was €20 less than he was normally charged by other taxi drivers. Mr Conroy gave Mr Kavanagh his business card and thereafter, he regularly collected Mr Kavanagh. This continued until Mrs Kavanagh died in December 2016. Mr Conroy stated that Mr Kavanagh was 84 years old when they first met, and that he was deeply religious, stating "sport and religion were his big loves. He loved snooker and golf and going to the movies."

7.3 After December 2016, Mr Conroy states he collected Mr Kavanagh daily and brought him to lunch in various establishments such as public houses, and then brought him home. Mr Conroy states he charged €30 per day, but it was paid at the end of the week out of Mr Kavanagh's contributory old age pension. Mr Conroy stated

to the court that he always collected Mr Kavanagh's pension but always gave it to Mr Kavanagh, who in turn gave him €210. This left Mr Kavanagh with a very small net amount of money remaining from his pension. On the rare occasions when Mr Conroy was unable to collect Mr Kavanagh, he arranged for one of two other taxi driver friends to collect Mr Kavanagh and bring him to lunch. However, in practice, this alternative taxi service was usually undertaken by Mr Nangle. When this occurred, Mr Conroy stated to the court he paid Mr Nangle "at least €50" per day even though Mr Kavanagh paid his usual €210 to Mr Conroy at the end of the week. In other words, Mr Conroy stated to the court he subsidised Mr Nangle's daily charges.

7.4 The following extract from Mr Conroy's affidavit dated the 27 August 2020, demonstrates some of Mr Conroy interactions with Mr Kavanagh.

On 13 August 2015 when I was bringing Joe to visit his wife he mentioned to me that it was his birthday. After visiting his wife I asked him to join me for something to eat in The Halfway House in Ashtown in circumstances where I knew he was going to spend the rest of the evening alone. I paid for his meal.

On the following day, 14 August 2015, Joe rang me on my mobile phone and asked if I would take him for lunch on the way to visit his wife in hospital. I agreed and we had lunch in the same establishment and afterwards I brought him to visit his wife. Again, I paid for the lunch.

For the next sixteen months, daily, I collected Joe up from his house at 12 noon, brought him for lunch and afterwards to visit his wife in hospital and return home. Sometimes he asked me to take him shopping, to the post office, to the bank etc. Despite the increased frequency in journeys and me paying for his lunch (the average cost of lunch €15.00) I continued to only charge him €30.00 per day. This continued until his wife passed away in December 2016.

Post the death of Joe's wife and until his own death I continued to pick him up daily and bring him to lunch, shopping and assist him with his daily requirements such as going to the bank, shops, doctors, post office etc.

We developed a friendship and I could not bring myself to charge him more than the €30.00 we originally agreed for a return visit to the hospital.

On the very few occasions I was not available I had F McK (sic) or Derek Nangle drive Joe. I had to pay them €50.00 for the taxi service alone on these occasions.

I often purchased food for Joe from my own resources and I always ensured he had credit on his mobile phone. I paid for his dry cleaning in the dry cleaners in the Tesco shopping centre in Prussia Street, Dublin 7 and his occasional visits to the chiropodist near Aughrim Street amongst other essentials. I did not consider these chores as a burden, I was glad to help Joe whom I considered a friend.

Joe was a very lonely man. He loved meeting and talking to people, our daily visits and I enjoyed his company. He took a keen interest in current affairs and politics. He loved philosophy, snooker, old films and could quote from George Bernard Shaw, Oscar Wilde, GK Chesterton and Thomas Moore.

Since I came to befriend him no family member came to visit him to the best of my knowledge and belief. He never spoke about his relations."

7.5 In examination in chief at the trial Mr Conroy testified that he drove Mr Kavanagh on the 20 March 2018 to Ó'Ceallaigh Solicitors in order to facilitate Mr Kavanagh collecting the title documents.

7.6 According to Mr Conroy, Bourke's Funeral Undertakers were engaged to deal with the funeral of Mr Kavanagh's wife. However he stated that Mr Kavanagh only told him about the funeral account in February 2018. In that month, according to Mr Conroy, Mr Harmon requested payment. This upset Mr Kavanagh and Mr Conroy commented on foot of this that "Joe was going crazy".

7.7 Mr Conroy stated he was advised by Mr Harmon to go to the North Circular Road to obtain Mrs Frances Kavanagh's death certificate. He therefore first went to the Registrar of Births and Deaths in Lombard Street, Dublin and then to the relevant department in the Navan Road, Dublin to collect a funeral grant for almost €2,000. Mr Conroy then stated he paid €2,300 out of his own money and told Mr Harmon that Mr Kavanagh could pay the balance of €900 out of his money. Mr Conroy stated that he denied to Mr Harmon that he was Mr Kavanagh's financial controller when Mr Harmon queried the situation.

7.8 Mr Conroy further outlined that despite the fact Mr Kavanagh was a regular attendee at Knock Shrine, Lough Derg and the Legion of Mary, he told Mr Conroy that he felt let down by the charities, which added to his loneliness. He stated that Mr Kavanagh told him that despite his generosity towards charities that no charity in return would give him anything. In this respect he referenced Mr Kavanagh's desire for a walk in shower in the house, and his belief that Mr Kavanagh had an expectation of some charitable assistance, though this never materialised.

7.9 Mr Conroy stated that Mr Kavanagh's immediate family were not involved in his care due to their advanced age.

7.10 Mr Conroy outlined how he always collected Mr Kavanagh's pension up to Mr Kavanagh's death. This even occurred when Mr Kavanagh was a patient in the Mater Hospital and later in Fairview Hospital in Dublin.

7.11 When Mr Kavanagh died, Mr Conroy stated he was informed by Mr Kavanagh's niece Elaine McGuirk. He stated that he noted he held an envelope which he believed to contain memorabilia relating to Mr Kavanagh's grave. In this respect, he referenced Mr Kavanagh's devotion to St Monica, St Padre Pio and St Bernadette of Lourdes. It transpired that this envelope contained the alleged will dated 17 April 2018. Referring to Mr Kavanagh's death, Mr Conroy in emotive terms stated to the

court that he and Mr Kavanagh were very close. Mr Conroy attended the funeral mass and subsequent burial of Mr Kavanagh.

7.12 After Mr Kavanagh's death, the deeds of the house were found on the sitting room floor of Mr Kavanagh's house.

7.13 When the house was put up for sale, Ms Cahill, Mr Kavanagh's neighbour and witness to the purported will dated 17 April 2018, notified Mr Conroy of the sale and informed him of the existence of the will. He stated that Mr Kavanagh never mentioned any will to him and he was unaware of the existence of the will until Ms Cahill informed him, notwithstanding that at all times this will was in Mr Conroy's possession.

7.14 Mr Conroy stated that Swaine Solicitors in Galway were his solicitors and had acted for Mr Conroy in a previous matter relating to a road traffic accident. Mr Conroy testified to the Court that Mr Kavanagh was unhappy with Ó'Ceallaigh Solicitors and that Mr Kavanagh did not trust the firm and that was the motivation for withdrawing the title deeds from Ó'Ceallaigh Solicitors. Mr Conroy stated to the Court that Mr Kavanagh believed the title deeds for the property were better off in his house.

7.15 Mr Conroy testified that he did not take an active part in pre-court proceedings before the hearing of this action due partly to his treatment for a medical issue and partly due to the five kilometre travel restriction in place during the global pandemic.

7.16 In cross examination, the court formed the opinion that Mr Conroy's memory loss, which he attributes to a side effect of his medical treatment was somewhat selective. In matters where the evidence could benefit his narrative, he was crystal clear in his replies to questions. However, where answers to queries might be negative to his narrative, he couldn't recollect those events. For example, in an affidavit to court, he testified he was never involved in prior court proceedings. When it was put to him that this statement was untrue and that there were prior serious, but unconnected, contentious court matters which went to his credibility as a witness, he

first claimed not to remember. When the court rose for a short period to allow him to recollect his replies, he was clearer, although he blamed other persons for the events. For example, when it was put to him that he authorised undertakings to the court in respect of ownership of a property which he didn't own, he blamed his partners' solicitor. As will be observed later in this judgment his partner, Ms Oonagh Cusack, did confirm that he had a beneficial but not a legal ownership of the dwelling house held in her sole name. It also appears he didn't have €15,000 in a bank account in respect of a different undertaking furnished to the court, although Mr Conroy's counsel pointed out that monies nearing this sum were held in different financial institutions by him.

7.17 Overall the picture that emerged from Mr Conroy's own evidence is that he had engaged with Mr Kavanagh to the extent that he had considerable control over Mr Kavanagh's financial and personal affairs. It is of particular note Mr Kavanagh was going through a very vulnerable period in his life, with his wife's illness and subsequent death resulting in extreme loneliness.

7.18 The evidence of Mr Derek Reddy, Mr Kavanagh's barber and Mr Nicholas Duffy, a builder, was proffered to demonstrate to the court that Mr Kavanagh's comprehension was not affected, and this is considered in paragraphs 10.1 and 11.1 of this judgment. However, it is for the court to decide, taking all of the evidence into account, if the issues described affected Mr Kavanagh's decision making capacity and if he had the requisite capacity to make decisions on his own behalf, noting Mr Kavanagh did not receive legal or independent advice. A noticeable factor in this scenario was the collection of the contributory old age pension and the retention of the vast majority of it, approximately 80%, by Mr Conroy.

8. Evidence of Ms Oonagh Cusack:

8.1 Ms Oonagh Cusack is the partner of Mr Conroy. She is a bookkeeper by occupation. She confirmed in her evidence that her dwelling house, though legally in her own name, is held in trust for the benefit of herself and Mr Conroy and that therefore Mr Conroy's previous undertaking to court with respect to the dwelling house was, in her view, furnished in good faith.

9. Evidence of Mr Alan Harmon:

9.1 Mr Alan Harmon, of Bourke's Funeral Undertakers, gave evidence as to the nature of the funeral account of Mrs Kavanagh, the delay involved in payment and, in his opinion, his concerns about Mr Conroy's relationship with Mr Kavanagh, which he stated he reported to an authority.

9.2 Mr Harmon gave details about the funeral arrangements and the funeral costs. He testified that he only talked to Mr Kavanagh twice, once in 2017 and once in 2018. Afterwards he dealt with Mr Conroy by text. He gave details of a bereavement grant. He did not have Mr Kavanagh's phone number. He further testified that Mr Conroy told him that he must contact him in connection with any issues as Mr Kavanagh's investments were handled by Mr Conroy. He stated that at no stage did Mr Kavanagh indicate he would not pay for Mrs Kavanagh's funeral.

10. Evidence of Mr Derek Reddy:

10.1 Mr Derek Reddy testified that his occupation is that of a barber and has been so for thirty-four years. He testified that he cut Mr Kavanagh's hair regularly during most of that period. He testified that Mr Conroy brought Mr Kavanagh to the barbers. Mr Reddy testified that Mr Kavanagh found it difficult to use the stairs but that he would talk about snooker and sport in general during these visits and that he was media savvy.

11. Evidence of Mr Nicholas Duffy:

11.1 Mr Nicholas Duffy testified that he has worked in the building trade for thirty years and did some repairs on Mr Kavanagh's house, including chimney work and fixing a tap leak. Mr Kavanagh paid him. In a conversation with Mr Kavanagh, Mr Duffy referred to the issue of the bill for Mrs Kavanagh's funeral, which he stated upset Mr Kavanagh.

12. Evidence of Ms Elaine McGuirk:

12.1 Ms McGuirk is a niece of Mr Kavanagh's wife Frances. She gave a history of her relationship with Mr and Mrs Kavanagh and also about the use of Bourke's Funeral Undertakers for Mrs Kavanagh's funeral. She testified that Mr Kavanagh referred to Mr Conroy as his "taxi friend" and she provided an account of her understanding of that relationship.

12.2 Ms McGuirk testified about Frances Kavanagh's stay in St Mary's Hospital and issues concerning the Fair Deal Scheme, whereby the state provides financial support for those in long-term nursing home care in return for certain undertakings.

12.3 Ms McGuirk further outlined how Mr Kavanagh had shown her his savings account prior to his wife's death and according to her testimony, he had enough money for two funerals and a headstone. She testified that Mr Kavanagh's solicitors were Cormac Ó'Ceallaigh & Co Solicitors. While Mr Kavanagh had mentioned another funeral undertaker, he ultimately opted for Bourke's Funeral Undertakers for his wife's funeral. She ultimately made the arrangements for the funeral.

12.4 Ms McGuirk testified that when Mr Kavanagh asked her to be an executor for a previous will she considered it to be an honour. She referred to her own father and mother's death. She remembered Mr Kavanagh showing her his will, outlining the bequests to the different charities and informing her that both she and her twin sibling

received 10% of the estate respectively. She testified that she was not aware that Mr Kavanagh changed his will to give her 30% of the estate.

12.5 Subsequently, Ms McGuirk testified that in 2016 when Frances Kavanagh was in hospital, Mr Kavanagh requested her to do errands back and forth to the house. Mr Kavanagh took courtesy buses to the Phoenix Park but later started to take taxis. She outlined that they were not a money orientated family and, in general, they did not avail of loans or hold outstanding debt. After Mrs Kavanagh died, she stated Mr Kavanagh was very distraught, stating "Joe was lost without Frances".

12.6 Ms McGuirk met Mr Conroy as Mr Kavanagh's "taxi friend". She stated that Joe informed her that his taxi friend invested money for him to the tune of €5,000. Upon hearing this, she stated alarm bells began to ring. She stated Mr Conroy said to her that she had enough to do in her day job. She referred to Mr Kavanagh's savings account and that he only had €120 in one account and €220 in the other account at this stage. She testified that Mr Kavanagh informed her Mr Conroy had also invested a further sum of €10,000. She stated Mr Kavanagh was adamant about payment of the funeral account of Frances Kavanagh. She testified that when she queried the investments with Mr Kavanagh, he told her he believed his investment was maturing through in two weeks. She also testified that Mr Conroy stated to her he paid the bill in relation to the funeral account.

12.7 Ms McGuirk further testified that she was not aware Mr Kavanagh was in hospital at one stage and found out that Mr Conroy had identified himself as next of kin to the hospital. When Mr Kavanagh returned home from hospital, she testified that he was "a bit distressed". In the summer of 2019, Mr Kavanagh informed her that Mr Conroy was looking to buy his house. This, she testified, raised alarm bells for her. Mr Kavanagh told her that Mr Conroy said he would buy the house and he would look after him for life.

12.8 Ms McGuirk referred to phone calls from the hospital and the constant interaction between Mr Conroy and Mr Kavanagh. While she referred to a house visit by builders, she, in general, was of the opinion that Mr Kavanagh was not mixing with people. She testified that Mr Conroy brought Mr Kavanagh to the bank on occasions. When Mr Kavanagh died, she dealt with the Gardaí and engaged with Bourke's Funeral Directors. She contacted Mr Conroy for the purpose of retrieving the keys of Mr Kavanagh's house from him, as the Gardaí were concerned for the security of the house. She referred to Mr Conroy getting a shirt and tie for the funeral directors. At the funeral, she met with Mr Conroy and his partner Ms Cusack.

12.9 Ms McGuirk referred to Mr Conroy's solicitors as Swaine Solicitors. She testified that Mr Kavanagh told her that he was changing solicitors. Referring to Mr Conroy, he stated the reasoning behind the decision was "Seamus did not like Ó'Ceallaigh as he deemed them too old fashioned". According to Ms McGuirk, Mr Kavanagh informed her that he was moving to Swaine Solicitors, who were based in Galway. She said the deeds of the house had always been with Mr Kavanagh's solicitor but after Mr Kavanagh's death, she found them in Mr Kavanagh's house.

12.10 Mr Cormac Ó'Ceallaigh gave evidence as to the signing of the will dated 28 August 2014 and of Mr Kavanagh's subsequent collection of the title deeds, which is referred to in paragraphs 4, 5 and 15.7 of this judgment.

13. Evidence of Paul Leonard:

13.1 Mr Paul Leonard testified as an expert witness in relation to the accounts. He said he regarded transactions from 2015 onwards as unusual. At the date of Mr Kavanagh's death, he stated Mr Kavanagh had only nominal amounts of money in his bank accounts.

14. Legal submissions on behalf of the plaintiff:

14.1 The plaintiff's counsel, in submissions, stated that the defendants did not challenge the testamentary capacity of the testator during the trial. They submitted that where the will is rational on its face, soundness of mind will normally be presumed. The decision of *RAS Medical Ltd trading as Park West Clinic v RCSI* [2019] IESC 4 was brought to the Courts attention. In this decision, the Supreme Court held at paragraph 7.6, that where

“there are facts which are material to the final determination of the proceedings and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged.”

14.2 In relation to the argument that Mr Kavanagh's alleged lack of testamentary capacity was not properly argued in Court, they state

“No expert witnesses were called to give evidence as to Mr Kavanagh's capacity at the time of drafting the purported will The onus of rebutting the presumption of capacity rests on the defendant.”

The plaintiff therefore argues the defence failed to rebut this presumption in court and thus cannot rely on written submissions after trial to bring the court's attention to the matter. They rely on the rule in *Browne v Dunn* to support this. The rule in *Browne v Dunn* (1893) 6 R. 67

“prevents a party by submissions written or oral after trial, or by further testimony, from raising issues or contested facts, which have not been squarely put to the witness who ought, in all basic fairness, be given an opportunity of commenting upon same, whether it be to agree or reject or refute, or qualify or contextualise or explain.”

14.3 Counsel for Mr Conroy alleged that numerous documents were withheld from them, as Mr Conroy's lawyers, by the defendant's solicitors until the last minute or withheld entirely, including solicitor attendances relating to the drafting of the April 2014 Will and the August 2014 Will, and the attendance note of 9 July 2019 when Cormac Ó'Ceallaigh said Mr Kavanagh had attended him to update his will. In relation to this last attendance at Cormac Ó'Ceallaigh Solicitors, the plaintiff claimed that Cormac Ó'Ceallaigh did not operate at any urgency to update the will and alleged that this was due to their contention that he wished to preserve his position in the August 2014 will as sole executor, and that this created an issue of a breach of fiduciary duties to Mr Kavanagh. However the court is of the view that no cogent evidence was brought up to justify this assertion and I do not accept that the allegation has any validity.

14.4 The plaintiff's legal team commented on a further affidavit of Cormac Ó'Ceallaigh which evidences the execution of three earlier wills executed on 18 February 1999, 21 May 2011 and 12 June 2013. They submitted that the plaintiff seeks to rely on this as evidence of Mr Kavanagh's familiarity with making and updating wills.

14.5 The plaintiff's submissions draws the court's attention to the decision of the High Court, in *Leopold v Malone* [2018] IEHC 726, where Ms Justice Pilkington held at paragraph 39:

"where there is a direct contradiction in respect of each attesting witnesses as to the manner in which the testamentary document was witnessed then in my view, on the balance of probabilities, I must assume that this will was executed pursuant to its terms."

14.6 The plaintiff addresses the defendant's claim of undue influence by relying on the decision of *Rippington v Cox and Butler* [2015] IEHC 516 where the court held, in the case of wills, there is no presumption of undue influence and the burden of

proving undue influence rests with the person alleging it. They point out that Mr Justice Noonan laid down three steps which must be satisfied to successfully prove that the testator was unduly influenced:

- (a) *“That the person alleged to exert the influence had the power or opportunity to do so;*
- (b) *That undue influence was in fact exerted;*
- (c) *That the will was the product of influence.”*

14.7 The plaintiff submitted that the defendant failed to satisfy this test and that the claim of undue influence is based heavily on the weekly subtraction of €210 from “a notional weekly gross sum posited barely above that, which turned out to be wide of the mark on the actual evidence”.

14.8 The submissions submit that the expert evidence of Paul Leonard, forensic accountant, demonstrated that the unexplained movements of money began before the plaintiff ever met Mr Kavanagh.

14.9 On the question of due execution, the plaintiff relied on the decisions of *Kavanagh v Fegan and Others* [1932] IR 566 and *Cooke v Henry* [1932] IR 574. The first case concerned a will with an attestation clause where one witness was too ill to give evidence and the other witness had a vague recollection of the execution. The court held the evidence of the second witness was not sufficiently reliable and definite to rebut the presumption of due execution which arose from the existence of a regular attestation clause. The second case concerns a situation where the testator signed the will before the witnesses arrived, yet acknowledged his signature in the presence of the witnesses before they signed the will. The will was admitted to probate.

15. Legal submissions on behalf of the defendant:

15.1 The defendant raises ten points in written submissions. The first point related to delay in issuing the Testamentary Civil Bill. The defendant submitted that the plaintiff failed to issue a caveat prior to the Grant of Probate and failed to make an

application to revoke the Grant of Probate in the period of January 2020 to November 2020. They contend that the plaintiff indicated in cross examination that he had not given instructions to his solicitor or junior counsel to bring a High Court Appeal against a Court Order of 4 September 2020. The defence submitted the proposition that if the High Court Appeal had not taken place, there is a strong possibility the plaintiff might not have had a Testamentary Civil Bill issued.

15.2 The defendant submitted that the court should find against the credibility of the plaintiff for a number of reasons. Firstly, he denied he took money from Mr Kavanagh for investment purposes despite the compelling evidence of Ms McGuirk and Mr Harmon to the contrary. Secondly, in affidavit, the plaintiff swore that he had never been in court previously in a civil case. Two prior cases were put to the plaintiff in cross examination, where he indicated that both cases were settled by the bank, suggesting he had no further liability. Finally, they submit that Mr Conroy did not deny that he continued to take €210 per week from Mr Kavanagh when he was in hospital in 2019 for approximately sixty-seven days. They suggest that Mr Conroy also indicated he had Mr Kavanagh's ATM Card during this time.

15.3 The third point the defence submits relates to the alleged failure of Mr Conroy to comply with court orders. The defence submitted that the plaintiff was in breach of Court Orders of the 30 July 2020 and 4 September 2020. The affidavit dated 4 June 2021 deposed to the undertaking handed into court on 30 July 2020. The defence submitted that this undertaking was based on assertions which have been proven to be false, suggesting Mr Conroy had no intention of upholding them. The defendant also submitted that the plaintiff engaged in obstructive tactics to prevent the sale of Mr Kavanagh's dwelling house. They referred the court to the decision of Ms Justice Hyland in *Greenwich Project Holdings Ltd v Con Cronin* [2021] IEHC 33. In this regard they stated that the plaintiff should be sanctioned for the

“significant, material or persistent procedural failure to comply with orders imposed”.

15.4 The fourth point raised relates to the personal condition of Mr Kavanagh on the 20 March 2018, when he collected his title deeds from Ó'Ceallaigh Solicitors. The defence submitted that the attendance note furnished by the defendant reflects the clear memory of Mr Ó'Ceallaigh within less than 21 months of the event. The defence claimed that this description indicates a person not displaying free will as he appeared under pressure, fearful, delusional and unable to comprehend and appreciate that the bank would not give him a loan at his age. The defence submitted that the title deeds were entrusted in Cormac Ó'Ceallaigh & Co Solicitors by Mr Kavanagh for a considerable number of years for safe, secure keeping and the act of taking them from the office and leaving them on a table in the house was not indicative of a sound mind. The defendant also submitted that it was Mr Conroy who had personally brought Mr Kavanagh to Mr Ó'Ceallaigh's Office on that date.

15.5 The defence referred to the visit of Mr Kavanagh to Cormac Ó'Ceallaigh & Co Solicitors on 9 July 2019, where Mr Kavanagh indicated to Mr Ó'Ceallaigh that he intended to change his will. They submitted, after the oral evidence in a written submission, that an attendance note for the visit of 9 July 2019 was misfiled and later discovered by a solicitor in Mr Ó'Ceallaigh's Office on 27 September 2021. It is regrettable that either no attendances or misfiled attendances appear to be a feature in Mr Ó'Ceallaigh's interaction with Mr Kavanagh. It does not have any evidential value as to the validity of the alleged homemade will in April 2018. It appears to be introduced to justify why Mr Ó'Ceallaigh did not take instructions in 2019.

15.6 The defence submitted that while the note discovered on the 27 September 2021 is very short, it demonstrates that Mr Kavanagh indicated that he was losing his mind. The defence submitted, on foot of this indication by Mr Kavanagh, that Mr Ó'Ceallaigh correctly sought medical advice in relation to Mr Kavanagh's testamentary capacity to change his will and in the actual giving of instructions. It is submitted therefore that Mr Ó'Ceallaigh, at all times deemed this an appropriate course of action. The defence submitted that if Mr Kavanagh had indicated in

instructions to Mr Ó'Ceallaigh in 2019 that he wished to leave his house or any substantial legacy to the plaintiff, or if a reference was made to a sum of €210 per week being taken for the alleged taxi services or reference to investments, Mr Ó'Ceallaigh would have raised a complaint with the An Garda Síochána Carriage Office and/or the Taxi Regulator together with a complaint to An Garda Síochána for reference to the Garda National Economic Crime Bureau. In the court's view, this is mere speculation and it is unhelpful in the overall assessment of the case. Notwithstanding the same, the defence submitted that they therefore rely on the decision of *Clitheroe v Bond* [2021] EWHC 1102, where it was held that the list of disorders which would cause incapacity is not closed. This case followed the decision in *Key v Key* [2010] 1 WLR 2020, whereby the court accepts bereavement could cause an affective disorder which would result in incapacity. They submitted that Mr Ó'Ceallaigh could not determine if memory loss was a disorder which might have resulted in incapacity and therefore they submit that he took the appropriate steps in seeking a medical opinion.

15.7 However, as stated, this evidence was not furnished in court and was not subject to cross examination. Specifically, when Mr Ó'Ceallaigh was asked by the court why he requested a doctor to give an assessment of testamentary capacity, he stated his reasoning was based on criticism he received from another Judge in a different case for not doing so. It appeared to the court that Mr Ó'Ceallaigh, in his evidence, did not take formal instructions as to contents of a new will in 2019. It is of note that Mr Ó'Ceallaigh in his letter to Mr Kavanagh's medical practitioner, merely in broad terms asked for a letter to confirm Mr Kavanagh's mental capacity. There were no reasons proffered in that letter on what the basis of that assertion was. In the court's view the medical doctor correctly pointed out that testamentary capacity is a legal test and requested to know the criteria for the assessment. The doctor requested a payment of €150 and Mr Ó'Ceallaigh sent a copy of that letter and request to Mr Kavanagh. However he did not pursue the issue nor explain it to Mr Kavanagh nor

reply to the Doctor with the criteria as to the assessment. Overall the court formed the view that this was at, best, superfluous to the case argued before the court.

15.8 The fifth point the defence submits concerns their allegation of undue influence by Mr Conroy over Mr Kavanagh. The defendant submitted that the plaintiff exerted such a degree of control over Mr Kavanagh that it amounted to undue influence. They state that “the taking of €210 per week from an old age pensioner in receipt of the state contributory pension of €240 per week rising to €267 per week demonstrates this control.” The defence further submitted that the alleged financially unviable task of taking Mr Kavanagh out for lunch is indicative of an ulterior motive to procure a homemade will wherein he obtained Mr Kavanagh’s house. They submit that Ms McGuirk provided evidence that there was no need for Mr Conroy to pay bills such as the funeral bill or give donations to the Legion of Mary, and that Mr Harmon gave evidence of his concern over the influence Mr Conroy had on Mr Kavanagh. The defence acknowledged in order to be successful in proving undue influence in the context of a will, the onus of proof rests of the party seeking to assert it but that the facts are inconsistent with any other hypothesis. The defence suggest a list of Mr Kavanagh’s actions which they submit gives rise to undue influence by inference:

1. Mr Kavanagh spending a very high proportion of his weekly income, €210 per week, on taxi fares and lunch;
2. Withdrawing in total €15,700 from his bank account through a branch where Mr Kavanagh did not usually do his banking;
3. Withdrawing €2,650 between 7 Feb 2017 and 24 Feb 2017, effectively exhausting his savings, leaving him totally dependent on his weekly income to survive;
4. Failing to pay Bourke’s Funeral Undertakers the balance of their invoice in relation to Mrs Kavanagh’s funeral account;

5. Taking the title deeds of the house from Cormac Ó'Ceallaigh & Co Solicitors whom Mr Kavanagh trusted and dealt with for a long period of time;
6. Making a homemade will leaving his house and contents to a man he met just a few years earlier and dramatically reducing the value of charitable bequests which he had previously made;
7. Withdrawing money from his bank account when he was in hospital with no need of cash.

15.9 The defendant referred to the cases of *Lynn v Lynn* [2015] IEHC 689, where in turn Ms Justice O'Malley refers to *Allcard v Skinner* (1887) 36 Ch D 145, which was cited with approval in this jurisdiction in *Carroll v Carroll* [1999] 4 IR 241:

“First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose:

Second, where the relations between the donor and the donee have at or shortly before the execution of the gift been such as to raise the presumption that the donee had influence over the donor.

In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will ...

In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent relations which existed between parties and the influence arising therefrom being abused.”

15.10 The defendant submitted that there is a public policy issue in this case, where a taxi driver formed a relationship and the influence arising therefrom was abused. Another taxi driver, allegedly witnessed the alleged signature of the vulnerable, old aged pensioner. The defence submitted that such relationships cannot be condoned as

a matter of public policy. The plaintiff, they submitted, failed, refused and neglected to provide his taxi licence number until so directed by the High Court which the defendant submits suggests an intention to deliberately impeded a complaint/enquiry to the Garda Carriage Office.

15.11 The sixth point submitted by the defendant relates to the issue of fraud. The defendant submitted that the plaintiff failed to discharge the onus of proof that funds were not fraudulently misappropriated. The defence states that there is no supporting documentation for the sum of approximately €40,000 taken for alleged taxi services per the plaintiff's sworn affidavit on 27 August 2020. Furthermore, the defence submitted that multiple ATM [automated teller machine] withdrawals were made, such as three withdrawals of €200 when Mr Kavanagh was out of hospital recuperating.

15.12 The defence submitted that the alleged execution of the homemade will is in breach of Section 78 of the Succession Act 1965. They point out that in her evidence, Ms Rita Cahill stated she did not see Mr Kavanagh sign the will, that she did not read it or know the contents and she indicated that she was the only one present when she signed the will. The second witness, Mr Derek Nangle, arrived. Ms Cahill greeted him and said that she "would leave him there". This gives an impression that she was leaving. The defence submitted, on Ms Cahill's evidence, that the will was not signed in the presence of two or more witnesses present at the same time as required by Section 78 of the Succession Act 1965. The defence also submitted that Ms Cahill's evidence failed to indicate the reasons why she was satisfied Mr Kavanagh knew what he was doing when he signed the will.

15.13 The defendant referred to the delay of Mr Nangle entering the court to give his evidence after Ms Cahill gave her evidence and noted that Mr Nangle's evidence is contradictory to that of Ms Cahill's. The defendant submitted that the possibility the will was written out by Mr Kavanagh under the dictation from the plaintiff cannot be ruled out. They note that Mr Nangle, in affidavit, stated that Mr Kavanagh was in

good form on the date of the alleged execution. Insofar as the plaintiff's allegation that Mr Ó'Ceallaigh could not have a clear recollection of a meeting in November of 2019 as to how Mr Kavanagh presented himself, they stated that Mr Nangle's "clear recollection" in March 2018 was unsustainable.

15.14 The defendant submitted that no evidence was proffered by the plaintiff to show that Mr Kavanagh was of sound disposing mind on the date of the alleged execution and there is the lack of medical witnesses called by the plaintiff. The affidavit of the plaintiff's solicitor sworn on 29 July 2020 states that Junior Counsel indicated to the plaintiff that the homemade will was likely to be challenged and that it was necessary to make contact with Mr Kavanagh's GP. This, they point out, did not happen and no medical witnesses were called to give evidence for the plaintiff as to capacity. In relation to testamentary capacity, the defendant referred to the authorities of *Banks v Goodfellow* LR 5QB 549, *Scally v Rhatigan* [2010] IEHC 475 and *Clitheroe v Bond* [2021] EWHC 1102. They noted that in *Scally v Rhatigan*, Ms Justice Laffoy pointed out that the test for determining testamentary capacity can be summarised in four points:

1. *The Testator must appreciate the nature and consequences of making a will,*
2. *The Testator must understand the extent of his property,*
3. *The Testator should consider any moral claims on his estate and*
4. *The Testator must not be affected by any disorder of the mind or insane delusion.*

The defence submitted that in relation to the first point, Mr Kavanagh did not appreciate that the drafting of the will was not drafted so as to compel the plaintiff to sell the property in order to fund the pecuniary bequests. In contrast they submitted that the previous will of 28 August 2014 clearly provided for the sale of Mr Kavanagh's dwelling house and the proceeds being distributed thereafter. In the alleged will of 17 April 2018, they submitted that the pecuniary bequests would be abated if there were insufficient funds to meet them, which they suggest was not Mr Kavanagh's intention.

15.15 The defence submitted in relation to the second point, that on the 17 April 2018, Mr Kavanagh had €44.87 in his savings account and €0.30 in his current account, which does not come near covering the pecuniary bequests of €33,000 “as stated in the alleged will”. Therefore, they assert that Mr Kavanagh did not understand the extent of his property at the time of drafting the will.

15.16 The defence submitted in relation to the third point that Mr Kavanagh recognised the care Elaine McGuirk provided him and his wife by increasing her share in their estate, suggesting that Ms McGuirk has a moral claim on his estate. They suggest that he did not consider this moral claim when drafting the homemade will in 2018 and bequeathing Ms McGuirk €20,000 out of monies that did not exist.

15.17 The defence submitted in relation to Ms Justice Laffoy’s fourth point that the following evidences Mr Kavanagh’s delusion at the time. Mr Kavanagh was handing over approximately 79% of his state contributory pension to Mr Conroy every week; that in view of Mr Harmon and Ms McGuirk evidence, but in particular that Mr Kavanagh believed, according to Ms McGuirk, for some time he would receive €100,000 from an investment scheme arranged by Mr Conroy; and finally they suggest that Mr Ó’Ceallaigh witnessed the delusions of Mr Kavanagh on the 20th March 2018 when he collected his title deeds within weeks of the alleged execution of the will dated 17 April 2018.

15.18 Therefore they submit these issues mean Mr Kavanagh did not meet the requisite test for testamentary capacity.

15.19 The defendant submitted in relation to the alleged “Golden Rule” in drafting wills that Ms Cahill and Mr Nangle do not address the issue of testamentary capacity and that their affidavits are formulaic in nature and cannot be taken as evidence of testamentary capacity. The defence submitted that the evidential burden of proving the capacity of Mr Kavanagh on 17 April 2018 had shifted onto the plaintiff, who failed to discharge the evidential burden.

15.20 Finally, the defendant submitted the undertaking of Mr Conroy on 30 July 2020 was based on a deception, in that the plaintiff did not have €15,000 of bank deposits in his own name at the time. The defendant submitted that it is reasonable to infer that if an undertaking was not handed into court on the 30 July 2020, an order of injunction would have been granted to Mr Ó'Ceallaigh against the plaintiff and/or an early hearing date would have been given for the hearing of the action.

15.21 The defendant submits that the delay in issuing the Testamentary Civil Bill may be attributed to the following factors:

1. A realisation that the Will of the 17th April 2018 was not properly executed;
2. A realisation that there was no proof of testamentary capacity and failures to make enquiries with GP;
3. Adverse comments of Mr Justice Charles Meenan on the 6th November 2020 in a High Court Appeal affecting the plaintiff's conduct;
4. An intention to delay and obstruct the proper administration of the Estate and to seek settlement by stringing out the threat of bringing proceedings to seek the revocation of the Grant of Probate;
5. The realisation that there was no supporting documentation to show any of the expenses allegedly incurred by the plaintiff for and on behalf of Mr Kavanagh;
6. A realisation that the plaintiff knew the defendant was the Solicitor for Mr Kavanagh but notwithstanding same that the plaintiff had knowingly and deliberately interfered with that relationship.

16. The Relevant Law - Due Execution:

16.1 Section 78(2) of the Succession Act 1965 states:

To be valid a will shall be in writing and be executed in accordance with the following rules:

2. *Such signature shall be made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the signature of the testator in the presence of the testator, but no form of attestation shall be necessary, nor shall it be necessary for the witnesses to sign in the presence of each other.*

16.2 In any case where a will is admitted to probate in solemn form or where a will is challenged, it is, in the court's view, necessary to hear evidence as to due execution before admitting that will to proof in solemn form. This arises even if the execution of a will is not challenged by the defence in its pleadings as in this case. In the court's view the law is correctly set out by Brian E Spierin SC in the book "Succession Act 1965 and Related Legislation: A Commentary" on page 284 as follows:

"Where a will is challenged, even though the will may look regular on its face, at a minimum the Court must hear evidence as to due execution to admit the will to proof in solemn form. If due execution is proved, depending on the circumstances of the case, certain presumptions arise and it may be unnecessary to go further. However, where the challenge is withdrawn, on the case being compromised, the court must hear evidence of due execution in order to admit the will to proof in solemn form."

16.3 Where the will on its face appears valid and a full attestation clause is present, a presumption of due execution arises. However, this presumption may be rebutted if evidence is put forward which contradicts the validity of the will. The evidence of the witnesses is key in determining whether the requirements of Section 78(2) have been complied with.

16.4 The witnesses of the will are attesting to the testator signing the will, therefore the witnesses must both be present and have an unimpeded view of the testator signing the will.

16.5 The legislation also allows for the testator to acknowledge his signature in the presence of both witnesses. In these circumstances the testator signs the will out of view of the witnesses, yet acknowledges his signature in the presence of both attesting witnesses before they sign the document. The witnesses must see or have the opportunity of viewing the testator's signature before signing.

16.6 It is not mandated for the witnesses to both be present when they themselves sign the document.

16.7 Where there is conflicting evidence put forward by the attesting witnesses, the court must assess the credibility of the witnesses. In the case of *Leopold v Malone* [2018] IEHC 726, Ms Justice Pilkington noted there was direct contradiction in respect of each attesting witness as to the manner in which the will was witnessed. The court, on the balance of probabilities and swayed by the presumption of due execution, assumed the will was executed pursuant to its terms. However this decision emphasised that is a matter for the court to weigh up the evidence presented and assess the credibility of such contradicting evidence, on the balance of probabilities.

17. Testamentary Capacity:

17.1 Section 77(1) of the Succession Act 1965 provides as follows:

(1) To be valid a will shall be made by a person who –

(a) has attained the age of eighteen years or is or has been married, and

(b) is of sound disposing mind

17.2 Counsel for the defence has referred to the so called Golden Rule in relation to testamentary capacity. In the case of *Key v Key* [2010] 1 WLR 2020, Mr Justice Briggs stated:

“the substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or one who has been seriously ill, he should arrange for a medical

practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings."

17.3 This statement was supplemented with the reassurance that non-compliance with the golden rule will not invalidate a will, however compliance will significantly, but not conclusively, aid in rebutting claims of testamentary incapacity. Ultimately, the determination of testamentary capacity is a question of fact and must be assessed on the balance of probabilities.

17.4 Ms Justice Laffoy endorsed this interpretation of the golden rule, as stated by Mr Justice Briggs, in the case of *Scally v Rhatigan* [2010] IEHC 475.

17.5 Following the *Scally v Rhatigan* case, The Law Society published a document titled "Transactions involving vulnerable/older adults: Guidelines for Solicitors [2012]". This document sets out procedures that should be followed when the issue of capacity arises, which include:

- Firstly, not assuming that because of vulnerability or age that a person lacks capacity.
- Ensuring the correct test of capacity is applied.
- Medical evidence may be of assistance to a solicitor in determining if the client has a medical condition which would impair his/her capacity, however the test of capacity is a legal test and not a medical test.
- A solicitor who wishes to obtain a medical report should request the client's consent to obtain the medical report.
- When requesting the medical report from the medical expert the solicitor should indicate the reason for which the report is required.
- Where capacity is at issue it is necessary for a solicitor to take detailed contemporaneous file notes.

To add to this, all matters involving elderly clients should be acted upon with sufficient speed and efficiency so as to ensure the client's testamentary wishes are executed.

17.6 However it should be pointed that testamentary capacity is legal test not a medical test and ultimately it is for the court to determine the issue of capacity. Any given case starts with the presumption of capacity. It is for the person alleging a lack of testamentary capacity to demonstrate in the first instance why the presumption should not apply. If a person has capacity he or she can still be vulnerable.

18. Undue Influence:

18.1 As Hilary Biehler points out in *Equity and the Law of Trusts in Ireland* (7th edition), "*in general the courts have shied away from any attempt to define precisely what constitutes undue influence*" but referencing *Harris v Swords* (1960) High Court No.71 at page 879, she states that "it has been described as where a person has exercised unfair, undue and unreasonable mental control over another". She further points out that Mr Justice Costello stated in *Healy v MacGillicuddy* [1978] ILRM 175 at paragraph 8 that "no presumption of undue influencearises in the case of wills and the burden of proving undue influence in relation to wills always rest on the person alleging it". A factor which was also emphasised by Mr Justice Murphy in *Lambert v Lyons* [2010] IEHC 29.

18.2 In the case of *Rippington v Cox and Butler* [2015] IEHC 516, Mr Justice Noonan laid down three steps which must be satisfied to successfully prove that the testator was unduly influenced:

- (a) "*That the person alleged to exert the influence had the power or opportunity to do so;*
- (b) "*That undue influence was in fact exerted;*
- (c) "*That the will was the product of influence.*"

18.3 These steps were recently affirmed by Mr Justice Meenan in the case of *Buckley v Cooper Junior* [2019] IEHC 424.

18.4 In *Cunningham v Cunningham* [2020] IECC 4 and *Elliot v Stamp* [2006] IEHC 336, the court cited with approval the decision of *Wingrove v Wingrove* (1885) 11 PD 81, which equated undue influence with coercion at paragraph 25.

“It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence.”

“Proof of motive and opportunity for the exercise of undue influence is required but the existence of such coupled with the fact that the person who has such motive and opportunity has benefitted by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator.”

18.5 The standard of proof is the civil law test of the balance of probabilities. Mr Justice Gillen in the Northern Ireland case of *Potter v Potter* [2003] NIFam 2 held that the more serious the allegation the less likely it is the event occurred and, hence, the stronger should be the evidence before the court.

19. Unconscionable Conduct:

19.1 While the issue of civil fraud was argued, the issue of unconscionable conduct was not as such argued before the court. However in response to a request from the court before final submissions, Counsel for the defendant stated in a final written submission that he “has at all material times urged on the Honourable Court that the conduct of the plaintiff was unconscionable, while not using those precise words, there has been ongoing references made to the treatment of Joseph Kavanagh [deceased] by Mr Conroy as being unconscionable, together with the conduct of Mr Conroy as a defendant”.

19.2 The Law Society in their Guidelines for Solicitors [2012] in dealing with transactions involving vulnerable/older adults, define unconscionable conduct as

“taking unconscientious advantage of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in their best interests.”

19.3 The doctrines of undue influence and unconscionable conduct are regarded as distinct. The High Court of Australia made reference to this distinction in the case of *Commercial Bank of Australia Ltd v Amadio* (1983) 46 ALR 402. Unlike undue influence which focuses on the quality of the consent of the weaker party, unconscionable dealing focuses on the conduct of the stronger party, in attempting to facilitate an arrangement with a weaker party, in circumstances where it is not consistent with good conscience.

19.4 The doctrine of unconscionable conduct is based on the principles set down by Mr Justice Gavan Duffy in *Grealish v Murphy* [1946] IR 35:

“Equity comes to the rescue whenever parties to the contract have not met upon equal terms”.

19.5 Successful claims on the grounds of unconscionable transaction are usually associated with inter vivos transactions but it is the court’s view that it is also possible it can apply to testamentary dispositions provided there is some unconscientious power by a stronger party against a weaker party. It is accepted that the criteria to reach such a conclusion in the case of testamentary disposition may be more rigorous.

19.6 Again as Hilary Biehler points out in *Equity and the Law of Trusts in Ireland* (7th edition) the elements of a successful claim are set out in the English judgment of Peter Millett QC, as he then was, in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*:

“First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken. Second, this weakness of the one party has been exploited by the other in some morally culpable manner And third, the resulting transaction has been not merely hard or improvident, but overreaching and oppressive In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself Which in the traditional phrase “shocks the conscience of the court” and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained.”

19.7 In the well-known Irish case of *Grealish v Murphy* [1946] IR 35, the plaintiff was a sixty-year-old farmer who lived alone and was, according to medical evidence, mentally deficient. The defendant was a 32-year-old man who worked the land for the plaintiff. The transaction in question was based upon a promise by the plaintiff to give the defendant his land after his death if he worked the land in the meantime. The court held that it was appropriate for equity to intervene as the parties had not met upon equal terms.

19.8 In the Northern Ireland case of *Rooney v Conway* [1982] 5 NIJB, the plaintiff was an elderly man who lived in a dilapidated old farmhouse in Tyrone. The defendant, Mr Conway, was an exceptionally good neighbour to the plaintiff, so much so that if it wasn't for the defendant's care the plaintiff would have been in a nursing home. After a falling out with his family, the plaintiff offered the defendant his land for at an under-market rate. The defendant accepted and a solicitor prepared the necessary deed. After the plaintiff's death, a family member successfully challenged the transaction. The court set the deed aside as it was unconscionable for the defendant to accept the benefit of the contract in these circumstances due to the relational inequality, the plaintiff being somewhat dependent on the defendant, and the

transactional imbalance, the land was worth considerably more than what the defendant paid.

19.9 In the Australian decision of *Blomley v Ryan* (1956) 99 CLR 362, a broad interpretation is given to the circumstances where relational inequality arises, namely:

“whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.”

19.10 In the Irish High Court decision of *Noonan v O’Connell* [1987] IEHC 54, a transaction for the transfer of land was set aside as the court found that the elderly plaintiff was totally dependent on the defendant, which put the defendant in a stronger position, meaning the transfer of land for a nominal amount was unconscionable.

19.11 There is academic debate over whether the conduct of the stronger party requires some moral impropriety in order for a claim of unconscionable conduct to be successful. Mr David Capper discusses this in detail in his academic article *“Undue Influence and Unconscionability: a rationalisation”* LQR 1998, 114. The Australian and New Zealand Courts have concluded that it is not necessary to show evidence of abuse or lack of good faith on the part of the stronger party. The Northern Ireland decision above, *Rooney v Conway* [1982] 5 NIJB, is another example of where the intentions of the defendant were unquestionably sound, however due to the stronger position the defendant held over the plaintiff, the court decided the transaction was unconscionable.

19.12 The English courts require that the terms of the dealing operate harshly against the weaker party for the transaction to be set aside as unconscionable, insisting that the defendant must act in some morally reprehensible manner.

19.13 It was indicated, albeit obiter, by Mr Justice Gilligan in *Prendergast v Joyce* [2009] IEHC 199, that it was not a requirement of Irish law that the defendant acted in a manner involving some element of moral turpitude in order to set the transaction aside on grounds of unconscionability.

19.14 Where property is transferred voluntarily or for a nominal amount, the receipt of full and independent legal advice becomes increasingly important especially when the parties have met on unequal bargaining power due to the relationship which exists between them.

20. Independent Legal Advice:

20.1 In circumstances where undue influence or unconscionable conduct is alleged, evidence of independent legal advice will be significant in rebutting the allegation. Although not a blanket rule, if a testator has been independently informed of the consequences of his wishes and the advisor or solicitor can testify as to the capacity of the testator at the time of execution, the court will find this evidence convincing. In the case of *Elliott v Stamp* [2006] IEHC 366, Mr Justice Murphy found that there was no evidence of duress or undue influence exerted on the testator. The fact the testator benefitted from independent legal advice weighed heavily on this finding.

21. Civil Fraud:

21.1 Civil fraud arises in circumstances where one party deliberately misrepresents or deceives another party, to achieve a certain advantage or gain, usually financial. Civil fraud is only actionable as a specific claim, which must be proven to the civil standard of proof, on the balance of probabilities.

21.2 In *Banco Ambrosiano SPA & Anors v Ansbacher and Company Ltd & Anors* [1987] ILRM 669, the Supreme Court held that:

“There is no rational or cogent reason why fraud in civil cases should require a higher standard of proof than that of the balance of probabilities. Where, however, such proof is largely a matter of inference, such inference must not be drawn lightly, or without regard to all the circumstances, including the circumstances of the consequences of a finding of fraud. Per Henchy J – in considering an allegation of fraud, evidence cannot be ignored which tends to show that the person accused of fraud has acted in an apparently dishonest manner in other matters relating to the same general transaction.”

22. Summary of the Facts:

22.1 I am satisfied on the balance of probabilities that Mr Conroy had complete control over Mr Kavanagh’s financial affairs and financial decision-making functions from the time of Mrs Frances Kavanagh’s death in December 2016 until his death on the 20 August 2019. This was at a time when Mr Kavanagh was an elderly and vulnerable person and was stricken with grief and loneliness following his wife’s death.

22.2 I am satisfied that even on Mr Conroy’s own evidence, he controlled Mr Kavanagh’s money including the taking charge of his old age pension. I am also satisfied that Mr Conroy orchestrated the taking out of the title deeds of Mr Kavanagh’s dwelling house from Cormac Ó’Ceallaigh & Co Solicitors in March 2018 and that there was no other logical reason why this was done. I accept the evidence of Ms Elaine McGuirk as to Mr Conroy’s attempt to “buy” Mr Kavanagh’s dwelling house. I also accept her evidence that Mr Kavanagh believed that an investment which he made with Mr Conroy was going to achieve a considerable return, but which never materialised.

22.3 I accept Mr Harmon’s evidence, as to the difficulties in payment of the funeral account of Mrs Kavanagh, was credible and that Mr Conroy effectively controlled this payment.

22.4 I am also satisfied that Mr Conroy set up the meeting in which the alleged homemade will on 17 April 2018 was to be executed. It is of note that Mr Nangle collected Mr Kavanagh the day before for his daily lunch so that he could then be asked to be a witness the following day. I am also satisfied that Mr Conroy produced the draft homemade will. I regard as fanciful the notion that Mr Conroy did not know the envelope that he had in his possession was Mr Kavanagh's will even though he held it for a considerable period of time and even though his friend Mr Nangle was an alleged witness.

22.5 The two attesting witnesses gave conflicting evidence to the court as to the due execution of the homemade will. In simple terms if Ms Cahill's evidence is credible, the document she signed was not signed as a will according to Section 78 of Succession Act 1965. This arises because Ms Cahill did not see Mr Kavanagh's signature on the document. She also did not see Mr Kavanagh sign the will. After she signed her name she handed the will to Mr Nangle who had arrived and then she left the house. She did not see Mr Nangle sign the will.

22.6 If Mr Nangle's evidence is deemed to be credible, the will was signed correctly according to Section 78 of the Succession Act 1965 in that all three persons, i.e. testator and the two witnesses, were present when the will was signed.

22.7 I accept Ms Cahill's evidence as credible. In contrast, Mr Nangle's evidence was in the courts view rehearsed and was not credible.

23. Applying the Law to the Facts:

23.1 As stated at paragraph 16.2 of this Judgment, a will which seeks to be admitted to probate in solemn form and/or which is challenged must be proved irrespective of whether the matter was included or not in the pleadings.

23.2 While I accept the law set out in a High Court Judgment of Ms Justice Pilkington in *Leopold v Malone* [2018] IEHC 726, that in circumstances where there is direct contradiction in respect of each attesting witnesses as to the manner in which the testamentary document was witnessed, provided both witnesses are credible, a court would on the balance of probabilities assume that the will was properly executed. However that does not arise in this case. In this case I have held that the evidence of Ms Cahill was credible and the evidence of Mr Nangle was not.

23.3 On that ground alone the document produced by Mr Conroy is not a valid executed will according to the terms of Section 78 of the Succession Act 1965.

23.4 However I go further and say even if the will was validly executed, I am satisfied that the whole domination and control of Mr Conroy over Mr Kavanagh gives rise to a presumption of undue influence, which has not been rebutted, notwithstanding that this document is a will. Mr Conroy retained control of the document after it was executed and Mr Kavanagh never received any independent legal advice. Although Mr Kavanagh had the presumption of understanding, it was not one that he was able to make a worthwhile judgment on what was in his best interest and Mr Conroy took advantage of that. I therefore hold that the three criteria laid down by Mr Justice Noonan in *Rippington v Cox and Butler* [2015] IEHC 516, apply in this case. Namely:

1. *“That the person alleged to exert the influence had the power or opportunity to do so;*
2. *That undue influence was in fact exerted;*
3. *That the will was the product of influence.*

23.5 More strongly, I am satisfied looking at the relationship between Mr Conroy and Mr Kavanagh that it was one in which Mr Conroy had complete control over Mr Kavanagh, a much weaker person who was totally dependent on him. This relationship and the making of the alleged will is not one consistent with good conscience. To add to this, Mr Kavanagh did not receive independent legal advice.

23.6 Mr Conroy facilitated and, in the court's view, initiated the taking of Mr Kavanagh's title deeds from his solicitor. Far from being a good friend, the relationship was one in which Mr Conroy ensured Mr Kavanagh was reliant on him to the exclusion of other people. Mr Conroy was determined to and did take control of Mr Kavanagh's money and attempted to take control of his dwelling house.

23.7 In legal terms, Mr Conroy took advantage of Mr Kavanagh, an innocent but very vulnerable person who, though not deprived of an independent and voluntary will, was unable to make a worthwhile judgment as to what was in his best interests. In simple terms, it was a clear case of elder abuse, specifically in relation to financial matters where Mr Conroy took advantage of Mr Kavanagh financially. This abuse extended to the making of the alleged will dated 17 April 2018. I am of the view that unconscionable conduct is a more appropriate description of this conduct than civil fraud.

23.8 The tragedy is that apart from Mr Harmon's concerns, no one reported Mr Conroy's conduct to the Health Service Executive [HSE], who is charged with safeguarding vulnerable persons at risk of abuse. The matter does not appear to be investigated by the HSE.

23.9 The relationship and the making of the alleged will are not consistent with good conscience. No legal advice was obtained, and Mr Conroy controlled both the process and the retention of the document until after Mr Kavanagh's death.

23.10 For these reasons, the court dismisses Mr Conroy's claim and refuses to admit to probate in solemn form the document dated 17 April 2018, as the last will of Joseph Kavanagh ["Mr Kavanagh"], deceased, and therefore also refuses the application to revoke the will dated 28 August 2014 of Mr Kavanagh, which was admitted to probate in common form on the 22 January 2020.

24. Costs

24.1 I will hear the parties as to any application for costs. However, I believe before any application is heard that any parties, such as residuary legatees, should be informed of this judgment. As a matter of good practice where charities may be affected by the decisions of a court, executors and/or their solicitors should inform them of court pleadings and decisions.