

To confabulate or not to confabulate...that is the question: will validity in the High Court

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Confabulation: 'the invention of circumstantial but fictitious detail about events supposed to have occurred in the past. Usually this is to disguise an inability to remember past events.' Oxford Medical Dictionary.

If you have not previously come across the word 'confabulation', *McCabe v McCabe* is the case to read. All 171 pages of it.

The Judge found that Mary McCabe's last will, made while she was suffering Alzheimer's Disease and reflecting a radical departure from her previous will making history, was valid and effective in disinheriting her younger son Timothy in favour of her older son Stephen.

Timothy argued that the will was invalid as it had not been duly executed, that his mother had not had capacity to make a will and that she did not know and approve its contents.

His challenge failed on all three grounds. On due execution, the Judge dismissed the evidence of the independent attesting witness, who claimed not to have signed the will in the presence of the testator, as a failure to recollect.

Whilst Stephen had made arrangements for the will to be made (which, it might be argued, would excite the suspicion of the court following the principle in *Barry v Butlin*), the Judge found his involvement to be simply a reflection of the fact that he was the only child with whom Mrs McCabe was in contact. On the basis of the evidence of the will draftsman and the other attesting witness (a psychogeriatrician, Dr. Ardron, who also gave expert evidence in the case) the Judge found that Mrs McCabe knew and approved the terms of the will and actively gave instructions as to its content.

The arguments on capacity were more involved. Even though the will had been witnessed by a psychogeriatrician, the Judge agreed with counsel for Timothy that the golden rule had not been properly observed (there was no letter of instruction to Dr Ardron who was not made aware of the *Banks v Goodfellow* test and was not asked to make a full and contemporaneous record). Ultimately the Judge found that the case turned on whether the decision to disinherit Timothy was based on false beliefs or confabulations (whether delusional or otherwise). The critical questions were whether Timothy initiated a police investigation into Mrs McCabe's finances and Stephen's involvement therein without Mrs McCabe's authority, and whether Mrs McCabe falsely believed that Timothy had done so.

The Judge found that Mrs McCabe was not irrational or deluded in her belief that Timothy had initiated the investigation without her authority. Further, she was not affected by a delusion or confabulation in relation to whether Stephen had been imprisoned as a result (he had not), but rather a misunderstanding. Accordingly her decision to disinherit was not based on a delusion or confabulation. The Judge held that Stephen had discharged the burden of proving capacity.

Clearly such a short summary of a judgment running to 171 pages will miss interesting judicial observations. On a practical level the comments on the Golden Rule may be useful for will draftsmen, and, for the contentious lawyers the case serves as a reminder of confabulations as the basis for a testamentary capacity challenge. Amy Berry, Timothy's barrister, is talking about the case at Withers in November. [Click here to register](#).

[Read the case here.](#)