THE HIGH COURT

PROBATE

IN THE MATTER OF THE ESTATE OF WILLIAM JOSEPH (OTHERWISE BILLY J.) COURTNEY LATE OF 27 NARCISSUS ROAD, LONDON, NW6 ITL, BUILDER (RETIRED) DECEASED AND

IN THE MATTER OF THE SUCCESSION ACT 1965 AND

IN THE MATTER OF AN APPLICATION BY MICHAEL C. LARKIN, ONE OF THE EXECUTORS NAMED IN A TESTAMENTARY DOCUMENT EXECUTED BY THE DECEASED ON 20TH AUGUST, 2007

JUDGMENT of Ms. Justice Baker delivered on the 13th day of June, 2016.

1. This judgment is given in an application by Michael C. Larkin, one of the two executors named in a will made in Ireland by the deceased on the 20th August, 2007, for a declaration as to the effect of the revocation clause contained in a later will made by the deceased in London on the 22nd September, 2013.

Background

2. William Joseph Courtney died on the 30th October, 2013, aged 84 years, a married man without issue, or issue of a predeceased son or daughter surviving him, leaving him surviving his lawful widow, Patricia Alvina Courtney, a notice party to this application. The deceased was of Irish domicile of origin but was domiciled in the domiciliary unit of England and Wales at the date of his death. He had substantial property in Ireland, including a dwelling house in Killarney, a dwelling house in Dublin and sizeable farm lands at Derrynaflan, Co. Tipperary, lands where the Derrynaflan Hoard was found. The deceased had substantial property in Ireland and continued to maintain a close connection with his Irish relatives and was a frequent visitor, in particular, to Co. Kerry where he for over 40 years had employed the service of Michael C. Larkin, solicitor, with a business address in Killarney, Co. Kerry. Mr. Larkin is one of the executors named in his will in respect of which this application is made, the other executor, also a solicitor, having renounced his executorship.

3. The deceased executed a testamentary document on the 20th August, 2007, by which he devised and bequeathed his Irish property as to five eight shares thereof for his wife and the remaining three eights to his sister, Mary, for their respective lives, with remainder over on trust for identified nephew and nieces, and grandnephews and grandnieces. By that will, the deceased declared that he had been ordinarily resident in England since the year 1953, and that he was domiciled there, and that the will was intended to "extend only to my property which is situate in Ireland".

4. The deceased executed four codicils to the will, on the 15th September, 2008, 22nd October, 2008, 1st November, 2010 and 18th July, 2011, and all executed in the office of his solicitor, Mr. Larkin.

5. No issue arises as to the validity of the Irish will or codicils thereto, each of which was executed in accordance with the statutory requirements for testamentary documents in Ireland. An affidavit of laws of Michael John Maunsell confirms that the will and the four codicils were executed in accordance with the relevant legislation and rules in the domiciliary unit of England and Wales.

6. Over the years the deceased engaged in correspondence with his solicitor and the relevant correspondence exhibited shows a considerable degree of care and consideration in the preparation of the will of 2007 and codicils thereto. Mr. Larkin may have been prescient, when he said to the deceased that it would have been preferable for him to have drawn a fresh will in Ireland and that the costs of any dispute regarding the interpretation or effect of the codicils after his death ought to be borne in mind by him.

7. In the events, the question that has come to be considered by the Irish High Court relates to a homemade will executed by the deceased on the 22nd September, 2013, shortly before his death in London, which contained a clause by which he revoked all previous wills and codicils. By that will, the deceased devised onto his wife all of his interest in his house at West Hampstead, London and the proceeds of his current bank accounts subject to a provision for the payment of a sum to a named beneficiary. The net question to be determined by me in this application is whether the revocation clause in that will had the effect of revoking the Irish will made on the 20th August, 2007 and the four codicils thereto.

8. Certain factors must be noted from the will made on the 22nd September, 2013. It contains no residuary clause, and deals with named assets in the domiciliary unit of England and Wales. If it is held to have revoked the Irish will made on the 20th August, 2007, and the four codicils thereto, the deceased will have died intestate as to the entire of his Irish estate and any residuary estate in the domiciliary unit of England and Wales.

9. The person entitled to succeed on intestacy in the estate of the deceased is his widow, Patricia Alvina Courtney, who swore an affidavit on the 2nd May, 2016, in which she said that in her opinion, in executing the will of the 22nd September, 2013, that "the deceased did not intend to revoke his Irish will". It is useful to quote in full the two relevant paragraphs of her affidavit:-

> "3. In my opinion, in executing his will of 22nd September, 2013, the deceased did not intend to revoke his Irish will. Throughout his life, the deceased considered his Irish and UK assets to be separate and that is why he had separate wills. The deceased was of the view that his Irish assets should effectively 'remain in Ireland' with his relatives there.
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> 4. Therefore, I am firmly of the view that in executing his will dated 22nd September, 2013, the deceased only intended to revoke his previous UK will and not his previous Irish will and codicils."

10. Mrs. Courtney was legally represented in the application before me. I was advised that the English will has been admitted to probate and that a grant issued from the High Court, District Probate Registry at Winchester on the 2nd October, 2014, to his widow, the said Patricia Alvina Courtney and the other executrix named therein, Josephine E. Evans.

11. The net value of the estate of the deceased within the jurisdiction of Ireland as returned in the Inland Revenue affidavit of 8th December, 2014, was €1,858,663. The foreign estate is stated to have a net value of €1,663,810.

The Statutory Provisions

12. Section 85(2) of the Succession Act 1965 provides two ways in which a will may be revoked, namely by will or codicil, or by some other writing declaring an intention to revoke it:-

> "Subject to subsection (1), no will, or any part thereof, shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed, or by the burning, tearing, or destruction of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it."

13. The revocation may be of part of a will or of one of several wills made by a testator although most wills do contain a general revocation clause, revoking all previous testamentary dispositions.

14. The exercise of revoking a will must be accompanied by an intention to revoke the will. It has been suggested that an express revocation clause is desirable because it at least raises a presumption that a testator has the necessary animus revocandi in relation to earlier testamentary documents. This is apparent in the judgment in in Re Keenan [1946] 80 I.L.T.R. 1 where MacDermott J. said as follows:-

> *"For my own part, I incline to the view that where, as here, a will contains a clear revocatory clause couched in comprehensive terms and having the knowledge and approval of the testator, there is no room for such an inquiry and no ground for discriminating between different kinds of earlier testamentary dispositions which are fairly sought by the language of the clause."*

15. Implicit in this dicta is that a clear revocation clause, while it might raise a presumption that a testator intended to revoke all previous testamentary documents, could not of itself, absent the knowledge and approval of the testator, do so if the necessary animus revocandi was not present. Also implicit is that the onus of establishing that the testator did not have an intention to revoke is on the person who so asserts.

16. The authoritative Williams on Wills (9th Ed.) Vol. 1, p. 182 states the following:-

> *"The intention of the testator is the sole guide as to whether words amount to a revocation of a will and revocation is not proved by mere accidental words or by inference or by the form of the testamentary document or by implication where the circumstances do not accord with such an intention."*

17. Support for this is found in the judgment of *Re Phelan* [1972] Fam 33. Sterling J. was hearing an application in respect of a testator who had executed four wills, each of which was made in respect of a separate investment. Each of the three later wills contained a revocation clause and Sterling J. granted an application permitting the surviving executor to apply for a grant of probate in all four wills, holding that the court could omit words that the testator had included in a will by inadvertence, mistake or misunderstanding.

18. In *Re Morris* [1971] P. 62, in an extensive review of earlier authorities, Latey J. considered the extent to which a testator was bound by errors in drafting made by a solicitor or other person instructed to prepare a will on his behalf. He accepted that a tension was apparent in the case law, but that the old authorities would suggest that the rule enunciated by Lord Penzance in *Guardhouse v. Blackburn* [1866] L.R. 1 P. & D. 109 at p. 116 is correct:-

> *"… the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof."*

19. Latey J. considered that that particular statement must represent "the high watermark of the rule" and that the "more modern trend" is that the court would make "the best use of all materials available to ascertain the truth". He held that there was no rule of law that a testator was bound by a draftsman's mistake of which the testator was not aware, and that this arose from the first principle that a testator cannot delegate to another the task of deciding how his property should be willed: *Hastilow v. Stobie* [1865] L.R. 1 P. & D. 64. While the testator has to accept the phraseology of a person who has drafted a will on his behalf or on his instructions, the testator:-

> *"…has to accept the phraseology selected by the draftsman without himself really understanding its esoteric meaning, and in such a case he adopts it and knowledge and approval is imputed to him. If the draftsman in the use of the selected phraseology which he, knowing the testator's intentions, has deliberately and not per incuriam chosen, and thus himself known and approved, has made a mistake as to the effect of that phraseology, the testator, having adopted it, is bound by the mistake."*

20. Latey J. considered in some detail where the line is to be drawn between cases where there was knowledge and approval and where it can be said that the testator is bound only by what the draftsman writes on his instructions, or express instructions. He answered the question by returning to first principles, that the testator has sufficient understanding and quoted from Sachs J. in *Crerar v. Crerar* [unreported, see note in 1956 106 Law Journal 69] that:

> *"Further, it is not the law of this country that the testator can give testamentary validity to a testamentary disposition by accepting without understanding its effect something put forward by another."*

21. The case was answered, then, by reference to the question of the "knowledge and approval" of the testator, to borrow the language of MacDermott J. in in *Re Keenan*, and the court considered extrinsic evidence to construe the documents.

> *"Accordingly, I hold, that the testatrix was not bound by this mistake of the draftsman which was never brought to her notice. The discrepancy between her instructions and what was in the codicil was to all intents and purposes total and was never within her cognisance."*

22. I adopt that approach and consider that the correct approach of the court in the present case is to consider whether the testator knew, approved of and understood the full effect of the revocation clause in the will made in England in 2013.

23. In *McCormack & Anor. v. Duff & Anor*. [2012] IEHC 285, Herbert J. considered how the court would approach the question of ascertaining the knowledge and intention of the testator in these circumstances. Helpfully too, the judgment deals with the question of the effect of a revocation clause in circumstances which are broadly similar to those in the present case.

24. The testator in that case had made an Irish will in 2005, and an Italian will, which contained a general revocation clause, in 2006. Herbert J., having found that the testator was domiciled in Italy at the date of the execution of his Italian will, went on to consider whether that will had revoked his Irish will made the previous year. As a starting point, he considered that he could not "erase or disregard what is stated by the deceased in his Italian will", and that there was:-

> *"a very heavy burden on the plaintiff executors…to show that this revocation clause did not revoke all previous testamentary dispositions. They must satisfy me that there is sufficient evidence that the late Antonio Senzio did not intend to revoke the Irish will made prior to the Italian will."*

25. Herbert J. considered that that, in the absence of a clear or express indication in the Italian will, and there being no internal inconsistencies between the two wills, the question came to be considered in the light of the evidence whether the deceased did intend by the revocation clause to revoke the Irish will, and that this question engaged the provisions of s. 90 of the Succession Act 1965:-

> *"Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will."*

26. Herbert J. considered that he was:-

> *"…entitled to have regard to direct or consequential evidence of the circumstances surrounding the making of the Italian will by the late Antonio Senzio…. This evidence of surrounding circumstances only confirms me in the view that I would have taken in any event, having regard to the other matters which I have already addressed that the late Antonio Senzio intended the general revocation clause in his Italian will to be limited to revocation of prior wills made by him in Italy."*

27. One factor that weighed heavily on the mind of Herbert J. was the length and complexity of the Irish will, which he believed evidenced a great deal of thought on his part, and which suggested to him that the deceased did not intend to die intestate as to his valuable estate in Ireland and that his previous actions had suggested that this was a consequence he had sought to avoid.

Extrinsic evidence

28. In *Rowe v. Law & Ors*. [1978] I.R. 55 and the later case of *O'Connell & Anor. v. Governor and Company of Bank of Ireland* [1998] 2 I.R. 596, it was established that extrinsic evidence will be admissible only to construe an ambiguity or contradiction in a will, or if its admission is necessary to ascertain the intention of the testator. In the present case, I consider that some uncertainty arises as to whether the deceased intended to die intestate as to his Irish estate, and whether he intended the general revocation clause in his English will to revoke his carefully prepared and executed Irish will and four codicils.

29. I am satisfied on that authority, and from the other authorities referred to above, that I am entitled to have regard to extrinsic evidence to ascertain the intention of the testator when he makes the testamentary document in London in 2013.

The Evidence

30. Much of the relevant evidence is uncontested, and it is noteworthy that no contest exists between the executor and the person who would be entitled should the revocation clause be held to have revoked the Irish will. Affidavit evidence of Michael Courtney, a nephew of the deceased and one of the notice parties, sworn on his own behalf and on behalf of the other beneficiaries entitled under the Irish will and codicils thereto, explains in some detail the circumstances surrounding the making of the will in London. The deceased died on the 30th October, 2013, and one week before his death and whilst he was in hospital executed a homemade will on pre-printed stationary. No amendments were made to any of the pre-drafted contents in that document, and the widow of the deceased is quite clear and frank in her evidence that she does not believe that her late husband intended by that document to revoke his Irish wills and codicils thereto. Michael Courtney explained that he and the other nephews, nieces, grandnephews and grandnieces of the deceased were in regular contact with the deceased who visited Ireland regularly. He says that on a number of occasions, the deceased specifically informed him that it was his intention that his Irish estate would be dealt with by an Irish will and remain with his Irish family. This too is the view of the widow of the deceased.

31. Certain other factors must bear on my considerations. The deceased executed a will in Ireland on the 20th August, 2007, which did contain a revocation clause but one which was carefully drafted to not revoke the prior English will. All of the testamentary documents executed in Ireland relate expressly to the Irish estate and to that alone. The English will of the deceased made on the 22nd September, 2013, makes no reference whatsoever to any element of the Irish estate either by specific bequest or by any disposition of the residue.

32. Mr. Larkin's evidence is also of considerable benefit. He describes a long professional relationship with the deceased for in excess of 40 years, and that he had been throughout his life been very generous to his nephews, nieces, grandnephews and grandnieces in Ireland. I consider that of some significance too that the deceased who made four codicils to his will never changed the general approach that he had to his Irish estate, namely, that it would remain with his Irish family, and that in each of those codicils executed with legal advice and assistance, he dealt exclusively with his Irish assets. Broadly similar bequests were made in wills made by the deceased before 2007.

33. I consider that the extrinsic evidence points me inexorably to a conclusion that the deceased did not approve of the general nature of the revocation clause contained in the English will made on the 22nd September, 2013, and did not thereby intend to revoke his Irish will and four codicils thereto. I consider that the extrinsic evidence points me to a firm conclusion that the deceased did not intend to die intestate with regard to his Irish estate, and that he had carefully, over many years, acted in a way that shows that he did not intend to dispose of his Irish property other than by express disposition under an Irish testamentary instrument.

34. In those circumstances, I am satisfied that in order to fully understand and construe the testamentary intentions of the testator, that extrinsic evidence is admissible and that this evidence leads me to a conclusion that the deceased did not intend by the revocation clause contained in his will of the 22nd September, 2013, to revoke his Irish testamentary documents.

35. In the circumstances, I am satisfied to make an order that the revocation clause contained in the will of the deceased made in London on the 22nd September, 2013, was limited in its effect and did not revoke the Irish will of the deceased and four codicils thereto which were not as a result thereby revoked.