THE HIGH COURT

PROBATE

IN THE MATTER OF THE ESTATE OF CHARLES (OTHERWISE CATHAL) GILLESPIE LATE OF STRANARVA, CROLLY COUNTY DONEGAL, BATCHELOR, LABOURER, RETIRED, AND

IN THE MATTER OF AN APPLICATION BY PATRICK JOSEPH BOYLE

JUDGMENT of Ms. Justice Baker delivered on the 13th day of July, 2015

1. Charles (otherwise Cathal) Gillespie deceased died on the 11th May, 2013. He previously made what is asserted to be his last will and testament on the 28th December, 2009. This application is brought by notice of motion by the executor named in the said will, his nephew, to set aside a caveat lodged on behalf of Annie O'Donnell, a sister of the deceased, on the 25th March, 2015. The estate is very small, and the applicant asserts that its value is less than €100,000. While the value of the estate was not contested in the early stages of this application, the respondent now asserts that the real property contained in the estate has a value far in excess of that contended for by the applicant. The matter of valuation is not generally speaking a matter that ought to concern the court in determining whether to remove the caveat, but I consider that the size of this estate ought not to be forgotten in my consideration of the matter before me.

2. The caveat was duly warned and the caveator caused an apparance to the warning to be entered on the 7th May, 2014. In that context, and following repeated requests on the part of the named executor that the caveat be removed, this matter came on before me in the Monday Probate Motion List and following a number of hearings I reserved my judgment.

3. The will of the deceased having appointed the applicant, Patrick Boyle, as executor and trustee, gave, devised and bequeathed all of his estate to him. No other provisions in the will are relevant to this application. What does require to be noted however is that the will is shown as having been witnessed by two persons, Joseph McAteer and John McLauchlan, both of whom were identified has having addresses in Glasgow.

4. The deceased had previously made a will dated the 15th February, 2001 by which he had devised and bequeathed his house contents and land at Crolly County Donegal to his sister Annie O'Donnell for life, with remainder over to her two children as tenants in common in equal shares.

5. No dispute arises as to the formal validity of the will made in Glasgow which complies with the formal requirements of Irish law. The respondent however asserts that the will contains some unusual elements, and I return to those and any implication that might arise from this assertion later in this judgment.

6. The caveator asserts that the last will of the deceased is not the will identified as having been made on the 28th December, 2009 in Glasgow, but was the earlier will of 2001 by which was appointed as executrix Jacqueline Sharkey solicitor. Ms Sharkey by affidavit sworn 19th March, 2015 avers that the deceased was a long standing client of her firm, and that at no stage after making the will with her in 2001 did he indicate to her or any member of her firm that he had a wish to amend or revoke the will. She said he was a very conscientious person who was careful in his business affairs, and that had he intended to change his will she would have expected him to seek her advice, and that it seems unlikely that he would have made a will in Glasgow without consulting her. She also makes a point, which took on a degree of importance in the hearing before me, that the weather conditions in the Christmas period of 2009 were particularly severe and that it was unlikely that flights to Glasgow from the closest airport at Derry would have been available with any frequency or at all. Ms. Sharkey also says that she finds it difficult to understand how the deceased who was then 88 years of age and in poor health would have taken a short trip to Scotland in extreme weather conditions to sign a will. She also points to the fact that the deceased signed his name by the name Cathal, a name which she never knew him to use, and that she knew him as Charles.

7. Ms Sharkey also raised a question, which also came to have some importance in the argument before me, as to how the applicant came to be in possession of what she believes not to be a genuine will of the deceased, and says that she has been unable to ascertain who drafted this document, the occupation of the witnesses or the relationship of those persons to the applicant. In that context it should be noted that the will of December 2009 is held by the solicitor for the applicant and was identified as being so held in correspondence with Ms Sharkey.

8. The caveator Annie O'Donnell swore an affidavit on 18th March, 2015 in which she averred that she and her brother were very close and that she was in constant contact with him. It seems that the deceased had lived in Scotland for a while but had relocated to Ireland at an unidentified time. She says she was his next of kin on his passport and hospital documentation. She too asserts that the deceased did not ever sign his name as Cathal Gillespie, and that she did not know him to be called by that name. She says she is "very certain that Charles was in Donegal" on the date the 28th December, 2009 when the will was purported to have been made. She says that her daughter, the niece of the deceased, spoke to him on Christmas day and she also confirms that the weather was particularly severe during that Christmas period.

9. She states quite simply that as the deceased was 88 years old in 2009 and because of his health and poor weather conditions "there is simply no way that he would have been in the position to travel to Scotland". She also says that she cannot understand why the deceased might have left his estate to one nephew when he had a good relationship with all of his seven nephews and nieces.

10. The respondent also exhibits a note from a local supermarket showing that shopping was delivered to the home of the deceased on the 30th December, 2009 and on the 5th January, 2010, and that the delivery van had become immobilised in the snow on the 22nd December, 2009 as a result of which the shopping ordered by the deceased had been delivered to a neighbour on that day. She asserts that this sequence of deliveries suggests that the deceased was indeed in his home in Donegal throughout the relevant period.

11. A local farmer, John Con O'Donnell, swore an affidavit on 19th March, 2015 averring to the fact that he visited the deceased on St Stephen's Day, 26th December, 2009 at his home in Co. Donegal.

12. Michael Campbell, also a neighbour of the deceased, confirms that the weather in the Christmas season of 2009 was particularly severe and that the access road to the house of the deceased was impassable. He says that the deceased was at home on the 30th December, 2009.

13. The applicant states in a replying affidavit sworn 7th May, 2015 that the deceased frequently used the Irish form of his Christian name, Cathal, and that this was the name by which he was referred to by his mother, and that it is not surprising that the deceased used the name Cathal as he lived in a Gaeltacht area and frequently used the Irish form of his name.

14. The two persons who witnessed the will have both sworn affidavits by which they confirm the execution by the deceased of the will in Glasgow on the 28th December, 2009, and from these affidavits, which were in identical form, it is clear that the attestation of the will was done in accordance with the requirements of the Succession Act 1965. One of the witnesses, John McLaughlan, is a retired head teacher, and the other a Joseph McEnteer, a school teacher.

15. Both parties employed a graphologist to advise on the authenticity of the signature of the deceased on the document of 28th December, 2009, and both graphologists agree that as a matter of probability the signature thereon is the signature of the deceased. While some argument has been made by counsel for the respondent that some of the exhibits to the graphologist's report obtained by the applicant have not been made available to her, the evidence quite clearly points to the expert opinion being that the testamentary document of the 28th December, 2009 was executed by the deceased.

Conclusion on the evidence
16. The evidence thus points to a conclusion by the experts that the document in respect of which probate was sought was executed by the deceased. The caveator asserts that the deceased could not have been in Glasgow on the date of the 28th December, 2009 as the weather was particularly inclement. It is also asserted that the deceased had no reason to depart from his previous approach to the disposal of his assets after his death, namely that he would make a bequest to his sister, to whom he was very close, and that further there is no reason why he would have preferred the applicant over his other nephews and nieces.

The Monday motion list
17. This matter comes before me as a motion on the Monday Probate List. That list is intended to deal with so called "non contentious" probate motions, and although that description is clearly a misnomer in that many applications are contested, the purpose of the list is administrative and it operates to adjudicate on disputes which may be resolved on affidavit, or determined on matters of law. It is possible, although unusual, that a motion in this list would throw up contested facts that would require to be resolved following cross examination of the deponent of an affidavit. The Monday Probate List is not a substitute for a full probate action, or an action with regard to the validity of a will, nor can an application in the List normally resolve a contested question of testamentary capacity, or an assertion that a deceased had executed a purported testamentary document as a result of undue influence or duress which resulted in a lack of true understanding of the will or intention to execute a will in that form.

18. Section 36(3) of the Succession Act 1965 allows the court to adjudicate with regard to doubts or questions that arise in the administration of an estate and the Monday Probate List is primarily a list by which the High Court exercising its probate jurisdiction may give directions to the Probate Registrar with regard to certain matters in the probate jurisdiction.

19. While the distinction between the class of matters which is suitable for the Monday Probate List is not one in respect of which I wish in this judgment to make a definitive statement, I consider that a good starting point for the purposes of determining the issue in dispute in this case, is whether the issue is one that may be resolved on affidavit, or is properly speaking a matter in respect of which a full plenary hearing is required.

20. It is not disputed that the issue in this case is one of fact, and the controversy is with regard to whether the deceased did execute the will in Glasgow on the 28th December, 2009, and not whether, for example, the will falls for absence of form, or that an issue of fact has been raised in respect of which it is possible to reach a finding.

21. An application to set aside a caveat is one that may be properly be brought on affidavit, but may not always be possible to resolve without oral evidence, and I turn now to consider whether the respondent has raised a sufficient issue and doubt on affidavit such that the order setting aside the caveat ought not be granted on the motion, which will of course have the practical effect that a grant of probate in the will of the 28th December 2009 will not issue.

The treatment of affidavit evidence
22. Neither party has sought to cross examine the affidavit of the other, and indeed no affidavit has been furnished from either graphologist, it being apparent that both handwriting experts agree and that no purpose would be served from seeking further evidence from either of them.

23. The first matter I must determine is whether the respondent has raised on affidavit a sufficient issue of fact to render it impossible to determine for the purposes of this application the facts surrounding the execution of the document on the 28th December, 2009. I consider that the respondent has not raised a sufficient issue of fact for the following reasons.

24. While the respondent asserts that the weather conditions were severe in the Christmas season of 2009, and this is not disputed, the respondents are not in a position to point with any certainty to the whereabouts of the deceased on the date of the 28th December, 2009 when the testamentary document is said to have been executed by him in Glasgow. The respondent has raised a number of suspicions, one of which, whether the signature of that document was the signature of the deceased, has been resolved in favour of the document, but no evidence has been adduced that would suggest the deceased was not in Glasgow on the relevant date and that *ipso facto* he could not have executed the document. In fact the opposite is the case and two professional persons have sworn on affidavit that they witnessed the execution by the deceased of the testamentary document in Glasgow on that date. While I appreciate it is difficult to prove a negative, the respondent has not adduced any evidence that there was in fact no means by which the deceased might have been able to travel from Ireland to Scotland at or around the relevant dates and the respondent's evidence at best shows that the deceased was in Ireland on the 26th December, and on the 30th December, but cannot fill the gap between those dates, the relevant window in which it is asserted the testamentary document was executed. Thus the respondent is not in a position to point to any fact, as opposed to suspicion or conjecture, that would suggest that the deceased was not in Glasgow at the relevant time.

25. Accordingly, and while I note the assertions that the choice of beneficiary of the deceased was unexpected, and perhaps even out of character, no evidence has been adduced before me that makes it impossible for me to resolve the issue on this motion with the assistance solely of the affidavit evidence before me. I do not require for the determination of this matter to choose between differing affidavit evidence, and indeed the evidence that I have, which remains uncontroverted, is that the deceased was in

Scotland on the 28th December, 2009, and did execute the testamentary document now sought to be admitted to probate.

26. One must bear in mind also that the onus to justify the caveat, and the onus to persuade the Court that probate ought not to issue in respect of the testamentary document of the 28th December, 2009 rests on the respondent. I consider that the respondent has not raised on affidavit sufficient dispute on the facts to meet the burden.

Cross examination of witnesses
27. The respondents contend that the affidavits of the attesting witness have raised, as was put by counsel, "suspicions". These suspicions remain at the level of conjecture in the absence of any cross examination of those deponents on affidavits which as matters currently stand in the application before me, and the affidavit evidence enclosed raised no doubt in my mind as to the veracity of the matters therein deposed.

28. Late in the process before me, counsel for the respondent did make an informal application to cross examine the attesting witnesses. It was noted in that context that as both of these witnesses were out of the jurisdiction that the cross examination could only occur by the issue of letters rogatory by this Court to the Scottish court, and/or by the taking of evidence on deposition in Scotland, under Council Regulation 1206/2001 on the taking of evidence in civil or commercial matters. No formal application was made for the assistance of the Irish court in aid of an application to cross examine the deponents' affidavits in Scotland, but it seems to me that even were a formal application to come before me, and even indeed if I were to grant the application such that the process for the conduct of the cross examination of the attesting witnesses would commence or conclude, the matter now in issue before me would not be progressed in any real way.

29. I come to this conclusion because it seems to me that the challenge sought to be mounted by the caveator to the will of the deceased is not a challenge that no testamentary document was executed by him on the 28th December, 2009, but rather that certain "suspicions" have been raised by her with regard to that document, and the matter crystallised in the course of argument as ultimately being an assertion that if the deceased did execute the will, and the evidence points to it having been executed in his hand, that he did so as a result of undue influence and/or duress such that the purported testamentary document ought to be condemned.

30. The reason for the caveat then in its essence arises from a challenge to the will which ought properly to be brought by way of a will suit by which the court would determine on oral evidence, and in the context of the applicable legal principles, whether the testamentary document of the 28th December, 2009 may properly be said to be the will of the deceased. The action is an action to condemn the will brought by a probate action, and by which the will may come to be either proved in solemn form of law or condemned. Such an action will be prosecuted by plenary proceedings either on behalf of the estate to prove the will in solemn form, or more likely by an action by the caveator to revoke a grant and/or to declare that the will was executed as a result of undue influence or duress, or on the ground that some other vitiating factor exists which renders the will not truly the document of the deceased.

31. Such a determination may not be made on motion, and not in the Monday Motion List.

32. Because it seems to me that the action which the respondent seeks to bring is in essence a plenary action in the form now identified by me, I regard it as fruitless for me to now permit the commencement of a process by which some of the affidavit evidence tendered on behalf of the applicant may be cross examined. The result of such cross examination seems more likely to be focused on the issue of duress, undue influence or other vitiating factors, or to establish facts to condemn the testamentary document as having been made by the deceased at a time when he was not of sound mind, memory or understanding, or on the basis that he did not know of and approve the contents thereof, or that there existed other vitiating factors which rendered the will void.

The purpose of entering a caveat
33. Thus, there being no issue of formal validity, and having regard to the evidence from the graphologists, the continued maintenance of this caveat is in aid of an assertion that the testamentary document of the 28th December, 2009 ought to be condemned, or if a grant has already issued that the grant be revoked.

34. The purpose of entering a caveat is to prevent the issue of a grant of probate, but a caveator cannot indefinitely hold up the issue of a grant merely on account of suspicion. As is stated at para. 221 of Spierin, *The Succession Act 1965 and Related Legislation: A Commentary*, 4th Ed, (2011, Bloomsbury):-

> "A caveator who has or claims no interest, but has reason to oppose a grant being made to an applicant, may commence action to show cause."

35. In *Re Nevin deceased* (unreported, High Court, 13th March, 1997) Shanley J. at p. 4 pointed to the fact that the effect of s. 38 of the Succession Act 1965, and O. 79, r. 41 to 51 of the Rules of the Superior Courts is:

> *"… that the warning in response to the Caveat obliges the person entering the Caveat either to abandon his claim to a grant or to take contentious proceedings in furtherance of his claim…."*

36. Later Shanley J. at p.5 noted that the purpose of the caveat is

> *"…merely to ensure that no grant issues unknown to the Caveator: its presence does not restrain the Court from ordering a grant where a Caveator is on notice of the application of the grant." (Emphasis in original)*

37. I adopt that statement of the law, and also the statement contained in p. 243 of *Miller's Irish Probate Irish Practice* (1900, Maxwell) that the effect of warning a caveat is "to compel the caveator either to take contentious proceedings or to abandon his claim to a grant".

38. Further, rule 55 of the Non Contentious Probate Rules makes it clear that a grant of probate or administration may not issue from the District Registrar following the lodging of the caveat, unless the caveat has expired, or being warned and no appearance entered or "that the contentious proceedings consequent upon the caveat terminated".

Conclusion on lodgement of caveat
39. I consider that this caveat was lodged for cause, and at the time it was lodged the caveator believed that the testamentary document of the 28th December, 2009 was not made under the hand of the deceased. There is no doubt that the caveator has an interest in the matter in that she is the beneficiary under the will which would stand revoked should the 2009 document be admitted

to probate. However, the matter as it has now crystallised is an assertion on the part of the caveator that suspicious circumstances exist surrounding the execution of the will, and the resolution of any assertions of invalidity arising from such suspicions may be achieved only by a probate action, and may not be resolved on a motion.

40. Miller immediately after the statement quoted at para. 37 above goes on to say by entering an appearance to the warning, the caveator may compel his deponent desiring a grant to be the plaintiff in such contentious proceedings. The applicant however elected not to commence proceedings to prove the will in solemn form, but sought the removal of the caveat and the application proceeded, and it has become clear to me that the basis on which the caveator has continued to assert a right to maintain the caveat lies in her suspicion or concern with regard to matters of testamentary capacity or other matters that might vitiate the will.

41. I consider that the only way by which the contentious proceedings asserted as being appropriate by the caveator may be determined is by a plenary action in which a court on oral evidence can determine questions of capacity and/or the knowledge of the deceased of the document that he executed, and accordingly I consider that it is appropriate, in those circumstances, that the caveat be removed and such proceedings, which the precise form thereof has not been identified to me, may in due course come to determine matters in the dispute.

Conclusion on continued maintenance of the caveat

42. Accordingly, the purpose for which the caveat was lodged has now become spent, and any further challenge to the testamentary document of 28th December, 2009 must be brought to trial in a probate action. No purpose is served by the cross examination of the attesting witnesses and no dispute exists on affidavit which requires me to resolve a dispute of fact. The facts as disclosed point to the execution of a document by the deceased in Glasgow on the 28th December, 2009 and the concerns expressed by the respondents, while they might ultimately come to be established as a matter of fact, are at this juncture no more than conjecture, suspicion or disbelief arsing from what is contended to be an unexpected and inexplicable change of mind by the testator.

43. Thus, in those circumstances I consider that the caveator has no further basis on which to maintain the caveat and that it is appropriate that an order be made directing the removal of the caveat. While this may have the inevitable result that a grant will issue to the executor named in the testamentary document of the 28th December, 2009, whether that will ultimately comes to be condemned may only be resolved in a probate action and not in the motion.