THE HIGH COURT

PROBATE

IN THE MATTER OF THE ESTATE OF NOEL O'BRIEN, DECEASED, LATE OF BEALNALACHKA, RUAN, COUNTY CLARE,

A FARMER (DECEASED)

AND IN THE MATTER OF THE SUCCESSION ACT 1965

AND IN THE MATTER OF ORDER 79 OF THE SUPERIOR COURT RULES 1984 (AS AMENDED)

AND IN THE MATTER OF AN APPLICATION BY MARIE O'BRIEN

JUDGMENT of O'Neill J. delivered on the 29th day of July, 2011

1. The applicant in this application seeks an order removing a Caveat lodged by Scarry O'Connor & Company, solicitors, on behalf of Annette Keeshan, as guardian of Ben Keeshan, and also removing any further Caveats lodged by or on behalf of Ben Keeshan or Annette Keeshan against the estate of the deceased. The respondent to this application is Annette Keehsan as guardian for the said Ben Keeshan who is her son.

2. The deceased in this case was born on 13th November, 1964. He and the applicant were married to each other on 31st July, 2009, and the deceased died on 18th October, 2009.

3. The respondent, Annette Keeshan, is a sister of the deceased and Ben Keeshan is now an infant aged three years of age is a daughter of the respondent and nephew of the deceased.

4. Following upon the death of the deceased, the applicant lodged an application to extract a Grant of Administration Intestate to the estate of the deceased in the District Probate Registry at Limerick. Correspondence occurred between Messrs. Scarry O'Connor & Company, solicitors, on behalf of Annette Keeshan, with the solicitors for the applicant in which it was revealed formally by the solicitors for the applicant that the deceased had made a will on 29th October, 2008, in which he had bequeathed his lands at Kilkee East, Ruan, County Clare, comprising approximately 24 acres to Ben Keeshan, leaving all of the residue of his estate to the applicant.

5. This will is in the following terms:

> *"I, NOEL PATRICK O'BRIEN, of Bealnalicka, Ruan, in the County of Clare, farmer, hereby revoke all former wills, codicils and testamentary dispositions heretofore made by me and I declare this to be my last will.*
>
> *I APPOINT WILLIAM HILLARY of Kilkee East, Ruan, County Clare, sole executor of this, my will.*
>
> *After payment of all my just debts, funeral and testamentary expenses, I GIVE, DEVISE AND BEQUEATH THE FOLLOWING:-*
>
> *1. My lands at Kilkee East, Ruan, County (Clare) comprising approximately 24 acres to my nephew, BEN KEESHAN, of Oldcastle, Clonakinny, Roscrea, County Tipperary.*
>
> *2. All the rest residue and remainder of my estate to MARIE BURKE of Ballymote Road, Tubbercurry, County Sligo, for her own absolute use and benefit.*
>
> *IN WITNESS whereof I have hereunto signed my name this 29th day of October, 2008.*
>
> *SIGNED by the said Testator as and for his last Will and Testament in the presence of us both present at the same time who, in his presence, at his request and in the presence of each other, have hereunto subscribed our names as witnesses."*

6. The solicitors acting for the applicant in their correspondence made it clear that they considered that the will in question had been revoked by the subsequent marriage of the respondent under the provisions of s. 85 of the Succession Act 1965, and hence, in their view, the deceased had died intestate with the consequence that the applicant was entitled to succeed to his entire estate and therefore entitled to extract a grant of administration. The solicitors acting for the respondent would not accept this and contended that the will made on 29th October, 2008, had been made in contemplation of marriage and was a valid will as of the date of death, so that the estate of the deceased had to be distributed in accordance with the terms of that will.

7. To protect the position of Ben Keeshan, a Caveat was lodged by Messrs. Scarry O'Connor & Company, solicitors, on behalf of Annette Keeshan as lawful guardian of Ben Keeshan. This Caveat, was in due course, warned, with a final warning letter dated 14th September, 2010, being sent by the solicitors for the applicant to Messrs. Scarry O'Connor & Company. In due course, this application was brought by the applicant.

8. Lengthy affidavits have been filed in the proceedings by the applicant and Annette Keeshan. Affidavits were also sworn by William Hillary and Michaela Hillary and by Cora McNulty and Bridget Malone.

9. From all of these, it is clear that several facts are not in dispute. The applicant and the deceased became involved in a relationship with each other going back to approximately 2004. The applicant was then resident in and working in County Sligo. The deceased, throughout their relationship, suffered from ill health and lived with his parents at Bealnalicka, Ruan, County Clare. In 2006, his mother, who was a person of unsound mind not so found, went to live as a fulltime resident in the Little Flower Nursing Home, Lebane, Ardrahan, County Galway, at a stage when the deceased and the deceased's father were unable to care for her at home. The deceased's father, Patrick O'Brien, died on 22nd April, 2008, testate. Under the terms of his will, he left his home and lands comprising Folio 15767, County Clare, to the deceased, subject to a right of residence and maintenance and support in favour of the deceased's

mother, Anne O'Brien. By order of the High Court dated 16th November, 2008, made under s. 115(5) of the Succession Act 1965, the court elected on behalf of the deceased's mother to claim her legal right share of one-third of the estate of Patrick O'Brien in preference to the provision made for her in his will. The deceased's mother subsequently died on 18th February, 2010.

10. The deceased and the applicant became engaged to be married in 2008, and by a notice dated 30th September, 2008, they gave notice of their intention to marry on 31st July, 2009, at the Civil Registration Office at St. Camilla's Hospital, Limerick. This notice of intention to marry was served on the Registrar, Mr. Quirke.

11. On 9th October, 2008, the deceased sold the remainder of his lands at Drumeer, known as *'Turley's Place'* for a sum in the region of €330,000. He had inherited these lands from his uncle, Terence O'Brien.

12. On 29th October, 2008, the deceased attended at the office of his solicitor, Pamela Wall, *inter alia,* for the purpose of making a will. The focus of controversy in the case centres around the intentions of the deceased concerning the effect which his will would have, namely, whether it was made in contemplation of his marriage or not.

13. Evidence was given on affidavit by various deponents as to their belief in that regard based upon conversations subsequently had by the deceased with them, or actions of the deceased which were said to be either consistent with or inconsistent with this will being made in contemplation of the marriage in question.

14. Evidence was given on affidavit by Cora McNulty and she was cross-examined on her affidavit. She deposed to being a legal executive working for Pamela Wall, the deceased's solicitor, and it was she who took instructions for and drafted, and indeed, also witnessed the execution of the will of 29th October, 2008. In her evidence, she averred that the deceased attended at the office on that day on business unrelated to his will, and while so doing, intimated that he had not been feeling well and had been in hospital and that he was keen to make a new will. She deposed to this in her affidavit and was adamant in cross-examination that the reason he wished to make a new will was because he was feeling unwell. In the course of conversation with Ms. McNulty, the deceased mentioned that he was getting married the following year, and in response to this, Ms. McNulty advised the deceased that the marriage would automatically revoke his will and that it would be of no effect following his marriage. She further advised that in those circumstances, in the event of his death after marriage, his entire estate would go on intestacy to his wife. She advised that in order to give effect to his intentions, he would have to make a new will after his marriage.

15. The deceased's testamentary intentions were, as expressed in the will which he made, namely, to leave the land in Kilkee East to his nephew, Ben Keeshan, and the residue of his estate to his intended bride, the applicant.

16. I am quite satisfied upon the evidence that, having listened to the advice of Ms. McNulty, the deceased went ahead and executed a will adhering to his original testamentary intentions.

17. Whether the sale of lands, apparently recently completed by him, had any bearing on his desire to make a new will or any effect on his testamentary intentions, can only, at this stage, be a matter of speculation. However, it can be observed that it must have been well known to him that the proceeds of that sale were likely to be spent either in whole or in part on the renovation of the family home and other expenditures, including payment of debts, all arising in the time period prior to his intended marriage. It would therefore seem improbable that the realisation of the proceeds of sale of this land would have had any material bearing on the making of the will.

18. In May or June 2009, while renovation work was being conducted on the family home, William Hillary, who, with the aid of the plaintiff, was carrying out that work, deposes that in the course of a conversation with the deceased, the deceased told him that he had "*left a chunk of land to that young lad*", referring to Ben Keeshan.

19. In her affidavit, Michaela Hillary avers, at paragraph 8, that she had a conversation with the applicant in July 2009, when the applicant called to the Hillary household, in which she avers that the applicant told her that the deceased had made his will, what the terms of the will were, and that the deceased had left land to Ben Keeshan and that she was very unhappy with this and she wanted it changed. In her replying affidavit, the applicant, in reference to the foregoing averment, says she had no recollection of it. At paragraph 50 of her replying affidavit, the applicant does recall a conversation with Michaela Hillary concerning payment of debts of the deceased and clarifies that her reference to being "*burned"* related to an earlier experience with the deceased rather than to her previous marriage.

20. At paragraph 27 of her said replying affidavit, the applicant describes the circumstances in which she became aware that the deceased had made the will of 29th October, 2008, namely, that this had occurred on Tuesday 28th July, 2009, when the deceased was admitted to hospital and he expressed a fear that he would die before the wedding, whereupon he told her that he had made a will, where the copy of it was, and he asked her to read it. The applicant read the copy will, and in light of her knowledge of the deceased's financial difficulties and of the substantial sums she had already advanced to him, she became extremely angry and when visiting him again in the hospital, expressed her surprise and anger because he left the lands in question to his nephew.

21. The day after the death of the deceased, there seems to, undoubtedly, have been a conversation between the applicant and Annette Keeshan in which the applicant disclosed to Annette Keeshan the existence of the will and the fact that the land in question was left to Ben Keeshan. It is quite clear that up to that point, Annette Keeshan was entirely unaware of the existence of this will, and indeed expressed surprise, believing that the deceased was not, as she put it, the type to make a will.

22. I infer from the foregoing evidence that regardless of what Cora McNulty may have advised the deceased, he persisted with his testamentary intentions. There could be no doubt whatsoever but that the deceased had his marriage to the applicant in contemplation at the time he made this will, having only three weeks previously served the requisite notice of his intention to marry the applicant on 30th July, 2009. At the time, he was in the process of setting about renovating the family home, and whilst the applicant, in her affidavit, seeks to distance herself from any suggestion that this renovation project was related to the deceased's and her own marital intentions, given that she was in the process of seeking employment in the Clare region, and having regard to the formal nature of her and the deceased's marital plans, her disavowal in this regard seems hollow. In fact, she moved into the deceased's family home on 24th July, 2009, a week before the wedding.

23. I am satisfied that when the deceased, in May or June 2009, had the foregoing conversation with William Hillary, which I accept occurred (William Hillary was not cross-examined on his affidavit), the deceased's state of mind as of that time was that in the event of his death, by his will, the lands in question would go to Ben Keeshan. Manifestly, his upcoming marriage to the applicant would have been in his contemplation at the time, and indeed, well known to William Hillary, and it would seem to me to be highly improbable that he would have made this statement concerning leaving land to Ben Keeshan if he thought that the will in question would become

ineffective when he got married, and that he only intended the will of 29th October, 2008, to have effect in relation to his death occurring between 29th October, 2008, and the date of his marriage. The words as used by the deceased were in the past tense, "*left a chunk of land to that young lad".* All of this suggests to me that as a matter of probability, the deceased considered at that time i.e. May/June 2009, that he had made a will leaving those lands to Ben Keeshan and that that would remain the position for the foreseeable future, as of that time, which necessarily included his contemplated marriage. If his intentions were otherwise at that time, it is extremely unlikely he would have mentioned the subject at all or that he would have expressed himself as he did.

24. It is clear from the affidavit of the applicant that a heated discussion took place between the applicant and the deceased on or about 28th July, 2009, concerning the applicant's will, and in particular, the leaving of the lands in question to Ben Keeshan. It seems implicit from the averments in the applicant's affidavit in this regard that she came away from these discussions under the impression that the deceased's testamentary intentions, as expressed in his will, were subsisting as of that time. If the deceased understood and intended his will not to have any effect after the date of his marriage, which was only three days away, it would have been extraordinary that he would not have told the applicant of this state of affairs and reassured her in that regard. The applicant, in her affidavit, discloses no such reassurance from the deceased, and I infer from that silence that the deceased was content that the applicant would know that his testamentary intentions as of that time were as expressed in his will, notwithstanding his impending marriage to the applicant.

25. The conversation which took place between the applicant and Annette Keeshan on 19th October, 2009, the day after the death of the deceased, in my view tends to confirm that the deceased, in his discussions with the applicant in the days immediately prior to the marriage, conveyed to the applicant, firstly, that he had made a will, secondly, that he was, by that will, leaving the lands in question to Ben Keeshan, and, thirdly, that his testamentary intentions in that regard were subsisting, with his marriage in contemplation. If it had been the case that the deceased had conveyed to the applicant that his will was to be revoked by his marriage, or that the applicant, as a result of any assurance or otherwise, understood that the will was revoked by the marriage, it would seem to me to be highly unlikely that she would have broached the subject of the will in the manner she did in her discussion with Annette Keeshan on 19th October, 2009. It seems clear, that as of that time, the applicant understood the will to be a valid, subsisting will, notwithstanding her marriage to the deceased.

26. The affidavit of Bridget Malone establishes that on 2nd October, 2009, the deceased telephoned the offices of John Callinan & Company, solicitors, and spoke to Bridget Malone who was a receptionist there. The deceased sought an appointment with Mr. Callinan and this was arranged for the following Monday at 3.30pm. In response to Ms. Malone's enquiry, the deceased said that the appointment he was seeking was in connection with the making of his will. The deceased did not keep the appointment. The fact that the deceased may have considered changing the will he made on 29th October, 2008, is immaterial. The evidence does not go so far as to indicate that he intended to change the will. He may only have sought advice concerning the will. Even if he did intend to change the will, that would not displace what he intended or had in contemplation when he made the will on 29th October, 2008. I do not think that seeking an appointment in this regard can be said to be evidence which sheds any light on the issue of whether or not the will of 29th October, 2008, was made in contemplation of his marriage.

27. A consideration which necessarily arises in the case is what is meant by "*in contemplation of that marriage*".

28. Section 85(1) of the Succession Act 1965, provides:

> *"85.—(1) A will shall be revoked by the subsequent marriage of the testator, except a will made in contemplation of that marriage, whether so expressed in the will or not."*

29. The Act does not offer any definition relevant to what is meant by "*contemplation of that marriage*". What is clear is that the effect of s. 85(1) is that unless a will is actually made in contemplation of a marriage, it will be revoked by that subsequent marriage, whether so expressed or not in the will.

30. Section 85(1) re-enacted the general rule contained in s. 18 of the Wills Act 1837, to the effect that a marriage subsequent to the making of a will revoked that will. In the United Kingdom, s. 117 of the Law of Property Act 1925, provided that, "*a will expressed to be made in contemplation of a marriage . . .*" was saved from revocation by a subsequent marriage to the person in respect of whom the marriage was contemplated. A crucial aspect of this provision was that it was essential to the preservation of the will from revocation, that the contemplation in question was expressed in the will itself. The authorities established in due course that the issue was one of construction of the will, in respect of which extrinsic evidence could not be admitted, rather than establishing as a fact the relevant intention or contemplation on the part of the testator.

31. The United Kingdom Administration of Justice Act 1982, following on the recommendations of the Law Reform Committee, replaced s. 18 of the Wills Act 1837, which was the statutory revocation, and also s. 117 of the Law of Property Act 1925, with a provision in s. 18(3) which is as follows:

> *"Where it appears from a will that at the time it was made, the testator was expecting to be married to a particular person, and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person . . ."*

32. A similar provision was enacted in respect of particular dispositions in a will.

33. Notwithstanding the substantial change in this legislative provision, an essential feature present in s. 177 of the Law of Property Act 1925 remains, namely, that the will itself must express the relevant requirement. This would appear to be an inevitable consequence of the phrase "*where it appears from a will . . .*"

34. Section 85(1) of the Succession Act 1965, involves a very significant and fundamental departure in our jurisprudence from the approach adopted since 1925 in the United Kingdom. As is apparent from s. 85(1), it is not necessary for the relevant contemplation or intention to be expressed in the will itself, and indeed, it could be said that even where such intention or contemplation is expressed in a will, it may not be decisive.

35. Thus, whereas in the United Kingdom jurisprudence, the issue of whether the required contemplation was present when the will was made, remains primarily one of construction of the will, in this jurisdiction, the ascertainment of whether that contemplation existed or not is a question of fact to be established by evidence. Needless to say, where, in this jurisdiction, a will does contain an expression which purports to be a contemplation of marriage for the purposes of the section, a construction issue would arise in respect of that, but given the manner in which the sub-section deals with such expressions, in my opinion, extrinsic evidence could rarely be excluded in the determination of any such issue.

36. On the question of what is required to establish "*contemplation of that marriage*", I would not go so far as was recommended by the UK Law Reform Committee, to the effect that the intention or contemplation must be that the will should continue to have effect after the marriage and notwithstanding the marriage. It is, of course, the case that the consequence of the existence of the relevant contemplation is that the will continues in existence, notwithstanding the marriage in question, but that consequence should not be confused with a precondition for it. For many testators, advice on these consequences may not be available or clearly understood.

37. It is sufficient, in my view, if the evidence establishes that when the will was made, the testator actually had or must have had in contemplation a marriage to a particular person. To require an intention that the will continues to have effect after the marriage in question exceeds what the language of the section expresses and would, in effect, involve an addition to the section. Section 85(1) does not expressly say that "contemplation" in the context of the section means an intention that the will would continue to have effect after the marriage. Neither can it be said that such a construction of the section is warranted as a necessary or obvious implication from the language used in the section. It is noteworthy that the language used in the section does not mention the word "intention" at all, let alone any specific intention. The section adopts the much broader concept of "*contemplation*" which persuades me that the legislative intent was that a testator would merely bear in mind or have regard to a particular forthcoming marriage. In this context, of course, it must not be forgotten that the Succession Act 1965 introduced a number of important safeguards for spouses, specifically, s. 111, which gives a spouse a legal right to one-half of the estate if there are no children, and one-third if there are children. This statutory right, to a very large extent, replaces and achieves the policy objective underpinning the revocation of a will by a subsequent marriage, as enacted in s. 18 of the Wills Act 1837, namely, to protect the position of dependent spouses, in the event of the death of the other spouse having made a will prior to the marriage which fails to make adequate provision for the dependent spouse.

38. For the reasons already discussed above, I am quite satisfied that the deceased in this case must have had in contemplation his marriage to the applicant when he made his will on 29th October, 2008, and indeed, the evidence goes further, in the sense that his conversation with William Hillary and his conversations with the applicant and her conversation with Annette Keeshan after his death gave rise, in my opinion, to the inference that he intended his will to continue to have effect after his marriage to the applicant.

39. I have therefore come to the conclusion that the will of 29th October, 2008, was not revoked by the applicant's marriage to the deceased on 31st July, 2009, and therefore the estate of the deceased must be administered in accordance with that will.

37. Accordingly, I refuse the relief claimed in this notice of motion.