THE HIGH COURT

PROBATE

IN THE ESTATE OF MARY MCDERMOTT (LATE OF MILL LANE MANOR, SALLINS ROAD, NAAS, CO. KILDARE)

BETWEEN

DERMOT MCDERMOTT AND ELEANOR MCDERMOTT

APPLICANTS

AND

SARAH KENNEDY A WARD OF COURT ACTING THROUGH HER COMMITTEE, PATRICIA HICKEY

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 14th day of October, 2015

1. This judgment relates to the application to admit to probate the will of the deceased Mary McDermott in circumstances where the original of her will has been lost or mislaid. It is known that the will was in the custody of the deceased for a number of years prior to her death and the applicants claim that they have adduced sufficient evidence and argument from circumstance to rebut the presumption that it was destroyed by her with the intention to revoke it.

Background facts

2. Mary McDermott died on 6th November, 2013, a widow without children. She was predeceased by her husband who had died 18th October, 2008 and the applicants are two of his four children from a previous marriage. The respondent is the sole surviving sibling of the deceased, and is the person who is entitled to succeed on intestacy to the entire of her estate.

3. The deceased made a will on 28th March, 1988 by which she appointed one of her four step-children, David McDermott, to be the sole executor thereof and by which she bequeathed her share of a dwelling house at 47 Dufferin Avenue, Dublin 8, to her sisters, Kathleen Kennedy, who predeceased her, and Sarah Kennedy, the respondent, or the survivor of them, for their respective joint lives, and the remainder interest, together with the residue of her estate, to her four step-children, of whom the applicants are two.

4. The dwelling house at 47 Dufferin Avenue, Dublin 8 was in fact held by the deceased and her sisters as joint tenants and will have passed by survivorship to Sarah Kennedy as sole surviving joint tenant on the death of the deceased.

5. The respondent is a Ward of the High Court having been taken into wardship by order of the President of the High Court made on 3rd October, 2013, and one of her four stepchildren, Paul McDermott, was appointed committee of her person and estate. The General Solicitor acts in these proceedings on behalf of the ward because Paul McDermott is one of the persons named as a beneficiary in the will.

6. The estate of the deceased comprises a bank account with a value of €360,000 in round figures which had been held by her jointly with deceased husband, and it is assumed for the purposes of this application that the monies in that joint account have passed to her by survivorship on his death.

7. The deceased married her late husband Arthur McDermott on 28th December, 1978. He was a widower with four children who at that time were aged between 13 and 23 years. Arthur McDermott died on 18th October, 2008 having previously made his last will on 4th April, 2008, the legal effect of which was to place the entire of his estate on trust for the deceased for her life, with the remainder over on trust for his four children equally.

8. Arthur McDermott had previously made a will on 12th August, 1981, by which he had bequeathed his entire estate to the deceased, and a short time later, on 2nd September, 1981, he executed pursuant to s.113 of the Succession Act 1965 a renunciation of his right to the legal right share in her estate to which he would become entitled on her death testate under Part IX of the Act. That renunciation was presumably made in the circumstances where the deceased was, at the date of her marriage, living in the house in Dufferin Avenue with her two unmarried sisters, and presumably without regard being had to the fact that that premises was held by the three sisters as joint tenants.

9. The evidence suggests that at the time the late husband of the deceased executed his second will on 4th April 2008, the deceased was suffering from dementia and incapable of looking after her own affairs. She first exhibited signs of dementia in 2001 and 2002 and her increased cognitive impairment, and the serious sight problems experienced by Arthur McDermott, led the couple to sell their former family home in Chapelizod, Co. Dublin, and to move together to a retirement home in 2007.

10. The deceased was made a Ward of the High Court on 3rd October, 2013 and was then found to be of unsound mind and incapable of managing her personal property.

Searches for original

11. The evidence points to the fact the deceased retained custody of the original of her will after she executed it in March of 1988, and nothing is known of its whereabouts since that date. It was not found following her death, nor after she was taken into the wardship of the High Court.

12. After the death of the deceased, enquiries were made of Austin Dunne, the solicitor who had prepared and witnessed her will and that of her husband. Mr. Dunne had acted as solicitor for Arthur McDermott and had also advised him with regard to the execution of the renunciation. He was confident that as he had retained only a copy of the two wills in accordance with his usual practice that the deceased must necessarily have taken away the original. The wills' register of that firm has not been located and it is not known what

happened to it when the firm was taken over by another firm, Niall Murphy & Co.

Evidence of control and custody
13. The uncontroverted evidence is that after her husband's death in 2008 the deceased lived for long periods of time with her stepchildren, and indeed in the years 2008, 2009 and 2010 she lived with them and their families in a system of rotation that had the practical effect that she lived full time with one or another of them until she was admitted to a nursing home in January, 2010 when her dementia made it impossible for her to live without intensive nursing care. The relationship between the deceased and her stepchildren was close and the children stayed living at home with their father and stepmother until each of them set up their own independent lives. The relationships remained close and good, and they shared holidays, including summer holidays, and the children continued to maintain a good relationship and frequent contact and visits after they had their own families. The relationship remained close and caring after the father of the children died. It is fair also to extrapolate from the facts that as the children continued to reside with their father and stepmother well into their 20's and 30's, and when each of them was independent, that the relationship with their stepmother was very good.

14. It would be fair to say that there is not any certain evidence that the original will was ever in the custody of the deceased, although counsel for the applicants do accept as a matter of probability that given the evidence of Mr. Dunne her solicitor, which was by way of surmising from his general practice, that she did take away the will.

Findings of fact
15. I find, as a matter of probability, that the original will of the deceased was given into her possession at or near the time it was executed on the 28th March, 1988. I also find that as a matter of fact the deceased had a good and close relationship with her four stepchildren, and that she would have wished to benefit them by the bequest of any property of which she should die seized. I also find as a matter of fact that from the year 2000 or thereabouts the deceased had become cognitively impaired, and that the decision that she and her husband made to move to a retirement home in 2007 was motivated by his failing eyesight and his perception that his wife's dementia condition was becoming progressively worse and that she would be unable to take care of her own or of his needs should his blindness become total. I also find as a matter of fact, and this evidence is uncontroverted, that the respondent, who is the person who would solely inherit the estate of the deceased should she be found to have died intestate, did not, in 1988, nor at any time before or at the date of death of the deceased, have any financial needs, and she had worked all her life and had the benefit of two pensions.

16. The will of the deceased made a specific bequest of the property at Dufferin Avenue and on the mistaken assumption that her interest in that property did not pass by survivorship to her two sisters. In that context the will that she made in 1988 by which she made a specific devise of the property at Dufferin Avenue to her sisters and the survivor of them for their respective lives was prudent and rational. It is critical in that context to note that the deceased devised what she believed to be her interest in remainder expectant upon the death of her sister in these premises in equal shares to her four stepchildren, whom she also appointed as her residuary legatees. That particular fact is important to understand the choice that she made then, some ten years after she married their father, and when each of them had passed the age of majority, namely to benefit each of them after the death of the survivor of her sisters. I also regard it as significant that the relationship was such that she chose to appoint as executor one of her stepchildren, David McDermott, who died on the 23rd October, 2009, and she clearly had sufficient confidence in her youngest stepson to vest in him that role. It is important also to note, and I find as a matter of fact, that the deceased's mental condition was such that by the time her executor David McDermott died on the 23rd October, 2009 her cognitive impairment was such that she was no longer capable of making a new will, or a codicil to her exiting will, by which she might have replaced her executor.

17. Thus all the circumstances point to the deceased having, well into the majority of each of her stepchildren, an intention to benefit each of them by her will of 1988, and equally an intention to preserve for the benefit of her sisters and each of them, a right to reside for their respective lives in the house at Dufferin Avenue.

18. There is no evidence before me that would suggest that at some stage before the deceased lost cognitive capacity, that she became aware of the nature of the joint tenancy in the premises at Dufferin Avenue, and that she therefore would have considered it to be either morally appropriate or prudent to die intestate. It should be noted in that context that the operative part of the deed by which the three sisters purchased the property of the 18th September, 1962 does identify the joint tenancy, but as late as 1988, some 26 years after the property was purchased by the sisters, the deceased herself certainly believed, and must have been so advised by her solicitor, that the property was held by them as tenants-in-common as she referred in her will in 1988 to her "share" in the dwelling house and specifically dealt with it in her will.

The law: presumption of revocation
19. Counsel agree that the application invokes the presumption that where a will is shown to have been in the custody of the testator and is not found at his or her death, that a presumption arises that it was destroyed by the testator with the intention of revoking it. Counsel also agree that the presumption is rebuttable. Counsel for the respondent argues that the presumption is a rule of law, but counsel for the applicant asserts that it is a presumption of fact which may be rebutted by evidence, and that the evidence can include circumstantial evidence from which certain conclusions can be drawn.

20. The presumption is of considerable antiquity and it was first explained and identified in *Welch v Phillips* (1836) 1 Moo PC 300 where Parke B. explained the underlying rationale as follows:

> *"the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: that if a Will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary."*

21. The Supreme Court quoted that passage with approval in the decision of *In Re the Goods of Coster (Deceased)* (Unreported 19th January, 1979) when Kenny J. gave the judgment of the Court. The deceased in that case had made a will with the assistance of her solicitor and some two years later called to her solicitor's office and asked for the original will which she took away. She said nothing to indicate why she wanted it. She purchased a printed form of will from Messrs. Easons, and after her death this printed form with nothing written on it was found amongst her papers, but the will made some years earlier in the office of her solicitor was not. Gannon J. in the High Court refused an application to declare that the deceased had died intestate on the grounds that he thought that the

will might have been mislaid, or that even if it had been destroyed, it was not destroyed with an unconditional wish to revoke it, but that the revocation was conditional upon the execution by the deceased of another valid will, and that this assumption could be made from the fact that she had purchased a form of will from a stationers. The Supreme Court disagreed.

22. Kenny J., quoted with approval of the statement of Parke B., referred to above, and pointed to the ancient origin of the presumption. He went on to say the following:

> *"It is however a presumption only and not an absolute rule so that it may be rebutted. Thus the occurrence of a fire at the testatrix's home, or the character of the deceased's custody (see judgment of Chief Justice Cockburn in Sugden v. Lord St. Leonards (1876) Prob Div 154 at p.215) or the possibility of a disappointed beneficiary having removed the original will have to be taken into account as matters which may rebut the presumption."*

23. The Supreme Court rejected the argument that if the will had been destroyed, that the destruction was conditional on the testatrix making another will. It held that, as there was nothing to rebut the presumption, the deceased had destroyed her will of 1971 with the intention of revoking it, that she had died intestate.

24. Kenny J. indicated a number of factors that might rebut the presumption, and although the occurrence of a fire at the home of a testatrix might be an obvious example of destruction without an intention to revoke, the other example he gives is the possibility of a disappointed beneficiary having removed the original will, not as a matter where evidence shows that this had happened, but where evidence points to it being a possible explanation for the loss of the will.

Statutory context: revocation requires intention
25. It seems to me that the presumption must also be seen in the context of the general rule with regards to revocation of a will, namely that stated in *Harris v. Berrall* (1858) 1 Sw & Tr 153 that:

> *"If it is once proved that a will has been duly executed, I hold that it is entitled to probate, unless it is also shewn that it has been revoked by one of the several modes pointed out by that statute…."*

26. The reference was to s. 20 of the Wills Act 1837, similar to s. 85 (2) of the Succession Act 1965.

27. Thus, the starting point for the consideration of the question of revocation has to be that the revocation of a will cannot happen without an accompanying intention to revoke it, and this is clear from s. 85 (2) of the Succession Act 1965:

> *"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."*

28. An *animus revocandi* is an element in revocation, thus the presumption of that animus from the mere fact that a will known to be in the possession of a testator was not found at his or her death, is one which points to an intention but no more. Accordingly I consider that counsel for the respondent is incorrect in arguing that the presumption is a rule of law, and the presumption is in my view a presumption of evidence or fact, such that in the absence of any other fact or evidence, the court will presume that the will was destroyed and the intention to revoke was present, but many cases will involve a consideration of the available evidence of an intention to revoke.

Standard of proof
29. I accept the argument of counsel for the applicants that the presumption, if it is to be rebutted, is to be rebutted on evidence which shows that the loss of the will does not impute a destruction and/or destruction with the intention to revoke, and that the proof must be on the civil standard of the balance of probability. The application being a civil case, the civil standard of proof must apply, and as stated by Hardiman J. in *Boliden Tara Mines Ltd. v. Cosgrove & Ors*. [2010] IESC 62, at p. 19:

> *"It appears clearly established in Irish law that there are but two standards of proof: that applicable in criminal proceedings, which require proof 'beyond reasonable doubt' and that applicable in civil proceedings, where proof on the balance of probability is required."*

30. As the presumption is one that may be rebutted on the civil standard the role of the court is to weigh the evidence and assess which argument from the evidence is more probable than the other.

The nature of the presumption
31. The nature of the presumption was considered recently by the English High Court in *Wren v. Wren* [2006] EWHC 2243 (Ch), where Rimer J. admitted a copy of a will to probate and held that the original had been destroyed or lost by accident. Explaining the presumption he said at para. 94 the following:

> *"It is, however, only a presumption and it is open to Michael to adduce evidence rebutting it; that is, evidence pointing to the higher probability that any loss or destruction of the will was accidental and not accompanied by any intention on Peter's part to revoke it. That evidence can include the contents of the will itself. Put simply, it may be improbable that the maker of a highly elaborate will, containing detailed bequests in favour of a wide range of beneficiaries, should decide to substitute for it a disposition of his estate under the laws of intestacy. It can also include oral declarations of the testator. Repeated affirmations by him following the execution of the will of the dispositions made in it may tend to support the view that he cannot have voluntarily destroyed it with the intention of revoking it".*

32. That Court found statements by the testator down to the date of his death which were consistent only with the will representing his final testamentary intention, and the Court did not find it possible to reconcile those statements with a deliberate decision by the deceased to destroy the will with the intention to revoke it. The Court did not look to the circumstances of how the will was lost, although it did note that the deceased had a propensity to hoard documents and possessions, and accepted one form of evidence and argument from that evidence which it was held was sufficient to suggest absence of intention to revoke.

33. I consider this approach to be correct.

The operation of the presumption
34. There is little authority on the operation of the presumption in this jurisdiction, although there is some useful authority in other

jurisdictions, including authority under the old Wills Act of 1837, which must be treated as authoritative. It is well established that the burden of rebutting the presumption lies on he who sets up the will. In *Sugden v. Lord St. Leonards* (1877) 1 PD 154, referred to by Kenny J. in *In Re the Goods of Coster (Deceased),* Cockburn C.J. said the following:

> *"Now, where a will is shewn to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course that presumption may be rebutted by the facts. Although presumptio juris, it is not a presumption de jure, and of course the presumption will be more or less strong according to the character of the custody which the testator had over the will."*

35. Earlier in *Patten v. Poulton & Ors* [1858] 1 Sw.& Tr. 55, Sir C. Cresswell explained the presumption as follows:

> *"…in the absence of circumstances tending to a contrary conclusion, to warrant an opinion that the maker of the will destroyed it. But it is a presumption that prevails only in the absence of circumstances to rebut it, and is, therefore, commonly called a prima facie presumption. It may be fortified or it may be rebutted by many circumstances….On the other hand there are many circumstances tending to negative the presumption. …it may be said, that the contents of the will itself shew the improbability of its destruction."*

36. The case law would suggest that the courts will look at the combination of circumstances from which the probabilities may be assessed and weighed. I also consider that the case law points to the court weighing those possibilities in the light of the arguments advanced as to the most likely explanation for a particular happening, and that one important circumstance is the content of the will itself. Thus I consider that the evidence on which the court must form an opinion can be, and perhaps almost always will be, circumstantial evidence. Certain factors will guide that opinion such as the character of the testator, the character of possession and the contents of the will itself.

37. Counsel for the respondent points me to a considered judgment by the Supreme Court of British Columbia in Canada in *Thierman Estate v. Thurmann & Ors.* (2013) BCSC 503 and to the practical guidelines expressed there as to the type of evidence that might be considered in attempting to rebuff the presumption of revocation. A similar presumption operates in that jurisdiction and the judgment of that Court referred to *Sugden v. Lord St. Leonards*, and *Welch v. Phillip*s itself. The Court identified a number of factors to be considered. The relevant ones of which are as follows:

a. Whether the terms of the will itself were reasonable.

b. Whether the testator continued to have a good relationship with the beneficiaries identified in the copy will which is propounded in the action.

c. Whether the personal effects of the deceased were destroyed prior to the search for the will being carried out.

d. The nature and character of the deceased in taking care of personal effects.

e. Whether there were any dispositions of property that might support or contradict the terms of the copy sought to be admitted to probate.

f. Statements made by the testator which confirm or contradict the terms of the will.

g. Whether there is evidence that the testator understood the consequences of not having a will and the effects of intestacy

h. Whether the testator made statements to the effect that he had a will

38. I consider this to be a useful modern summary of the factors. I turn now to consider these various factors in the light of the circumstances of this case.

The circumstances of the custody of the will

39. In *Patten v. Poulton* itself Sir C. Cresswell regarded the nature of the custody of the will as an important indicator of intention. He noted that the testatrix had changed her residence twice after the will was made and that she did not appear to have any place for the deposit and safekeeping of papers of importance. In that context he regarded the possibility of the will being lost by accident as not being excluded. He also noted that her brother had destroyed some papers, the particular nature of which was unclear, and therefore that the possibility of destruction by another person was also not excluded. The same approach is noted by Cockburn C.J. in *Sugden v. Lord St. Leonards* where he noted that:

> *"…the custody was anything but a close custody. The box was kept in a room on the ground floor, common not only to the inmates of the house, but to anyone who had obtained access to it. It was kept in a common box easily opened…."*

40. In the present case the evidence does not point to any care being kept by the deceased of her personal papers. It is also clear that she moved many times in her later years, and that she and her husband moved from their family home to a retirement home in 2007. It was said that at one stage important paperwork was kept by her in a wardrobe, but there is no evidence that the couple had a special and secure place in which they kept important documents. It is noteworthy in that context that no person appears to have seen the original in the lifetime of the testatrix.

41. I accept the argument of counsel for the respondent that there is no direct evidence as to the nature of the practice of the deceased and of her late husband with regard to the keeping of papers, and that therefore the circumstances of the custody of the will are not such as would raise an argument or might rebut the presumption.

42. What is more problematic, however, and this was pointed out by counsel for the applicant, is the fact that there is no evidence that the original of the will was in the custody of the deceased from the time it was made in 1988. It could well have been mixed with her other papers or of her husband, and there is also no contemporary evidence as to what was done with the various papers and belongings of the couple when they moved from their home to a retirement home. In that context it should be noted that the will was a small will of one page only and more bulky paperwork might well have been more obviously important, and thus less easily accidentally destroyed.

43. I consider that were the only circumstances to which I might have regard those of the care and custody of the papers of the

deceased, that little or nothing is available from which I can draw a clear conclusion.

Circumstance of the will itself
44. The authorities suggest that the circumstance of the will itself may be a key to the consideration of the presumption. This is evident from *Wren v. Wren* mentioned above, and from the old case of *Saunders v. Saunders* 6 NC 522 where Sir H. Jenner Fust said:

> *"The strongest proof of adherence to the will, and the improbability of its destruction, arises from the contents of the will itself."*

This *dicta* was quoted with approval by Sir C. Cresswell in *Patten v. Poulton.*

45. The circumstances of the will of the deceased are of particular importance. It seems that the deceased believed that she co-owned the property at Dufferin Avenue with her sisters as tenants-in-common. Counsel for the respondent suggests that on the death of her first sister on the 23rd of March 1994, the deceased must have known that the property passed by survivorship to herself and her sister Sarah. He argues that the misunderstanding as to the nature of the tenancy must have become clear to the sisters then, and that by then, the deceased would have regarded her will as redundant, as its primary objective, to ensure that her surviving sister or sisters would have a right of residence in the house no longer needed to be preserved. That argument would have force were one to consider that the "primary objective" of the will of 1988 was to protect the right of residence of the sisters of the deceased in the house they jointly owned. However, one might also read the will as protecting the remainder interest of the four stepchildren of the deceased with whom she had by then a long-established relationship. It must also be borne in mind in that context that in 1988 the deceased was almost 70 years of age, and it would have been reasonable for her to have given some weight to the remainder interest to which she believed she was entitled in the house in Dufferin Avenue, and to the benefit that she wished to give to her stepchildren.

46. Further, there is no evidence that the deceased ever became aware of the joint tenancy in the house in Dufferin Avenue, and it seems more likely that had she known of that fact she would have then considered making a new will if, as counsel for the respondent suggests, the primary purpose of her 1988 will had been achieved. Thus it seems to me that the contents of the will itself point to a considered position by the deceased.

47. Further, I accept the argument made by counsel for the applicants that nothing happened in the lives of the couple, or of their children, or of the surviving sister of the deceased, which might have created a moral imperative to provide differently for any of them.

48. Thus I conclude that the contents of the will, the circumstances of which are a factor which must weigh in my mind in assessing the probability that the will was destroyed with the intention of revoking it, point me to the will being the product of a rational choice and decision by the deceased to benefit both her sister and her stepchildren, and more especially to preserve the full beneficial interest in her estate for those children after the life estate which she purportedly bequeathed to her sister. This is a rational choice and the character of that choice is also a factor to which I must have regard and to which I now turn.

The character and position of the deceased
49. The authorities suggest that certain elements of the character or position in the life of the deceased may be considered probative and counsel for the applicants argues that this case is close to the facts found in *Patten v. Poulton.* The testatrix in that case had married a man she believed to be single and had children by him. It turned out that he had been previously married and had a lawful wife living and, on discovering this, the testatrix separated from him and afterwards married a Sicilian nobleman with whom she had no children. She had great affection for her children and maintained a strong bond and contact with them although they all lived in different countries. She was known to have made a will bequeathing all of her property between her three children equally, but after her death the original could not be found. Sir C. Cresswell admitted the copy will to probate, finding that there were many circumstances tending to negative the presumption that she had destroyed the will *animo revoncandi*. He expressed these elements as follows:

> *"the constant undeviating affection manifested by the deceased for her children - that the will was made under the influence of that feeling as expressed at the time and afterwards – that she never expressed a desire to benefit by her will any other person, and above all the fact that she perfectly well knew that her children were illegitimate (although not by any fault of hers), and that consequently, if she died intestate, they would receive no part of her property, but the whole would be divided amongst others."*

Sir C. Cresswell followed *Saunders v. Saunders* as he believed that the *"contents of the will itself shew the improbability of its destruction."* He held that the combined circumstances:

> *"render it so improbable that the deceased would wilfully destroy a will made in favour of her children, that I cannot, from the mere circumstances of its not being found, presume that she did so."*

50. Were the will of the deceased to have been destroyed by her with an intention to revoke it, she would have died intestate, as a result of which her estate would ultimately have passed to her remote relatives, her sister having died without issue, and her other sister being single and also having no children. Further, the facts suggest that she and her husband believed that she held an interest in the house at Dufferin Avenue in common with her sisters, and this belief is evident from the contents of her will, and from the fact that her husband, after their marriage, waived his rights to his legal right share in her estate at a time when her only asset was her interest in that house. The execution of the renunciation by the husband of the deceased is telling and indicates a view on his part, and on the part of his wife, and presumably the legal advice available to them, that in order to protect the rights of the sisters of the deceased in that home which they had occupied and owned jointly since 1962, that a waiver of his legal right share would be prudent. Furthermore, it must also be recalled that the deceased was almost 60 at the date of her marriage, and it is to be expected that she would have been acutely aware of the accommodation needs of her sisters and that neither she nor either of them had any children to whom she had any moral obligation or emotional connection.

51. On the other hand the evidence points to a very strong bond between the deceased and her stepchildren, a bond that continued well into her illness which led to a degree of cognitive impairment that commenced several years before she died and which is evident in their unfailing care for her after their father died and she was in her eighties and unwell. The facts point quite clearly in my view to a desire on the part of the deceased that she would benefit her stepchildren, provided the accommodation needs of her sisters, and the survivor of them, were adequately protected and preserved. That interest is also evident from the disclaimer executed by her husband not long after their marriage.

52. Counsel for the applicant urges upon me that I ought to presume the deceased was aware of her husband's financial affairs, and of the terms of his first will. I accept that this is a reasonable proposition and would flow from the fact that the couple considered it important that Mr. McDermott, and not the deceased, would execute a waiver of succession rights. I consider it important that mutual waivers were not executed, and this fact would suggest that the deceased's own will was made in contemplation of providing for her stepchildren. I consider it highly probable that the deceased knew the terms of her husband's first will which was made at the same time he disclaimed his right to take his legal right share on her death testate. Therefore I consider it probable that she intended by her will to preserve any inheritance she might have taken from her husband for his children, and not for her remoter relatives, with whom it is not established she had any strong bond or connection.

53. Counsel for the respondent also argues that the estate of which the deceased died possessed comprises wholly of the proceeds of sale of the house that she shared with her husband, and that as this was held in a joint account, it passed by survivorship to her and not under the terms of his will by which she was entitled to a life estate only. It is submitted that the supposition that the deceased intended to benefit her stepchildren on her death has no real basis in fact as she was likely to be unaware of the joint account or any inheritance she might take from her husband. I accept his argument to the extent that by 2000, and almost certainly by 2007 or 2008, the deceased was suffering from a degree of cognitive frailty which makes it unlikely that she understood the nature of the assets that she might inherit, or that were held in joint names and subject to a right of survivorship. However, I consider it significant that she never executed a renunciation of her own inheritance rights in the estate of her late husband, as he had done in hers. I consider it more probable than not that this couple discussed their own respective joint and several financial needs and those of their children, and of her siblings, and that the will she made in 1988 reflected a wish which was rational and in respect of which no evidence was being adduced that would suggest might have altered over the period between 1988 and the time frame when she became frail of cognition.

Conclusion

54. This case does engage the presumption of revocation. The presumption is rebuttable, and the evidence of rebuttal may be circumstantial, and the exercise engaged is a consideration of the circumstances of the deceased, the contents of the will, and the probability of the testator wishing to die intestate. I consider in this case that the presumption has been rebutted by such circumstantial evidence, and that the relevant circumstantial evidence includes the careful contents of her will which protected both the interests of her siblings and those of her stepchildren, allied to which is the fact that the husband of the deceased had renounced his succession rights in her estate, and that she had not renounced her rights in his estate. This circumstantial evidence points me to the conclusion that as a matter of probability the deceased did not intend to die intestate.

55. The evidence also points to the deceased being conscious of her financial means, and of having a sufficiently strong bond with her husband for him to have disclaimed his interest in her estate, but she not to have done so in his estate. The degree of complexity in thought, and the degree of mutual agreement that was necessary for that arrangement to be put in place, suggests that the couple was careful about their affairs, and the evidence therefore points to it being improbable in those circumstances that the deceased would have elected to have died intestate and thus to have denied her stepchildren the benefit of the monies which she inherited or took by survivorship following the death of her husband. Intestacy would have had the effect that her entire estate would pass to her surviving sister who is unmarried and has no children, and that the ultimate intestate successor would be remote relatives with whom she had no close connection or moral obligation. The relationship between the deceased and her four stepchildren was close and caring, and continued to be so close that she lived with them in an organised way for long periods of time in her later years, until she became incapable of living without full time institutional care.

56. I accept that some 25 years have passed between the time the deceased made her will and the date of her death, but I consider that the length of time makes it more probable that the will was lost rather than it was destroyed. Furthermore, counsel both accept that from the year 2000 or shortly thereafter the deceased was probably incapable of having the cognitive ability to revoke her will by destruction or otherwise and the period of 25 years is in effect shorter. Therefore in the circumstances I will make an order admitting the copy will to probate in common form of law.