THE HIGH COURT

PROBATE

IN THE MATTER OF THE ESTATE OF CARMEL CURTIN, DECEASED (LATE OF 52 BEAUMONT DRIVE, BALLINTEMPLE, CORK)

AND

IN THE MATTER OF THE SUCCESSION ACT 1965

AND IN THE MATTER OF AN APPLICATION BY KATHREIN CURTIN, KIERAN HUGHES AND JOSEPH CURTIN NAMED IN THE LAST WILL AND TESTAMENT OF CARMEL CURTIN, DECEASED

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

1. Carmel Curtin deceased died on the 9th February, 2013 having made and executed a testamentary instrument on the 17th August, 1998. The original of the will has been lost or mislaid as is not now forthcoming. There is in existence a photocopy of the will and evidence is available to confirm due execution of the will and the accuracy of the copy. This judgment deals with an application to admit the copy to probate in the absence of the original will and the applicants claims that there is evidence to rebut the presumption that in the absence of the original will it is to be presumed that the deceased had destroyed it with the intention of revoking it.

2. This judgment should be read in conjunction with the judgment delivered by me today in the estate of *Re McDermott* deceased where a similar issue arose.

Background

3. The deceased died divorced and without issue, leaving her surviving a brother and the children of four predeceased brothers, numbering fifteen in all, as the persons entitled to her estate on a death intestate. The application is made by motion to have the copy will admitted to proof by three of the four persons named as executors in the testamentary instrument.

4. The matter was heard on motion grounded on affidavit and the applicants were represented by counsel. Some of the beneficiaries who have opposed the application appeared as litigants in person, and some others expressed their opposition in letters to the Court. Counsel for the applicants sensibly accepted that the respondents who opposed the application be permitted to make submissions in writing, and that no oral evidence was required to be adduced by them under oath. The majority in number of the next of kin of the deceased oppose the application.

5. The grounding affidavit was sworn by the first applicant Kathrein Curtin, one of the named executors and a sister-in-law of the deceased. She swore the affidavit with the authority of the other surviving executors.

6. The deceased became unwell in May 2010 and came to suffer a degree of cognitive impairment such that on the 1st December, 2010 an enduring power of attorney which she had previously executed came to be registered in the High Court. The enduring power of attorney had been executed on 25th May, 2006 and her solicitor Eileen Lee has sworn two affidavits with regard to her knowledge of the affairs of the deceased, and exhibited copies of the deceased's diaries for the years 2005, 2006 and 2007.

7. After the deceased became unwell some time in the summer of 2010, one of the applicants, Kathrein Curtin, found an envelope in the home of the deceased and took it to Ms. Lee solicitor for safe keeping. The envelope was sealed and Ms. Curtin says that she did not know what it contained. After the deceased died the envelope was opened and it contained a copy of the will made on the 17th August, 1998 and an original note on purple paper.

8. It is accepted by all of the relevant parties that should the copy will not be admitted to proof, the deceased will be deemed to have died intestate.

The will

9. The will of the deceased is a "home made" will made in her own handwriting and by it she makes a number of specific pecuniary bequests, devised her interest in her home equally between three identified persons, her brother Brendan and two nephews, and the residue of her estate was bequeathed to all of her nieces and nephews equally.

10. There is a note at the end of the copy found, also in her handwriting, but possibly written with a different pen, which is as follows:

> "Note:-This will was composed and written by myself, C. Curtin, while alone in my own house, as above on Saturday 15th August 1998 and witnessed by above on 17th Aug, 1998 before they visited their elderly (84 yrs) mother who lives next door and has a live-in carer."
>
> There is also a line of script in what has been identified as Gregg shorthand immediately below the signatures of the two attesting witnesses and this has been translated as stating "original under mirror on chest in back bedroom".

11. Further the copy will had a note inscribed on the back thereof:

> "25th July, 2006
>
> CURRENT WILL
>
> made on Sat 15th August, 1998 witnessed by Mary & Vincent Redmond originally from 51 Beaumont Drive Presently at address as stated on Will
>
> C. Curtin"

12. The sealed envelope found in the home of the deceased in 1998 contained only a copy of the will but it also contained an original

note on purple paper which reads:

> "Glenhelen, 53 Beaumont Drive, Ballintemple, Cork City
>
> Thurs 3 Aug 2006
>
> Most valuable document I have
>
> C. Curtin
>
> Get copy May 2007."

The lost original: presumption of destruction with intention to revoke

13. When a will is known to have been in the possession of a testator and is not found after his or her death there is a presumption that the will was destroyed by the deceased with the intention of revoking it. The nature of the presumption was considered by me in the judgment of *Re McDermott deceased*. The presumption is a presumption of fact and may be rebutted by evidence, and, as discussed in *Re McDermott deceased*, that evidence may be circumstantial evidence. The court is required to assess whether the weight of the evidence and the circumstances, taken together, point to the fact of revocation. The onus of displacing the presumption lies on the party who sets up the will.

14. The applicants assert that the evidence points to the will still being in existence in 2006, probably in 2007, and argues that thereafter the deceased did not have sufficient mental capacity to destroy the will with the intention to revoke it. This case therefore raises two questions:

> 1. Whether the presumption that the will was destroyed with the intention to revoke it has been rebutted, and
>
> 2. The separate question of whether the deceased could have had the *animus revocandi* to revoke the will after 2007.

15. The latter question raises a different onus of proof, and, as will appear later in this judgment.

16. This case thus raises two questions of law and fact. The first question arises from the fact that the original will has been lost and involves consideration of whether the person setting up the will can establish sufficient evidence to rebut the presumption that it was destroyed during the lifetime of the deceased with the intention to revoke it. The second question relates to the capacity of the deceased to revoke the will, and thus that raises a separate question of fact and law, and whether sufficient evidence is available to establish that the deceased had the cognitive capacity to form an intention to revoke the will after 2007.

17. I will deal with each question in turn.

The loss or destruction of the original will

18. The presumption that if an original will was known to be in the possession of a testator and was not found after his/her death, that the will was destroyed, *animo revocandi*, is of considerable antiquity, and was found in the old Ecclesiastical Courts. I have considered the force of this presumption in the judgment of *Re McDermott deceased* and will not repeat that law here, save to say that the onus of rebutting the presumption lies on the person setting up the will. It is clear that the presumption may be more or less strong depending on the quality of the circumstantial and other evidence available.

19. One particular fact which has been noted as important in the case law is the quality of possession or custody of the will by the deceased: *Re Sugden v. Lord St. Leonards* (1876) 1 PD 154. It is also established that declarations of goodwill towards the named beneficiaries or adherence to the content of the will made by the deceased can amount to evidence which would suggest that the will was not revoked.

20. The applicants point to the fact that the deceased was known to be a woman who took considerable care of her possessions and papers, and this is shown by a number of means. The medical evidence from her GP Dr. David Flynn was that she was conscientious and perhaps even, in his words, "obsessional about detail". He describes her as "a very capable lady, bringing lists of her concerns, and fastidiously writing any advice or instruction dispensed". He noted that the deceased had worked in the Civil Service all her life and that she herself believed that her fastidiousness and care of detail arose from her training in the Service.

21. The deceased kept diaries, and her diaries for 2005, 2006 and 2007 were exhibited in the second affidavit of Eileen Lee sworn on the 4th June, 2015. Certain entries in that diary will come to be considered in the context of an examination of her state of mind in those years. For the present certain factors are to be noted: on the 27th November, 2005, there is an entry that she must "update my present will", identified expressly by her as the will which was witnessed by Mary Roche and her husband Vincent, which I consider as a matter of probability to be the one now sought to be admitted to proof. This would suggest that the will was still believed by her to be in existence and valid on the 27th November, 2005. It is also clear that she made several appointments through 2006 to see Ms. Lee with a view to giving her instructions on a new will, and as late as 30th March, 2007 the deceased said she would call to Ms. Lee's office to attend to payment of an outstanding invoice and to make a new will. On the 25th May, 2006 the deceased told Ms. Lee that her original will, which she identified as a handmade will, was at her home. There is evidence of various cancelled or delayed appointments to attend at Ms. Lee's office through the summer of 2006 and a diary entry of the 26th May, 2006 suggest that she was to make a "new apt for concluding my will".

22. The evidence also is that the deceased spoke to Ms. Lee on a number of occasions with regard the need to keep the handwritten will safe, although the last such conversation seems to have occurred on the 26th May, 2006.

23. All of the persons who oppose probate in respect of the copy point to the fact that the deceased wrote "not valid now July 2006/7" on the copy. I would deal later in this judgment with the reasons why the probable date of this note is 2007, but I consider that the personality and character of the deceased and the care she took of her documents and paperwork would suggest that she knew that she was writing on the copy, and I accept the argument made by all parties that she was unlikely to have written on what she believed to be an original. The respondents who opposed the admission of the copy to probate also point to the care that the deceased took with her personal belongings, and most especially with her paperwork.

24. They argue that a person who was so meticulous with her paperwork is unlikely to have lost or mislaid the old 1998 will and that is

a factor that I must take into account. All of them now accept, as they must, that the notation on the copy which suggests that the original was not valid is not sufficient at law to revoke the will, but they argue that this notation, together with the diary entries, which suggest that the deceased did intend in 2005 or 2006 to make a new will, point to the fact that she did intend to revoke the 1998 will, that it did not express her wishes by that time, and that these factors taken together with her personality and the care she would likely have taken to preserve original documents, point to the conclusion that the fact the original was not found means that the will was destroyed by the deceased with an intention to revoke it.

25. There are also the rather curious and ambivalent entries on the purple note found with the copy will. The first of these is the note "Most valuable document I have" and, I accept that it is reasonable to assume this denoted the original will, and that the purple paper and the copy were companions to that will and that the notes on the copy can be read usefully together with the purple document.

26. What is more curious however is the note "Get copy May 2007". I accept what was pointed out by a number of the objectors namely that this note must refer to a document other than the 1998 will as the deceased had a copy of that will and she in fact used it as a form of reference document from time to time, and certainly up to 2006 or 2007. This note does suggest that some other document was made in May 2007 or thereabouts of which the deceased wished to make a copy. It is difficult however to extrapolate with any certainty from this fact, as it is also clear from the evidence of Ms. Lee and from some of the diary entries that the deceased did have at least in mind that she would make a will through her solicitor, and she made and cancelled several appointments to do so in the relevant years of 2006 and 2007.

27. One of her nieces who lived with her as a child had a special relationship with her and believes that the deceased would have mentioned her specifically in the will. That factor does not it seems to me advance the argument, nor do the assertions made by many of the objectors that the will of 1998 did not in their view express what they believed would have been their aunt's wishes.

28. No person who has opposed the applicants can show evidence of any conversation with the deceased that would suggest that she did destroy the will, although it must be noted that equally the applicants cannot show any evidence of a conversation with the deceased where she voiced adherence to the content of the will or the existence of the will, after 2006 or perhaps 2007.

29. It is important however not to engage in speculation, and the question for the Court is whether there is sufficient evidence from circumstance to rebut the presumption that the will was destroyed *animo revocandi*. It is quite clear that the original was in the possession of the deceased in the relevant years, and I consider the evidence quite clearly points to the fact that it was in her possession in May 2006 and in her home and she herself recorded that fact as did Ms. Lee. The matter must, however, be considered in the context of the argument as to capacity.

The second argument: lack of capacity to revoke?

30. The applicants argue that while it can be said that circumstances do point to an intention on the part of the deceased to make a new will, that she did not do so and that the documentary and other evidence available would suggest that the will of 1998 was still in existence in 2006, and that this fact, and the fact that the deceased spoke of it as her last will to her solicitor, and made certain entries both in her diary and on the copy which she treated as a class of reference document, all point to the fact that at least up to 25th July 2006, the date of the note on the back of the copy will which indicates that this was the "current will" of the deceased, the will of 1998 was still in existence and considered to be valid by the deceased at that time. They argue that thereafter the deceased came to suffer from a degree of confusion of mind and cognitive incapacity such that it is likely that the will could have become lost or mislaid while it was in her possession, or that she did not, as a result thereof, have the capacity to form an intention to revoke the will, even if she herself did destroy the original. With that argument in mind, I now turn to examine the other proposition of law to which this judgment relates.

The capacity to revoke

31. Counsel for the applicants points to the statement in *Harris v. Berrall* (1858) 1 Sw & Tr 153 by Sir C. Cresswell, as follows at pp. 154 - 155:

> *"If it is once proved that a will has been duly executed, I hold that it is entitled to probate, unless it is shewn that it has been revoked by one of the several modes pointed out by that statute; and I am of the opinion that the burden of shewing that it has been so revoked lies upon the party who sets up the revocation."*

32. The Court was satisfied in that case that the will of the deceased had been duly executed and that, on the evidence, it had remained in a perfect state until the deceased became of unsound mind and it was torn up by her in her insanity.

33. As Sir C. Cresswell said in that case, *"an insane person cannot be said to have any intention",* and as the will was in the custody of the deceased and was torn by her, when she was not of sound mind, the tearing was not sufficient to revoke the will. Sir C. Cresswell identified the burden of proof as follows:

> *"The burden of shewing that it was not done after she became insane, but at a time when she was of sound mind, is cast upon the plaintiff, who sets up the revocation of the instrument."*

34. It may appear somewhat difficult to reconcile that judgment with the judgment in *Welch v. Phillips* (1836) 1 Moo. PC 302 as discussed in *Re McDermott deceased* but it must be recalled that the two lines of authority deal with different questions. The question in *Harris v. Berral* was whether the *animus revocandi* could be said to have been present at the time a will was destroyed, and the evidence in that case pointed to the will being in existence up to the time the incapacity was found. That particular factor is engaged in this case as it is clear the deceased did become of unsound mind in the years before she died and, as the will was known to have been in her custody during a period of unsoundness of mind, it could be said that the presumption of destruction with intention to revoke is not engaged. I consider that the *dicta* of Sir C. Cresswell is correct as a matter of law and it does no more than state the proposition that the act of revoking a will may not be done by a person without the requisite cognitive capacity to understand the nature and effect of the act he or she does. Thus, if it is known that an original will was in the custody of a deceased, and if it is known that he or she became of unsound mind, the presumption of revocation found in *Welch v. Phillips* will have no application. The question then becomes whether the original was in existence when the incapacity of mind arose. Thus two separate legal propositions are in play: the presumption of revocation if an original will is not found; and the legal principle that a will cannot be revoked by a person who lacks capacity to understand the act of revocation.

35. The applicants assert that the presumption of destruction with the intention to revoke does not apply as the evidence points to the deceased having become incapable, as a matter of fact, of revoking her will after 2007. *Harris v. Berral* was followed in *Sprigge v. Sprigge* (1868) LR 1 P & D 608, when Sir J.P. Wilde held that the presumption as stated in *Harris v. Berral* was correct and stated as

follows:

> *"The short proposition is, that the burden of shewing that the revocation was done not after the testator became insane, but when he was of sound mind, is cast on those who set up the revocation. In this case there was no evidence to shew when it was done. Therefore those who sought to set up a revocation failed in establishing the facts on which the presumption of revocation would rest."*

36. The principle as stated by Sir J.P. Wilde seems to suggest that where mental incapacity arose, those who set up a revocation have to adduce evidence to show when the revocation was done, and the burden is on *that* party to show that it was done with the requisite intention.

37. Sir J.P. Wilde, after he had become Lord Penzance in 1870, delivered a similar judgment in *Benson v. Benson* (1870) LR 2 P & D 172. He stated the general proposition, namely that:

> *"when a will is once proved to have been duly executed, the Court must be satisfied that it has been revoked before pronouncing against it."*

38. He then usefully went on to deal with the question of where the burden lay in regard to proof of revocation, and he, correctly in my view, stated that there is no presumption in the absence of proof that the destruction of a will was done before a testator became insane, or indeed after this had happened. He pointed to the question being one of fact as follows:

> *"The answer is, that the Court always refuses to presume one way or the other, but holds that the party who alleges that it was done at a time when it would amount to a revocation must prove his allegation, and in the absence of proof the revocation falls to the ground."*

39. I adopt these statements of the law and consider that the burden lies on the persons opposing the admission to probate of the copy will to show that the deceased did have an intention to revoke this will at a time when she had capacity to effect a revocation at law.

40. I accept also the argument of counsel for the applicants that the fact that the deceased showed an intention to make a new will, or even to revoke her old will is not sufficient evidence that she did do so.

41. Counsel for the applicants makes the point that the medical evidence points to the fact that the deceased had come to suffer a degree of dementia or cognitive impairment, and to manifest a degree of incapacity, possibly as early as 2005, although her treating doctor describes her condition as a class of "so-called pseudo-dementia" present "where cognitive function is impaired in tandem with more severe depressive symptoms that does not amount to actual dementing illness". He says the cognitive impairment in those circumstances can be exacerbated by the use of sedative drugs such as sleeping tablets, and the evidence is that the deceased did take sleeping tablets or sedative drugs for sleeping difficulties as early as 2006. Neither Dr. O'Mahony nor Dr. David Flynn, who acted as GP for the deceased for over 30 years, now holds her original medical notes. Dr. David Flynn however points to the fact that the deceased ceased driving in 2007, and that she did suffer from anxiety and depression throughout her life.

42. Dr. Flynn executed a certificate for the purpose of the putting in place of an enduring power of attorney by the deceased on the 22nd May, 2006 by which he confirmed that she did have capacity to understand and execute an instrument creating an enduring power on that date. Dr. Flynn confirms that her mental status "gradually deteriorated from the years 2008 to 2010 when she became more confused and forgetful" and on the 25th June 2010 he signed a certificate for the purposes of the registration of the enduring power of attorney based on his view that she no longer had capacity to manage her own person and affairs.

43. Apart from the medical evidence, there is the evidence from dairy entries from 2005 to 2008. The deceased, in a poignant entry on the 27th March, 2007, said, "the long lonelinesses drains me of energy". On the 28th September, 2006 her entry refers to her depression "building up every day, causing loss of energy". She said she had "no heart to ring anyone anymore". On the 14th November, 2006 she made the entry "must fill in diary everyday as memory failing!!" On the 27th March, 2007, with reference to the sedative drugs that she took for sleeping, she entered the following, "must take the sleeping pill now every night now – which leaves me 'dopey' when I wake." On the 28th March, 2007 the entry is "all my 'private business' is in Limerick Brain is 'winding down' so no mental energy anymore."

44. There was an incident in October 2008 when the deceased paid money to a builder in advance to do some work on her house who then did not do the work and could not thereafter be contacted. The matter was reported to the Gardaí and the exhibited Garda report suggested that the deceased was unable to "piece together what happened", and that her memory of the incident was confused and unreliable. The applicants places some considerable importance on this incident as an example of an objective observation of her lack of ability and Dr. O'Mahony also notes this incident, and he also notes that her friend who attended with the deceased when he assessed her in 2010 suggested that the dementing illness was manifest in 2008, and this is consistent with Dr. Flynn's evidence that her mental state did deteriorate from 2008 onwards.

45. The parties opposing probate of the copy will point to the fact that the persons appointed as attorneys under the EPA did not become sufficiently concerned to register the enduring power of attorney until the 1st December, 2010, and that one of the chosen attorneys had experienced a dementia condition with her own mother and must have as a result been aware of the difficulties the condition could cause and her obligation to seek registration of the instrument creating the power. Some of them point to conversations with the deceased, in December 2009, at the funeral of her late brother Brendan, when she was coherent and lucid and completely familiar with family members and activities. One of them describes contact with her by phone and a letter from her in March 2007, copies of which were exhibited and which it is argued show her to be lucid.

Conclusion on the evidence

46. As I have said it is important not to fall into speculatation and hypothesises with regard to the available evidence as to the cognitive impairment from which the deceased suffered. It seems moderately clear that by 2008 the deceased was suffering from some degree of cognitive impairment but not sufficient to trigger the registration of the enduring power of attorney, and she continued to live alone, albeit with some daily help, until 2011. Her condition is described by the medical advisors as progressive. A key date is the date of the execution of the enduring power of attorney in 25th May, 2006, when both medical and legal persons dealing with that instrument were confident of her ability. The other key date is 1st June, 2010 when the instrument came to be registered.

47. I return now to the note on the copy of the will of 1998 which contains the note "not valid now July 2006/7". I consider it more

probable that the relevant date is 2007. Had this note been made in July 2006 it would be difficult to reconcile with the note, also on the copy will, dated the 25th of July, 2006 where she records or declares that the copy is her "current will". It is more likely that the date was 2007, and that this reflected something that occurred or was thought to have occurred between the 25th of July 2006 and July 2007. Certain evidence is available of the activities of the deceased in the winter of 2006/7. On the 19th of February 2007 she makes an entry in her diary, "lot of document sorting in bedroom…" There is also the rather elusive note on the purple note which says, "get copy May 2007", which as I have said, must be a reference to a document other than the 1998 will. It might suggest that another will was made of which she might have wanted to make a copy.

48. I accept that it is clear that the deceased did at least consider making a new will after 2005 or 2006, and I consider that she had then formed an intention to make a new will. She herself notes that she found it "too difficult" and "hates deciding" in her diary note of the 31st January, 2006 and it must be remembered that she had a large number of nephews and nieces. I consider it possible that she kept the copy will as a template for the purposes of drawing up a new will but this is difficult to reconcile with the fact that she certainly seemed to consider it prudent to make a will through the assistance of a solicitor, and no new will was found among her papers.

49. I also consider it significant that the deceased was described as the repository of family documentations, photographs, letters, family paperwork, family correspondence, newspaper clippings, certificates etc. No other important document has been noted to be missing.

50. I conclude on the best evidence available that the deceased did come to suffer from cognitive impairment but not until 2008 and that her deterioration between 2008 and 2010 was gradual.

51. I conclude therefore that it was possible for the deceased to revoke her will up to 2008 or 2010 at the latest and that there was a window between 2005, when she first expressed dissatisfaction with the wishes expressed in the will of 1998, and 2008, or perhaps 2010, when she might have revoked the will. This results in a conclusion that those seeking to oppose probate in the copy have established to my satisfaction that the presumption of destruction does apply in those years between 2005 and 2008 or up to 2010 and that it was possible for the deceased to have formed an intention to destroy the will in those years.

Conclusion

52. I conclude then that the presumption of destruction with intention to revoke is engaged in this case and that there was a window up to 2008 or even to 2010 in which the deceased could have validly revoked her will of 1998. I consider in that context that certain factors led me to the conclusion that she did destroy the will with the intention to revoke it. There are not in this case many of the elements which are found in other authorities where a copy will was admitted as proof. There is no declaration consistent with the contents of the will; there would be no absurdity or irrationality in the deceased dying intestate, and the persons that she would wish to benefit would be identical or more or less identical with those persons who would succeed on intestacy; the practical effect of the will of 1998 and succession on intestacy is slight; the deceased had made an earlier will in 1995 in which she made a number of substantial chartable bequests, none of which were found in the will of 1998 and this difference shows that she regarded the making of a will as a matter of some importance and this is consistent with her personality and character. Allied to this is the fact that one test which is frequently applied in cases where a copy will is sought to be admitted is the character of the custody of the original, and it is clear that the deceased was a meticulous person, that she did at least at some point in time keep the will under a mirror in a bedroom in her house, that she did herself confirm that the copy will was in her home as late as July 2006, and that she did express disquiet about the contents of the 1998 will in writing and to her solicitor.

53. All these facts point to me to the conclusion that the presumption has not been rebutted by the applicants, and that the evidence points to the fact that the original will of the deceased was not lost or mislaid, but was destroyed by her with the intention to revoke, at a time when she did have mental capacity to validly revoke the will at law.

54. Therefore I refuse the application to admit the copy will to probate.