[2020]IEHC 447

THE HIGH COURT

PROBATE

[Record No. 19/10617]

IN THE MATTER OF THE ESTATE OF JOHN MC PARTLAN LATE OF 40 ASCAL RIBH, ARTANE, COUNTY DUBLIN, DECEASED
AND
IN THE MATTER OF SECTION 85(1) OF THE SUCCESSION ACT, 1965
AND
IN THE MATTER OF AN APPLICATION BY LINDA DINNEEN OF 31 LOWER BEECHWOOD AVENUE, RANELAGH, IN THE CITY OF DUBLIN AND PATRICK MC PARTLAN, OF FERNDALE, DUBLIN ROAD, MALAHIDE IN THE COUNTY OF DUBLIN

JUDGMENT of Mr. Justice Allen delivered on the 11th day of September, 2020

Introduction

1. John McPartlan, late of 40 Ascal Ribh, Artane, County Dublin, died on 12th August, 2019. He was survived by his wife Carol Graham, the respondent to this application, and seven siblings. The deceased and Ms. Graham married on 8th August, 2019.

2. By a will made on 18th June, 2019 the deceased named his sister Linda Dinneen and his brother Patrick McPartlan as his executors. He devised his house at 31 Ascal Ribh, Artane, County Dublin to his seven siblings in equal shares and bequeathed the residue of his estate to Ms. Graham. The value of the residue is a little more than the value of the house.

3. On the executors' application to prove the will, the issue now before the court is whether the deceased's will of 18th June, 2019 was revoked by his subsequent marriage, in which case Ms. Graham would be entitled to succeed to the entire estate on intestacy.

The evidence

4. Although there was a protracted exchange of affidavits, there is no real contest as to the essential objective facts. There is, as will appear, a sharp divergence of perspective.

5. The deceased grew up in the house at 31 Ascal Ribh, Artane and continued to live there with his mother until she died in 2014. The deceased inherited No. 31 from his mother. Ms. Graham grew up in the house at 40 Ascal Ribh where she continued to live with her mother until she died in 2015. Ms. Graham inherited No. 40 from her mother.

6. The deceased and Ms. Graham were in a long term relationship from January, 1996 but did not live together because they were caring for their mothers. After Mrs. McPartlan died in 2014 the deceased moved in with Ms. Graham and her mother. After Mrs. Graham died in 2015 the deceased and Ms. Graham continued to live in No. 40 until the deceased's death.

7. Over the years the deceased and Ms. Graham were regular visitors to Jersey and while they were on holiday together there in July, 2011 they became engaged. Both were at that time living with and caring for their mothers and there appears to have been no discussion for at least the following three or four years of setting a date.

8. Very soon after his return from Jersey the deceased instructed Messrs. Powderly, solicitors, in Kilcock to prepare his will. In the file note made by the solicitor at that time Ms. Graham is recorded as the deceased's partner but in written instructions prepared by the deceased for his solicitor and dated 15th July, 2011, the deceased described Ms. Graham as his fiancée. The written instructions were that the deceased's primary intention was to provide for his fiancée, Carol Graham, and his mother, Mrs. Sarah McPartlan. They contemplated that Ms. Graham would have half of what were described as his personal assets and his mother the other half. They contemplated that if the deceased's mother were to predecease him, her 50% would go equally to his siblings. If in that event the deceased should have inherited his mother's house at No. 31 but should not have married Ms. Graham, the house should go to his siblings. If the engagement to Ms. Graham should have been broken, by either, she should have 25% of his personal assets, rather than 50%.

9. Mr. Powderly prepared and on 5th August, 2011 the deceased executed a will by which Ms. Graham – therein referred to as his partner – was to have 50% of his estate, whether real or personal property, and the other 50% was to be held on trust for his mother for her life and thereafter, or in the event of Mrs. McPartlan having predeceased the testator, for his siblings.

10. Ms. Graham has averred that over the years – which I understand to be over the years after at least Mrs. McPartlan's death – at family and friends' weddings, the deceased would raise with her "*the question of getting married*" but, she says, "*we never reached agreement that we would get married*". There was, says Ms. Graham, some discussion of "*what sort of marriage we would want*". The deceased is said to have suggested a big celebration. Ms. Graham says that, by contrast with the deceased who was from a big family, she *"was from a small family and would never have wanted a big fuss*" but does not unequivocally say that she ever said so.

11. What becomes clear from the evidence is that, whatever about Ms. Graham, the deceased was enthusiastic to set a date.

12. In the weeks before his death, after he had been given a terminal diagnosis and a very short prognosis, the deceased gave his brother Patrick unrestricted access to his e-mails and bank accounts, and shortly after his death Patrick McPartlan found an e-mail which had been sent by the deceased to Ms. Graham on 20th July, 2018.

13. It is convenient at this point to deal with an objection which was raised in the replying affidavit of Ms. Graham and the written submissions filed on her behalf on 25th March, 2020 as to the admissibility of the evidence obtained by Mr. Patrick McPartlan from the deceased's files and records. The affidavit of Linda Dinneen on which the application was grounded, and which was sworn on 2nd December, 2019 referred to and exhibited the e-mail of 20th July, 2018 and some other documents to which I will come which were said to have been retrieved by Mr. Patrick McPartlan from the deceased's computer. Ms. Graham in her replying affidavit protested that the access to the deceased's computer had not been explained and was not justified and in a later affidavit persisted in her

objection that Mr. Patrick McPartlan had not filed an affidavit. Eventually, but not until 20th April, 2020, after the written submissions had been exchanged, he did, deposing, as I have outlined, that the deceased had given him unrestricted access to his e-mails and bank accounts. That evidence was unchallenged, and the point was not revisited in oral argument.

14. The posthumous accessing of digital records potentially raised all sorts of issues as to ownership of, and entitlement to access, information but no such issue was raised. If Ms. Graham was not satisfied with the explanation eventually given, I take the view that it was unobjectionable that Mr. Patrick McPartlan, as one of the named executors, if not in the continued exercise of the permission which had been given to him by his brother, should have examined his brother's papers and records.

15. In his e-mail of 20th July, 2018 to Ms. Graham the deceased wrote that he was entitled to a week's marriage leave and asked Ms. Graham to establish whether she was entitled to such special leave from her employment. He suggested that they might decide to get married on the first day of Ms. Graham's summer holiday, and possibly keep the wedding secret. He said, "*July 2019 seems to fit".* The deceased indicated that he had been making enquiries into civil marriage at the Dublin Registry Office and had established that at least three months' notice was required. He continued:-

> *"But we must try and get a date that suits us (July 2019?) – hence we can get organised if you will agree.*
>
> *You would need a day off work to meet with the registrar to arrange wedding. We both must attend and bring relevant information/documents with us. We are then issued a marriage licence.*
>
> *We will keep it simple and get it done.*
>
> *I hope you are happy to marry me!!!*
>
> *You are not to panic."*

16. Ms. Graham was cross that Mr. Patrick McPartlan had accessed the deceased's e-mails but confirmed that she did not reply to the e-mail of 20th July, 2018 and said that she "*did not agree to the hope or suggestion to actually get married*". Ms. Graham acknowledges that she and the deceased spoke about getting married and discussed a couple of possible dates, perhaps July, 2019 or April, 2020 but says that they never fixed a date or made any arrangements towards a marriage ceremony. The direct evidence as to when the discussions as to these possible dates took place is rather vague. Ms. Graham says that they took place "*in 2018 and 2019*" but it I infer from the date of the e-mail that the possibility of July, 2019 was discussed in or about or shortly after July, 2018.

17. The deceased retired from his work as a primary school teacher in December, 2018. In February, 2019 he was diagnosed with cancer and in March, 2019 was started on chemotherapy. The treatment was difficult, but the initial prognosis was optimistic.

18. In the Spring of 2019 the deceased turned his mind again to estate planning. In the last week of March, 2019 he consulted a tax specialist who set out or summarised his advice in a letter to the deceased of 29th March, 2019. The essence of the advice was that "*If you take only one piece of financial advice from me, it should be to marry your fiancée Carol and to do so soon*". The financial adviser set out a summary estimate of the value of the deceased's assets and set out what were described as two radically different scenarios should he die married or unmarried. The adviser calculated that should the deceased decide to leave his entire estate to Ms. Graham, Ms. Graham, if married, would take it tax free, but if unmarried would incur a tax liability of just short of €250,000, and he set out some other figures in relation to pensions. The letter concluded:-

> *"John, I look forward to meeting you again later in the year – following the successful conclusion of your treatment – to do some long term retirement planning. I hope I will also be able to shake your hand and congratulate you on your marriage. In the meantime, if I can do anything for you or Carol, please don't hesitate to ask."*

19. On 13th May, 2019 the deceased sent to his sister Mrs. Dinneen a draft of a letter he proposed sending to Mr. Powderly in which he said that he and Ms. Graham had agreed that No. 40 would remain in the possession of her family and No. 31, unless he had already sold it, in his. He told Mrs. Dinneen that Ms. Graham did not know that he had drafted the letter to Mr. Powderly "*re changing my/our will*".

20. On the same day, 13th May, 2019, the deceased wrote to Mr. Powderly:-

> *"Dear Mr. Powderly,*
>
> *I hope and expect to be married next April to my fiancée Ms Carol Graham.*
>
> *I now reside in Carol's house which is on the same road as my previous address. My new address is as above this letter. Carol is the sole owner of 40 Ascal Ribh where we reside.*
>
> *To update you, I am currently being treated for cancer and I receive chemotherapy every fortnight in Beaumont Hospital. We all hope for a happy outcome. Also, I retired from teaching last December.*
>
> *I wish to update my/our will to reflect our new situation. I will, of course, contact you shortly after our marriage to make any alterations you deem necessary.*
>
> *In short, we wish Carol's house (40 Ascal Ribh) to remain in her family's possession. Ditto my property (31 Ascal Ribh) to my family. Although I expect to sell my property when I am 70 years of age or so. I obviously expect to survive my cancer. …"*

21. Also on the same day, 13th May, 2019, the deceased made an enquiry by e-mail of a jeweller as to whether there would be a cost involved in making an appointment in

relation to men's wedding rings. The jeweller replied promptly that there would not, and on the following day the deceased bought himself a wedding ring for €350.00.

22. On 24th May, 2019 the deceased attended Mr. Barry Powderly. Mr. Powderly's note summarises the meeting and concludes "*Told John it was important to come back to me after he got married as the will would become invalid*". Mr. Powderly drafted a will which he sent to the deceased for approval, and on 18th June, 2019 the deceased attended again to execute it. The correspondence shows that at the time he made his will the deceased wished that Ms. Graham would make a similar will and indeed the deceased went as far as providing Mr. Powderly with a draft will for Ms. Graham, based on the will the solicitor had prepared for him, but the evidence does not disclose whether any such will was then or thereafter made by Ms. Graham.

23. In the meantime, on 5th June, 2019 the deceased had written to Mr. Powderly:-

> *"I will show the will to my partner/fiancée Carol Graham. I will ask Carol to draw up a similar will with you. Carol knows that we will have to rewrite our will after our intended marriage in April, 2020 but I would like to have her will drawn up in the meantime to cover the time lapse."*

24. On 30th June, 2019 the deceased and Ms. Graham returned to Jersey for what was planned to have been a week's holiday but was cut short when the deceased felt unwell. Over the month of July the deceased's health deteriorated rapidly and on 30th July, 2019 the deceased was given his terminal diagnosis and told that he did not have long to live. Until that time, says, Ms. Graham, there was no plan to get married and no marriage in contemplation. At that time no notice had been given and so, says Ms. Graham, they could not actually get legally married. There was no wedding plan, venue or ceremony considered, let alone agreed or booked. There was no date contemplated, let alone set. "*Indeed*", says Ms. Graham, *"we had not contemplated any of these things at all because we had not agreed to get married*."

25. On the day that he received his bad news, the deceased said to Ms. Graham that he wished to marry her and asked that they would get married in the coming days or weeks. Ms. Graham says that she did not want to get married in those sad circumstances but recalls that the deceased said to her, "*Please humour me, it's a man thing, I need to provide for you"* and that he wanted to "*make things right*" for her and "*to look after*" her. Up to that time, says Ms. Graham, while she and the deceased had been engaged, *"we had not agreed between ourselves to enter into a marriage and no marriage was contemplated*."

26. On 31st July, 2019 Ms. Graham and the deceased set about making arrangements for their marriage. Ms. Graham bought herself a wedding ring. With the support of the deceased's doctors, the Registrar of Marriages, and the senior social worker in Beaumont Hospital, a Circuit Court order was obtained on 7th August, 2019 dispensing with the requirement for notice, and the marriage took place at St. Francis Hospice, Raheny, on

the following day. Ms. Graham recalls that afterwards the deceased said to her *"Everything is yours now, I told you I'd look after you."*

Legal principles

27. In deciding this case I had very considerable assistance from Mr. Michael Hourican, on behalf of the applicants, and Mr. Mark O'Riordan, on behalf of Ms. Graham, for which I am grateful. Counsel thoroughly researched the law and filed written submissions in advance of the oral hearing on 13th July, 2020.

28. The law in Ireland, England, Victoria and New Zealand to which I was referred has developed and diverged over the years but notwithstanding the divergence, the English and antipodean authorities are helpful.

29. In 1837 and for a long time afterwards the law in all four jurisdictions appears to have been the same. Section 18 of the Wills Act, 1837 provided that every will made by a man or woman was revoked by his or her marriage. If this provision had the potential to frustrate the intention of testators, it had, I suppose, the advantage of clarity. *Otaway v. Sadlier* (1850) 4 Ir. Jur. Rep. 97 was an application to admit to probate a will made by the deceased on his wedding day in September, 1857. The evidence was that the will had been executed about half an hour before the wedding and the executor tried to avoid the operation of s. 18 of the Act of 1837 by invoking the legal doctrine of no fraction of a day, and by leading evidence of the intention of the testator, which was said to be clear from the identification of the lady as his wife, that the will would not be revoked by the marriage. Judge Keatinge found that the general rule that there is no fraction of a day could not apply where the division of days and hours was necessary for the purposes of deciding the rights of parties. The effect of s. 18 was clear and allowed no consideration of the intention of the testator.

30. The first modification of the rule was made in England by s. 177 of the Law of Property Act, 1925 which provided that a will, made after the commencement of that Act and expressed to be made in contemplation of marriage should not be revoked by the solemnisation of the marriage contemplated.

31. The first of the English cases to which I was referred was Sallis v. Jones [1936] P. 43. A Mr. Evan Jones who died on 17th November, 1934, had been widowed on 28th February, 1927 and had remarried on 7th November, 1927. In the meantime he had made a will on 27th June, 1927 making provision for his two daughters, in which he had incanted the formula "*that this will is made in contemplation of marriage*". The judgment of Bennett J. shows that there was some conflict as to the position of the deceased when he made his will on 27th June, 1927, with regard to the lady who became his wife on 7th November of that year. The deceased had told members of his family that he had in mind to marry the lady he did marry, but the lady herself swore that he had not proposed or been accepted until some date in August, 1927, and then only upon terms that the marriage would not take place until the anniversary of the death of his first wife. The report of the arguments is admirably concise. Counsel for the daughters argued that the declaration must be interpreted as referring to the particular marriage of the testator with

the widow. Counsel for the widow argued that compliance with s. 177 of the Act of 1925 required that the will be made in contemplation of a particular marriage and so, that name of the intended spouse should be inserted. Without deciding whether the evidence which he had heard de bene esse was admissible, Bennett J. held that s. 177 of the Act of 1925 had no operation unless there was in the will something more than a declaration containing a reference to a marriage generally, and he pronounced against the will.

32. It is important to emphasise that the decision in *Sallis v. Jones* turned on the construction of s. 177 of the English Law of Property Act, 1925 which required that the fact that the will was made in contemplation of marriage should be expressed in the will. The reference by Bennett J. to the evidence of the widow that at the time the will was made there had been no proposal or acceptance is not authority for the proposition that an engagement to be married is a prerequisite.

33. The second of the English cases to which reference was made was *In the estate of Langston, decd.* [1953] P. 100. In that case the testator, by his will made on 4th November, 1935, left his entire estate to "*my fiancée Maida Edith Beck*", whom he married on 7th January, 1936. By then, it had already been decided in an unreported case of *In re Knight* (1944) that a contemplation of marriage was sufficiently expressed by the words "*to E.L.B. my future wife".* In what was an uncontested case, Davies J. found that there was no difference between "*my future wife*" and "*my fiancée*" and that *In re Knight* was direct authority in favour of the motion. Citing what appears to have been the first reported case in which the effect of the modification of s. 18 of the Act of 1837 was considered, *Pilot v. Gainfort* [1931] P.103, Davies J. said that the proper test was : Did the testator express the fact that he was contemplating marriage to a particular person?

34. In New Zealand the move away from the Wills Act, 1837 was by s. 7 of the Law Reform Act, 1944, which followed the lead of s. 177 of the English Act of 1925. In *Burton v. McGregor* [1953] N.Z.LR. 487 the testator made a will on 31st July, 1951 leaving his estate to "[*his] fiancée Valerie Richards*", to whom he had become engaged on 1st May, 1951. Peculiarly, although the judgment of F. B. Adams J. said that the whole estate belonged to the widow either as beneficiary under the will or on intestacy, the report shows that the case was an action to prove the will in solemn form, and a counterclaim for a grant of letters of administration. Adams J. was wholly unconvinced by the decision in *Pilot v. Gainfort*, observing that the will (which used the words "*my wife*") did not express the fact that the marriage was in contemplation, but rather that it had already taken place; that testators commonly referred to their paramours as their wives; and that the words used simply applied to the lady the name and description which she had acquired by repute.

35. Adams J. said that:-

> *"The purpose of the law as to revocation by marriage is to let in the claims of wives and children, and it is reasonable to suppose that their claims are properly protected and adjusted by the law as to intestacy. To maintain a will made before*

marriage may result in injustice to children, or even to the wife herself, and there are good reasons why it should not be done unless the intention is clearly expressed on the face of the will."

36. Having reviewed *Sallis v. Jones* and a number of decisions of the Supreme Court of Victoria, the judge continued:-

> *"The question here is whether the mere description as 'my fiancée' is sufficient for the purposes of s. 7. In my opinion it is not. A man may make a will in favour of his fiancée for no other purpose than to provide for her in the interval, brief or long, while she continues to be his fiancée and before she acquires the status of his wife and the rights of a widow on his death intestate. If it is possible on the wording of the will that the testator's intention was such as I have just described, then it cannot, in my opinion, be said that the will is expressed to be made in contemplation of the intended marriage within the meaning of the statute."*

37. Significantly, for the reason to which I will later come, Adams J. gave as a further reason for his decision that the will must have been made with the intention that it should operate after marriage. He thought that the words "*made in contemplation of marriage*" meant that the will was made in contemplation of the marriage in the sense that the testator contemplated or intended that the will should remain in operation notwithstanding the marriage.

38. *Burton v. McGregor* was followed in New Zealand in *Public Trustee v. Crawley* [1973] 1 N.Z.L.R. 695, in which it was held that a disposition in favour of "*my fiancée*" only establishes that a marriage is contemplated and did not necessarily represent that the will is made in contemplation of marriage with the concurrent intention that the will is to survive the marriage, and again in *Re Whale (deceased*) [1977] 2 N.Z.L.R. 1.

39. The question came back to the English High Court in In re Coleman, decd. [1976] 1 Ch. 1. In that case the testator had made a will on 10th September, 1971, married on 18th November, 1971, and died a year later. The will, which had been professionally drafted, made a number of devises and bequests to "*my fiancée Mrs. Muriel Jeffrey*", amounting to about half of the value of the estate, to which, on an intestacy, the widow would have been absolutely entitled.

40. Megarry J. reviewed all of the cases, which he divided into three categories: the "*general contemplation*" cases, the "*wife*" cases, and the "*my fiancée*" cases. In the last category there were by then four cases: *In re Knight* (1944), *In the Estate of Langston* [1953] P. 100 and *Burton v. McGregor* [1953] N.Z.L.R. 487, to which I have already referred, and a decision of the Supreme Court of Victoria in *In re Chase, decd*. [1951] V.L.R. 477. The gift in *In re Chase* was a gift in a will made on 6th June, 1948 of two thirds of the testator's estate to "*my fiancée at present travelling to Australia on board the s.s. Stratheden due in Freemantle on June 8, 1948*", whom the testator had married on 24th June, 1948. Sir Edmund Herring C.J. found that the marriage was a marriage *"in contemplation of which*" the will was "*expressed to be made*". Having identified the

divergence between the English and Victorian cases on the one hand and the New Zealand case on the other, Megarry J., at p. 8B, went back to the words of the section.

> "'*Fiancée' is a word which means a woman who is engaged to be married, or is betrothed, and 'my fiancée' must mean a woman engaged to be married to the speaker. When a man speaks of 'my fiancée' he is speaking of 'the woman to whom I am engaged to be married'. It seems to me that in ordinary parlance a contemplation of marriage is inherent in the very word 'fiancée'. The word 'wife' is a word which denotes an existing state of affairs, and one that will continue until death, or, these days, divorce: but I do not think that it could reasonably be said that there inheres in the word 'wife' any contemplation of a change in that state of affairs, whether by death or divorce. No doubt some engagements last a long time, and others are broken off: but the normal feature for an engagement is its termination by marriage, or perhaps I should say its sublimation into marriage. Provided the 'contemplation' is real, I cannot see that it makes much difference whether or not there is any particular degree of imminence about the marriage. Accordingly in my judgment, unless curtailed by the context, a testamentary reference to 'my fiancée X' per se contemplates the marriage of the testator to X, as well as describing an existing status.*"

41. Megarry J. then turned to the requirement in English law that the will must be expressed to have been made in contemplation of marriage. It is, he said, the will and not merely some gift in it, which must be made in contemplation of marriage. This might be evident from a declaration in the will that it is made in contemplation of a marriage, or if each beneficial disposition was expressed to have been so made but what of a case in which some of the dispositions were expressed to have been made in contemplation of marriage and others not? Under the section the court was not concerned with what the testator contemplated but what he expressed in the will. Starting from the proposition, conceded by counsel for the executor, that it would be extravagant to say that a will containing a trivial gift of a gold ring or £100 "*to my fiancée Mary*" could be said to be "*a will expressed to have been made in contemplation of marriage*", Megarry J. concluded that unless all of the gifts were expressed to have been so made, the will as a whole could not be said to be expressed to have been made in contemplation of marriage. Any other conclusion, he said, would be to read the word will as including bits of the will.

42. That brought Megarry J. back to the test propounded by Davies J. in *In the Estate of Langston, decd*. [1953] P. 100 which, it will be recalled, was: Did the testator express the fact that he was contemplating marriage to a particular person. Noting that *In the Estate of Langston, decd.* was argued only on behalf of the applicant with the consent of the other parties, and that the bequest in that case had been in any event of the entire estate, Megarry J. decided that the test there propounded was insufficient because it did not address the requirement that the will should be expressed to have been made in contemplation of the marriage to a particular person.

43. Megarry J. then turned to *Burton v. McGregor* [1953] N.Z.L.R. 487. He disagreed with the view of Adams J. that the words '*my fiancée'* merely described status without also importing the necessary contemplation of marriage, preferring the view taken by Davies J. in *In the Estate of Langston, decd*. and the opinion of Herring C.J. in *In re Chase* on that point, but not that the test of whether a will was made in contemplation of a marriage could be met by a gift of two thirds. Megarry J. also disagreed with the conclusion of Adams J., that the test required that the testator should have contemplated and intended that the will should remain in operation notwithstanding the marriage. That, he said, would be to impose a double requirement while the statute imposed only one. He said at p. 10G:-

> *"All that the statute requires is that the will should be 'expressed to be made in contemplation" of the marriage in fact celebrated. Where this is the case, the result is that the will remains in operation despite the marriage; but I cannot see that there is any requirement that an intention to produce this result must be established."*

44. I pause to observe that while Megarry J., at p. 10H, referred to ignorant or muddle-headed testators, it is a common enough feature of the cases, including *In re Coleman, decd*. itself, and this case, that the wills were drafted by solicitors. It is also interesting that what Gannon J. in *Re John Baker Decd*. [1985] I.R. 102, to which I will come, expected would have happened in the event that the draftsman of that will had been told that it was being made in contemplation of marriage, was he would have come forward after the death and given evidence to that effect, as opposed to have given effect to the testator's expressed wish by setting it out in the will.

45. Finally, Megarry J. ruled inadmissible evidence directed to establishing the intention of the testator at the time he made his will because, in England, the question was one of construction of the words used by the testator rather than his instructions or whatever advice might have been given to him.

46. The law in Ireland is significantly different to that in England, New Zealand or Victoria as it stood when the cases I have considered were decided. Section 85(1) of the Succession Act, 1965 provides that:-

> *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."*

47. The first of the three Irish cases to which the court was referred was a decision of Gannon J., in *Re John Baker Decd*. [1985] I.R. 101. That was an application *ex parte* in which the issue was whether the deceased's widow would take the whole estate as the beneficiary of a will made prior to the marriage, or, there being no children, on intestacy. The will was made on 23rd April, 1951 and the marriage solemnised on 17th August, 1954. The legal issue on which the case turned was whether s. 85(1) of the Succession Act, 1965, which came into force on 1st January, 1967, applied to a will which, by the operation of s. 18 of the Wills Act, 1937 would have been revoked. Gannon J. found that

the will had been revoked by the subsequent marriage and could not have been revived otherwise than by re-execution. In any event, the only evidence as to the circumstances in which the will had been made was a hearsay statement by the applicant's solicitor that she was engaged to be married to the deceased for about two years before the marriage – which would have put the engagement at upwards of a year after the will was made.

48. The second, and very much the most helpful, of the Irish cases is the judgment of Ó Néill J. in *Re O'Brien (deceased)* [2011] 4 I.R. 687. In that case the deceased made a will on 29th October, 2008 leaving certain lands to a nephew and the residue of his estate to the applicant, to whom he was at that time engaged. The deceased and the applicant had on 30th September, 2008 given notice of their intention to marry on 31st July, 2009 at the civil registration office in Limerick, and had then and there duly married. The application was for a grant of letters of administration intestate on the premise that the will had been revoked by the marriage. As in this case, the evidence was that the deceased had been advised that his will would be automatically revoked by the marriage and that he would have to make a new will.

49. On the evidence, Ó Néill J. was in no doubt but that the deceased had his marriage to the applicant in contemplation, having only three weeks previously given notice of his intention to do so.

50. Commencing at para. 27, Ó Néill J. set out the provisions of s. 85(1) of the Act of 1965 and compared and contrasted the Irish law with the changes which were made in England in 1925 and again in 1982, focussing on the requirement there under the Act of 1925 that the fact that the will was made in contemplation of marriage must have been expressed in the will, and the requirement since the law was further changed by the Administration of Justice Act, 1982 that the expectation of marriage and the intention that the will should not be revoked should appear from the will. At para. 34 he observed:-

> *"[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 subsection deals with such expressions, in my opinion, extrinsic evidence could rarely be excluded in the determination of any such issue."*

51. It is not evident from the judgment of Ó Néill J. whether, or the extent to which, his analysis of s. 85(1) was informed or assisted by the English cases, or from the report, what if any reference was made to them in argument: but whether so guided or independently, Ó Néill J. was clear that it is sufficient if the evidence establishes that at the time the will was made, the testator actually had or must have had in contemplation a marriage to a particular person, and that to require an intention that the will should continue to have effect after the marriage would be to add a requirement. He said, at para. 37:-

> *"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 a 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 than 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 by 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."*

52. In *Re O'Brien (deceased)* the issue as to the testator's intention as to the effect of the marriage on the will arose because the evidence was that he had been told at the time the will was made that it would be revoked by his marriage and the argument was that he could not in those circumstances have intended otherwise. Once the analysis was confined to the testator's contemplation, no issue of his intention could arise.

53. It is also clear from *Re O'Brien (deceased),* if it is not a matter of basic logic, that the relevant time for the assessment of whether the will was made in contemplation of the marriage is the time at which the will was made. Ó Néill J. carefully considered the evidence as to conversations which had occurred after the will was made but only with a view to establishing or confirming what the testator intended and had in contemplation when he made the will.

54. I mentioned, before embarking on my review of the foreign cases, that notwithstanding the difference in the rules here and there they were of assistance. The divergence is between the exception made in Ireland for wills made in contemplation of marriage, and the exception elsewhere for wills expressed to be made in contemplation of marriage. In the English and antipodean cases there was a divergence of opinion between the judges on two points. The first was whether a gift to "*my fiancée"* merely described the beneficiary or expressed the testator's contemplation of marriage to the person so described. The second was whether there was a requirement that the testator should have intended that his will would not be revoked by the contemplated marriage.

55. While in this jurisdiction the exception depends solely on the testator's contemplation of marriage rather than on any expression of it in the will, it seems to me that the same issue can arise in discerning the testator's intention from the words used in a will or in assessing extrinsic evidence of the circumstances in which the will was made. So, an Irish will may make a gift to "*my fiancée Mary*", or there may be evidence of the testator's instructions that he wished to make provision for "*my fiancée Mary*" . The line of authorities in New Zealand starting with *Burton v. McGregor* would suggest that the words are not evidence of the testator's contemplation of marriage, whereas the line of authorities in England ending with *In re Coleman, decd*. would suggest that they are. I prefer the reasoning of Megarry J. in *In re Coleman, decd*. that in ordinary usage a contemplation of marriage is inherent in the very word "*fiancée*". I accept the submission on behalf of the applicants that an expression in a will which is sufficient to express a contemplation of marriage should suffice outside the will to evidence the same contemplation.

56. As to the issue as to whether the testator should have intended that the will would not be revoked by the contemplated marriage, that was decided by *Re O'Brien (deceased).* The judgment of Ó Néill J., as I have said, does not show that he was referred to or considered the English and Commonwealth cases, but he came to the same conclusion as did Megarry J. in *In re Coleman, decd*. I am bound by the decision in *Re O'Brien (deceased)* and, if I may say so, I respectfully agree with it.

57. In the third of the Irish cases, *Re McLaughlin (deceased)* [2013] IEHC 156 the judgment of Laffoy J. is littered with expressions of frustration as to the manner in which the case was presented and argued, or not argued, or not properly argued. In broad terms, that case concerned the devolution of a property in Kinsale which had been owned by a man who had an address in Rhode Island but had not been shown to have been domiciled or even habitually resident there, but who, before marrying the plaintiff, had made a will there in in which the Irish property was dealt with. Two passages are helpful. The first is at para. 36 where the judge observes that:-

> *"It does seem to me that whether a will executed in this jurisdiction or in Rhode Island complies with the statutory requirement to avoid revocation in the event of a subsequent marriage of the testator in both jurisdictions involves ascertaining the testator's intention as to a particular marriage when he made the will, by resorting to extrinsic evidence if necessary."*

58. The second is the conclusion, at para. 41, that there was no clear and convincing evidence that the will was made by the deceased in contemplation of marriage to the plaintiff - which took place more than three years after the will was executed - such as would rebut the statutory presumption which exists in Rhode Island law, and in para. 42, if the applicable law was Irish law, that the will was made in contemplation of the marriage of the deceased to the plaintiff. The reference in para. 41 to clear and convincing evidence comes from a reference earlier in the judgment to evidence which had been given of a requirement in Rhode Island law for such evidence if the statutory

presumption of revocation there is to be rebutted. By applying, in para. 42 the same reasoning in the application of Irish law, Laffoy J. appears to approve the same requirement in Irish law for clear and convincing evidence.

59. From all of this the applicable principles of law appear to me to be:-

1. The position of wills made in contemplation of marriage being an exception, the rule is that a will is revoked by a subsequent marriage. It follows that the person relying on the exception carries the onus of proof.

2. That onus is to show that the will was made in contemplation of a particular marriage, which is the subsequent marriage in contemplation of which the will was made.

3. It is sufficient to show that the testator had, or must have had, in contemplation marriage to a particular person. That requirement is that the testator should have borne in mind or have had regard to a particular marriage.

4. There is no requirement that the contemplated marriage should have been the motivating factor in the making of the will.

5. There is no requirement that the testator's contemplation of the marriage should be expressed in the will.

6. The requirement that the will should have been made in contemplation of "*a particular marriage*" means a marriage to a particular person. While wedding arrangements may provide evidence of the contemplation of marriage, there is no requirement that a date should have been fixed, or any arrangements made, or that notice should have been given. The relevant contemplation is the contemplation of a marriage, not of a wedding.

7. The survival of the will is a consequence of the application of section 85. There is no requirement that the testator should have intended that the will should remain valid notwithstanding the contemplated marriage. By the same token, any belief on the part of the testator that the will would be revoked by the marriage is not inconsistent with its having been made in contemplation of marriage.

8. There is no requirement in the section that anyone other than the testator should have contemplated the marriage. A proposal of marriage is made in contemplation of marriage. I see no room in the application of s. 85 for a requirement that there should have been a proposal or an acceptance.

9. While it will readily be concluded that a testator who has a short time before making his will given notice of his intention to marry had that marriage in contemplation, that is not definitive.

10. An engagement to be married is an agreement to marry. It is a matter of fact whether a will made by an engaged person is made in contemplation of marriage.

Discussion and decision

60. One of the peculiarities of our legal system is that while counsel may not in the viva voce examination of witnesses who they have called ask leading questions, counsel often have very significant input into the drafting of affidavits. It is perfectly proper that counsel should identify the issues and articulate the evidence in relation to those issues but care should be taken not to put words, a *fortiori* ambiguous words or potentially obscure words or legal conclusions, into the mouth of the witness.

61. Repeatedly in the course of her affidavits Ms. Graham was made to flatly assert that marriage was not contemplated at the date the deceased made his will. But that is the issue which the court must decide, and it is no criticism of Ms. Graham when I say that she was not competent to say so.

62. When the law is analysed it becomes immediately apparent that the basis upon which the assertion that the deceased's will was not made in contemplation of marriage is founded is wrong. The legal test is whether the testator, at the time he made is will, had in his mind, or had regard to, his marriage to Ms. Graham. It is not apparent from his will that he did, but that is not a requirement of the law in Ireland. It is however, abundantly apparent from all of the other evidence, starting with the opening declaration in the deceased's letter to his solicitor of 13th May, 2019 that he hoped and expected to be married next April to his fiancée Ms. Carol Graham, and the purchase by him of a wedding ring on the following day. It is confirmed by the instructions previously given to his solicitor in his instructions dated 15th July, 2011. As Mr. Hourican puts it, the solicitor's advice that a new will would be needed after the marriage cements the proposition that marriage was contemplated.

63. Mr. O'Riordan submits that the word "*that*" in the phrase "*that marriage"* is a determinative or demonstrative pronoun which qualifies the word marriage in the first line of s. 85(1) and means that the section is not speaking of marriage in a general or eventual sense but requires evidence of the contemplation of that particular forthcoming marriage. I do not disagree. Since the exception which is made is for a will made in contemplation of a marriage that later takes place, the marriage contemplated can only be that which has subsequently taken place, and not a marriage such as that contemplated by Miss Jane Austen in the opening line of Pride and Prejudice. I do not, however, agree that the evidence shows no more than various declarations or references to marriage generally. The evidence is that the deceased wished to marry Ms. Graham, and that he contemplated that he would, or might. The particular marriage must be marriage to a particular person and (although the evidence is that the deceased in this case did) there is no requirement that the contemplation should extend to marriage on a particular date, or within a particular time.

64. It is perfectly correct, as Mr. O'Riordan submits, that the will was not expressly, or on its face, made in contemplation of marriage but that is not a requirement of Irish law.

Similarly, the description of Ms. Graham in the will as the deceased's partner rather than his fiancée is, in Ireland, neither here nor there.

65. If it had been material, I could not have accepted the argument that no consent from Ms. Graham was forthcoming to enter into a marriage with the deceased until 30th July, 2019 when the date was more or less fixed. In my view, whatever words might have been used in Jersey in July, 2011, the engagement then agreed was the agreement of each to marry the other. In any event, there is no necessity for agreement. Every suitor must contemplate marriage before asking, since, whatever the answer may be, that is the object of the proposal.

66. The deceased and Ms. Graham became engaged in July, 2011. If at that time, by reason of their obligations to their mothers, it was not practical that they could marry, or, as Ms. Graham puts it, neither of them were in a position to get married, there was no such obstacle after, at the latest, Ms Graham's mother died. Ms. Graham avers that she and the deceased got engaged in Jersey in July, 2011 but repeatedly says, or is made to say, that she never agreed to marry the deceased. That is a contradiction. An engagement is an agreement to marry at some time in the future, whether certain or undetermined, and it endures until the engagement is broken off or (as Megarry J. put it) is sublimated into marriage.

67. The tax adviser's letter to the deceased of 29th March, 2019 was an exercise to highlight the tax advantages of marriage. It does not show an intention that Ms. Graham should take the deceased's entire estate. It does, however, show on the part of the deceased at least a hope that he would be married in the foreseeable future and is consistent with the expectation which is evident at the time, soon after, when the will was prepared and executed.

68. If the advice given to the deceased by his solicitor on 24th May, 2019 that the will would become invalid when he got married gave rise to a belief on the part of the testator that he would have to make a new will, or an intention to do so, that is not material to the assessment as to whether the will was made in contemplation of marriage.

69. The fact that the deceased, at the time he made his will, had not given notice of their intention to marry is not material.

70. The fact that a date had not been fixed is not material.

71. There is a lack of clarity in the evidence as to whether a wedding date was fixed or contemplated for April, 2020. In a text message on 24th May, 2019 the deceased told his sister in law that he and Ms. Graham intended to marry the following April in a quiet civil ceremony. In her first affidavit, Ms Graham acknowledges that she spoke to the deceased about a date in April, 2020 on which date, she says, sadly a marriage could never have happened. Neither is Ms. Graham entirely clear in her evidence as to whether the deceased had discussed his testamentary intentions with her, saying only that while the deceased may have said to one or more of his siblings that he wished to leave his

house to them, he said something different to his financial adviser, and that in any event all this occurred before 30th July, 2019 when she and the deceased agreed to get married in the following days. As to this, however, it is necessary to say no more than that the issue turns on what was contemplated by the deceased, and not by Ms. Graham.

72. As to Ms. Graham's evidence as to what the deceased said in the car on the way home from the solicitor's office on 18th June, 2019, or on 30th July, 2019, or on their wedding day, again it is necessary to say no more than that the relevant date and time is the date and time at which the will was executed.

Conclusion

73. In my judgment the evidence is quite clear that the will made by the deceased on 18th June, 2019 was made in contemplation of his marriage to Ms. Graham. By s. 85(1) of the Succession Act, 1965 it was not revoked by his subsequent marriage to Ms. Graham on 8th August, 2019. There will be an order admitting it to probate.

74. I will hear counsel as to the appropriate order for costs. My provisional view is that the applicants should have their costs out of the estate rather than against the respondent, but since they will be paid out of the residue, which the respondent is to have, it seems to make no difference. Similarly, any argument that the respondent should have her costs out of the estate appears to me to be academic.