

**THE HIGH COURT
PROBATE**

[2021] IEHC 657

**IN THE MATTER OF THE ESTATE OF THOMAS DELAHUNTY, DECEASED, LATE OF
BARNACOLE, MOONCOIN, COUNTY KILKENNY, FARMER**

AND

IN THE MATTER OF THE SUCCESSION ACT, 1965

AND

**IN THE MATTER OF AN APPLICATION BY PHILIP KINSELLA OF COOL NA GOWER,
DUNGARVIN, COUNTY WATERFORD**

JUDGMENT of Ms. Justice Butler delivered on the 14th day of October, 2021

Introduction

1. This application is brought by Philip Kinsella, nephew of the late Thomas Delahunty (“the deceased”) seeking to admit a document to probate purporting to be a carbon copy of the last will and testament of the deceased who died on the 2nd March, 2015, aged 86 years. The document is dated 20th May, 1980 and the evidence suggests that the original, which was retained by the deceased’s solicitor, was lost when the solicitor’s office was broken into and a safe removed from the premises in June, 1997. Neither the safe nor its contents were ever recovered. Although it is not strictly relevant to the legal issues, at the time of the death of the deceased, his estate was valued at just under €1.5 million which represents a significant benefit to those who might be entitled to it. If the copy will is admitted to probate, the applicant would be the main beneficiary. If, on the other hand the copy will is not admitted to probate, then the deceased will be treated as having died intestate and his sister, a large number of nieces and nephews and, potentially, the estate of his late wife all stand to benefit.
2. Although some of those potentially entitled on an intestacy have consented to the application, it is opposed by various other members of the deceased’s family including his sister, Ms. Bridget O’Flynn and the personal representatives of the estate of his widow, she having died some months after him in October, 2015. A number of grounds are advanced as to why the copy will should not be admitted to probate. These include an absence of evidence as to the execution of the will since the carbon copy is not signed and the attesting witnesses are now deceased; an absence of evidence that the deceased knew and approved of the contents of the will and an assertion that a failure by the deceased to respond to correspondence from his solicitor after the theft in 1997 inviting him to attend to prepare another will amounts in effect to a form of revocation.

Factual Background

3. The background to the making of the will is a little complex. As of 1970 the deceased was a bachelor farmer contemplating marriage. He was, at the time, 42 years of age and his bride to be was a few years older. In contemplation of that marriage, the parties entered into a marriage settlement on 5th October, 1970. From its terms, it seems that the settlement was intended as a renunciation by the deceased’s wife of her legal right share of his property to which she would be entitled on his death under s. 113 of the Succession Act, 1965. The settlement established a trust of which the deceased’s brothers John and Philip were named the trustees. The deceased transferred certain lands and chattels into the trust to be held in trust for himself for life and after his death on terms which varied

depending on whether he and his wife had children. As it transpired, although married for 45 years, the deceased and his wife did not have children. Consequently, the relevant terms of the settlement are those which were to apply in the event that the deceased predeceased his wife without issue. In those circumstances, the deceased's wife became entitled to payment of a cash settlement which was described as being "*in full discharge of all claims and demands which she might have against the Real and Personal estate*" of the deceased. The settlement also provided that the widow would "*thereupon leave the premises and have no further claims thereon*". Subject to this payment which was to be raised out of the trust property, the deceased could appoint beneficiaries of the trust by deed or by will. In default of such appointment, the trust property was to pass to the persons who would be entitled on a distribution on intestacy under the Succession Act, 1965 "*as if the settlor had died intestate and without having married*".

4. The marriage settlement was prepared on the deceased's behalf by his solicitor Thomas Kiersey, of Waterford. A decade later, the deceased returned to Mr. Kiersey and gave instructions in relation to the drawing up of a will. Those instructions are contained in a handwritten note made by Mr. Kiersey dated 20th April, 1980. Whilst the court must be cautious about imputing any particular intention to the deceased, it is notable that, at this point, both the deceased and his wife were in their fifties and it must have been apparent that they were now highly unlikely to have any children. It also seems that the deceased's marriage was a happy one as the effect of the instructions given was twofold. Firstly, the deceased proposed to give a benefit to his wife under his will significantly in excess of that which had been agreed under the marriage settlement. On his death, she was to receive an additional cash payment, an annuity and a right of residence in the dwelling house on his lands for life. Secondly, the residue of his estate including his lands and farm were left to his nephew, the applicant in this application. Those instructions were formalised into a typewritten draft will to which handwritten amendments were made by Mr. Kiersey; two further typewritten drafts were prepared to which further handwritten amendments were made by Mr. Kiersey before, the applicant contends, a final version of the will was signed and witnessed. Thereafter, the original will was retained by the solicitor in his safe and, it is claimed, a copy given to the deceased.
5. These matters stood until the evening of the 18th/19th June, 1997 when a burglary took place at the offices of T. Kiersey & Co. Solicitors which was, by then, located at Catherine Street, Waterford. By this time, Mr. Kiersey had retired and his daughter, Gillian Kiersey, had taken over as principal of the firm. Amongst the items stolen was the office safe and its contents which included the originals of wills and other documents. The matter was reported to the Gardaí but neither the safe nor its contents were recovered. Ms. Kiersey's firm wrote to the various clients affected by the theft asking them to make contact with the office. The records indicate that a letter was sent to the deceased on the 25th June, 1997. No copy of this letter is available, so the court is not aware of its precise terms. It seems that the deceased did not make contact with T. Kiersey & Co. in response to this letter or in relation to his will either then or at a later stage when he had cause to attend the firm in connection with other matters arising from the death of his brother in 2006.

6. The deceased died in March, 2015 and his wife died some five months later in October, 2015. A nephew of the deceased, James Delahunty, found the carbon copy will in a box amongst personal papers belonging to the deceased in an attic space above the kitchen at the deceased's house in May, 2015. There is no direct evidence from Mr. Delahunty in relation to the finding of the copy will. There is however the evidence of Ms. Gillian Kiersey to whose office he brought the document and the account he gave to her of finding it is confirmed in a letter from Mr. Delahunty's solicitors. Ms. Kiersey conducted extensive searches in her offices seeking to locate the original will. She wrote to 39 firms of solicitors in the Waterford and Kilkenny area asking if those firms were in possession either of the original 1980 will or any later will made by the deceased. She also arranged for the publication of two advertisements, one in the Law Society Gazette and one in a national newspaper asking anyone in possession of the deceased's will to contact her. Those steps did not result in the original or any later will of the deceased being produced.

Legal Issues arising

7. Based on these facts, two main issues arise. The first is whether the available evidence is sufficient for the court to be satisfied that an original will in the same terms as the carbon copy which it is sought to admit to probate was duly executed by the deceased. The second is whether an inference should be drawn from the particular circumstances in which the deceased did not attend at his solicitor's office to "re-do" his will, that the will was revoked by him. An additional issue is raised by the estate of the deceased's widow in written submissions filed after the hearing of the motion querying whether the evidence is sufficient to allow the court to conclude that the deceased was aware of and approved the contents of the will. This was not the subject of argument before the court and the applicant did not have an opportunity to respond to the point. In light of the facts I do not regard this as being a point of particular substance, but I will address it briefly nonetheless.
8. The requirements of due execution of a will under s. 78 of the Succession Act, 1965 are well known. The will must be signed at its foot or end by the testator and the testator's signature must be witnessed or acknowledged by two persons in each other's presence both of whom must also sign the will. The difficulty in this case arises because the carbon copy document before the court does not contain any signatures. Instead, it has typed into it the name of the deceased and, beneath an attestation clause, the names Thomas Kiersey, solicitor, and Mary Banks, both of whom are stated to be of 40 Barronstrand Street, Waterford (the then-address of Mr Kiersey's office). Both of these witnesses are now dead and, consequently, are unable to provide evidence of due execution of the will. The parties opposing the admission of the carbon copy to probate make the case that there is no evidence of the proper execution or attestation of the will.

Presumption of Regularity – Case Law

9. The applicant relies on the maxim *omnia praesumuntur rite esse acta* (all things are presumed to have been done correctly), also known as the presumption of regularity, to the effect that a document which on its face appears to be in order should be presumed to have been regularly executed unless the evidence suggests otherwise. Personally, I dislike resort to Latin maxims the meaning of which is no longer immediately apparent to

a generation of lawyers who came through the educational system when, not only was Latin no longer a compulsory subject, but it was one which was not available in most Irish schools. Consequently, for the balance of this discussion, I will refer to the presumption of regularity. This makes it clearer that, like any presumption, it requires sufficient evidence of a state of facts to raise it and it can be rebutted by sufficient contrary evidence. There is, of course, still scope for dispute as to what standard of evidence is sufficient in either case and whether that evidence has been adduced in the particular case.

10. Before looking at the main authorities relied on by the parties on this point, it may be useful to look at two older authorities considering the nature of the presumption and the circumstances in which it might be applied. The earlier of the two cases is *Harris v. Knight* (1890) 15 P.D. 170 in which Lindley L.J. said (at p. 179):-

"The maxim 'Omnia praesumuntur rite esse acta', is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect."

I think that this exposition usefully encapsulates the essence of the presumption. It allows a court to close an evidential gap regarding the formalities of an act which, on the available evidence, the court is otherwise satisfied was properly done. However, the presumption cannot be relied on if doing so would be contrary to the evidence which is available. Thus, it operates in the absence of certain evidence but not to displace evidence which is actually there.

11. More than half a century later, Davitt J. applied the maxim in *In the Goods of McLean* [1950] IR 180 in circumstances where a will appeared to be duly executed and the signatures of the testator and witnesses were confirmed but neither witnesses had a recollection of having witnessed the testator's signature nor of having signed any document in each other's presence. In considering whether the maxim should be applied, Davitt J. stated at p. 184:-

"The issue, whether or not a particular will has or has not been duly executed, is usually a pure question of fact. It seems to me that all these cases, looked at broadly, merely illustrate the principle that this question, like any other question of fact, should be decided on the balance of probability after all the evidence, circumstantial as well

as direct, has been duly weighed and all the relevant circumstances have been taken into account...

In the illustration given the question of due execution is decided on circumstantial evidence only, and there is no conflict either of testimony or probability. In many cases the question has to be decided on circumstantial evidence only and there is a conflict of probability. In many other cases the question has to be decided only on the testimony of the attesting witnesses. Here there may or may not be a conflict of testimony. In many other cases, again, there may be both direct and circumstantial evidence to be considered and there may be a conflict both of testimony and probability. In all cases, however, whether simple or complicated and whether the probabilities be all on one side or divided, the principle to be applied is the same; the question must be decided on the balance of probability. It seems to me that it can make no difference whether the process of decision is called "applying the principle of the balance of probability" or "applying the maxim "omnia praesumuntur rite esse acta"."

12. It is interesting that both of these observations frame the application of the principle very much in terms of whether the available evidence allows an inference to be drawn that an act was completed in accordance with the requisite formalities. Davitt J.'s comments, in particular, underscore the fact that the evidence relied on will frequently be circumstantial. This is unsurprising as if direct evidence of the execution of the will were available, the need to rely on a presumption is unlikely to arise. I mention this because the submissions made on behalf of those opposing admission of the copy to probate focus heavily on the absence of direct evidence of execution of the will. However, the absence of direct evidence is not, in my view, determinative of the question of whether the available evidence, be it indirect, circumstantial or documentary, allows an inference to be drawn that the will was properly executed.
13. Both sides rely on the decision of the Supreme Court in *Clarke v. Early* [1980] IR 223 to different effect. The case was one in which the Supreme Court upheld the refusal of the High Court to admit a handwritten document to probate. The document was apparently signed by the testator (although there was some dispute regarding his signature) and by two witnesses both of whom were dead by the time it was sought to admit the document to probate as the will of the deceased. The document had not been formally prepared by a solicitor, no executor was appointed and there was no attestation clause. The court accepted that the document had a "testamentary flavour" but held that there was no evidence of an intention on the part of the testator to enter into the formality of making a will.
14. The applicant relies on a passage from the judgment of O'Higgins C.J. which suggests that there are two preconditions to the application of the presumption, both of which the applicant submits were satisfied. He stated at p. 226 of the judgment:-

"To apply the maxim omnia praesumuntur rite esse acta it is necessary, in my view, that two conditions be observed. In the first place an intention to do some formal act

must be established. In the second place there must be an absence of credible evidence that due formality was not observed."

The first limb of this test is directed at establishing that what was done was intended to be a formal act. Clearly, if someone does not intend to make a will, the fact that he and two others sign an ambiguous document should not result in the accidental disposition of his estate. However, if the evidence establishes that the person did intend to make a will and the same ambiguous document is signed by himself and two others, then treating that document as a duly executed will may serve to give effect to the testator's intentions. As will become apparent below, I regard evidence of the fact that a person attended a solicitor's office and gave instructions for the drawing up of a will be strongly suggestive of an intention to do a formal act.

15. The second limb of the test is more complex, in part because of the use of the double negative and in part because, on the particular facts of the case, the court regarded the second condition as satisfied and so did not consider it in any detail. The application of the presumption allows a court to accept the observance of due formalities as probable when there is no direct evidence on the point either way. However, if there is credible evidence that due formalities were not in fact observed, then it would be inappropriate for the court to presume that they were. It is, I think, important to distinguish between positive evidence that the requisite formalities were not observed and an absence of evidence that they were observed. In this case, significant emphasis was placed by those opposing admittance of the copy will to probate on the fact that there is no direct evidence of its execution. This absence of evidence is due to the passage of time. All of those involved in the preparation and execution of the original document in 1980 are now themselves deceased. However, this does not prove or even tend to prove that the will was not executed. An absence of evidence of something is not, of itself, evidence that the thing did not happen. As I put it in a different context, an absence of evidence is not the same thing as evidence of absence. The circumstantial evidence, which I will detail below, suggests that the will was executed. No particular evidence has been advanced which positively suggests that, despite the indications to the contrary, the will was not actually executed.
16. The personal representatives of the deceased's widow rely on the statement of O'Higgins C.J. in his judgment (also at p. 226) that it is essential that there be some evidence that the document was actually signed by the deceased. They argue that in the absence of such evidence, the presumption cannot be applied. A similar argument is made as regards a requirement that there be evidence that the will was actually signed by the witnesses before the presumption of regularity can be applied to their attestation of it. Apart altogether from the fact that I am bound by this statement contained, as it is, in a Supreme Court judgment, I have no difficulty in accepting it as correct. However, I think reliance on it in this case is undermined by an assumption that the evidence of the deceased's signature or of the witnesses' attestation must be some form of direct evidence. As the judgments quoted above demonstrate, depending on the particular facts indirect, circumstantial or documentary evidence may suffice to establish that a document

was signed by the deceased and that the deceased's signature was witnessed or acknowledged by witnesses.

17. A number of other cases were relied on by the parties which I do not propose to analyse in the same level of detail. The applicant places emphasis on the presence of an attestation clause in the copy document because the presence or absence of such a clause was a factor deemed to be significant in *In Re Goods of Uniacke* [1964] IR 166, *Rolleston v. Sinclair* [1924] 2 IR 157 and *In Re Goods of Peverett* [1902] P 205. I accept that the presence of an attestation clause makes it easier for a court to conclude that the deceased intended the document to be a will (i.e. intended a formal act) although the absence of such a clause is not determinative of the absence of such an intention. The personal representatives of the deceased's widow's estate also rely on *Uniacke* to support the propositions that the presumption cannot apply where there is no evidence that the will was signed by the witnesses and that the application of the presumption depends on there being "some evidence other than the mere document itself".
18. I do not think that this case law can or should be read as establishing prescriptive rules as to the circumstances in which a document will or will not be presumed to have been properly executed. As observed by Pilkington J. in *Leopold v. Malone* [2018] IEHC 726, each case turns on its particular facts. Recent case law from the neighbouring jurisdiction suggests that the strength of the presumption and the corresponding strength of the evidence necessary to displace it will again depend on the facts of each case (see *Channon v. Perkins* [2005] EWCA Civ 1808, Neuberger L.J., and *Mason v. Robinson Solicitors* [2019] EWHC 4055). Thus, the stronger the evidence which suggests that the contested document was duly executed then the greater the evidence which will be required to displace the presumption that it was. Conversely, if the evidence which suggests that the document was duly executed is weak, it may be displaced by evidence which would not suffice in other circumstances. Where there is an absence of evidence from the attesting witnesses, the court will necessarily have to place greater emphasis on the surrounding circumstances.

Analysis of the Evidence

19. A feature of many of the cases relied on in which the document was not admitted to probate and, indeed, of *Clarke v. Early* itself, is that the document in issue had not been professionally prepared by a solicitor or by a person with knowledge or experience in the drafting of wills. This can be contrasted with the facts in *In Re Goods of McLean* where the testator, who had drafted his own will, was a clerk in a firm of solicitors and had extensive experience in the taking of instructions for and the drawing up of wills. There is no specific requirement that a solicitor be engaged in order for a valid will to be prepared although it is undoubtedly prudent for testators to seek and take appropriate advice on a matter as important as the disposition of their estate after their death. It is significant that the document which is sought to be admitted to probate in this case was one which was professionally prepared by a solicitor on behalf of his client. Many of the concerns rightly expressed by courts as to the intended legal nature of various handwritten, holograph or standard form documents do not arise where a client instructs a solicitor to

prepare a will and the will is drawn up in accordance with those instructions. In my view, those opposing the admission of this document to probate as the last will and testament of the deceased have attached insufficient weight to two factors. The first is that the document was prepared by a solicitor on the basis of his client's instructions; the second is the indirect or secondary evidence from that firm of solicitors supporting the contention that the original of the document, of which a copy is before the court, was in fact duly executed as the will of the deceased.

20. In my view, there is ample evidence on which I can be satisfied that the document before the court is in fact a copy of a document which was duly executed by the deceased as his will and attested by two witnesses in accordance with the requirements of s. 78 of the Succession Act, 1965. Firstly, the document itself is clearly one which has been professionally prepared by someone with legal experience and skill. Not only does it include basic elements, the absence of which has proved problematic in other cases (the appointment of executors, an attestation clause, the disposal of the residue of an estate); some of the gifts are themselves legally complex (the creation of an annuity and the grant of rights of residence) and are matters on which a lay person would usually have to take legal or other professional advice.
21. Secondly, the associated documents exhibited by Ms. Kiersey provide important evidence supporting the proposition that the will was duly executed. The wills register in T. Kiersey & Co. was clearly carefully maintained. The exhibited extract meticulously records the relevant details relating to the deceased's will. As recorded, these are entirely consistent with the copy document – the date of the will, the names of the witnesses and of the executors are identical. Significantly, under the heading "*Whether Will given to Testator on Date of Execution or deposited in Safe*", there is a set of marks indicating that, like the entries above it, the deceased's will was retained "*in safe*". Finally, although not relevant to the question of execution, in a column under the heading "*Remarks*", it is noted that a letter was sent to the deceased on the 25th June, 1997, i.e. after the theft of the safe.
22. Maintaining a wills register and keeping safe custody of clients' wills is an important element of the private clients side of solicitors' practice and may form a significant part of the goodwill of such a practise. Not only does it afford clients the security of knowing that their families will be able to locate their will after their death, the solicitor has an interest in continuing to provide professional services in connection with the administration of the estates of former clients. Recording details of unexecuted wills makes no legal or commercial sense and, in any event, most wills registers are set up, as this one was, to record details of the execution of the wills of which a record is being kept. Therefore, entry in the wills register is strong circumstantial evidence of the due execution of the will on the date recorded, 20th May, 1980.
23. In addition to the wills register, a series of documents are exhibited which show the process undertaken by the late Mr. Kiersey for the purposes of drafting this will. Firstly, there is a handwritten note dated 2nd April, 1980 which appears to be the instructions taken by him from the deceased, presumably at a consultation on this date, in relation to

his proposed will. Ms. Kiersey has confirmed the handwriting to be that of her late father. Those instructions are consistent with the contents of the will as ultimately executed. In addition, there are three documents, all headed "*draft*" and each of which comprise a typed version of a draft will which reflect the instructions recorded on the handwritten note. On each document, there are handwritten amendments in the late Mr. Kiersey's handwriting which appear to be incorporated into subsequent typed versions. The amendments do not make any significant change to the instructions as originally given and seem to have been made largely for the purposes of clarity. Again, I regard these documents as constituting strong circumstantial evidence as to the deceased's attendance with his solicitor for the purposes of making a will and the drawing up of a will in accordance with those instructions. It is also notable that the instructions given, as reflected in the will, expressly record an intention on the part of the deceased to leave his wife a significant benefit in excess of that to which she was entitled under the marriage settlement. In light of all of this evidence, I have no hesitation in rejecting the submission made on behalf of his widow's estate that there is insufficient evidence of the deceased's knowledge or approval of the contents of the will. In order for the court to accept this submission, there would have to be a concern that Mr. Kiersey had drafted a will on behalf of a client without instructions and either purported to execute it or recorded it as having been executed when this was not in fact the case. Not only is there is no evidence to support such a suggestion, all of the evidence points to Mr. Kiersey having been meticulous in the discharge of his professional duties towards his client.

24. Finally, an affidavit has been sworn by Elizabeth Treacy who worked as a legal secretary for the firm of T. Kiersey & Co. for 35 years between 1973 and 2008. Her duties included the typing of wills for clients and acting as a subscribing witness. Ms. Treacy does not claim to have been directly involved in the execution of the deceased's will; rather the purpose of her affidavit is to provide evidence of the general practice as regards the drawing up and execution of wills in Mr. Kiersey's offices at the material time. She points out that as of 1980, the firm did not have a photocopier. Consequently, duplicates were created by using a sheet of carbon paper between two sheets of white paper when typing the original will. She states that when an original will was executed and witnessed in full "*the date of execution of the will, the names of the person who executed the will and the witnesses to the will would have been typed onto the carbon copy of the will*".
25. Ms. Treacy also described Mr. Kiersey's practice when she was asked to attest a will. Mr. Kiersey would read the will to the testator and, once the testator was satisfied, she would then be asked to witness it by watching the testator sign it in her presence and in that of Mr. Kiersey, both of whom would proceed to witness the will. She would then immediately type in the details onto the carbon copy and if the testator wished to retain a copy of the will, the carbon copy would be handed to them. None of this is particularly surprising and no doubt reflects the practice of many solicitors around Ireland at the time. Based on her knowledge of this practice and on the contents of the wills register, Ms. Tracey is satisfied that the original will was executed by the deceased on 20th May, 1980, that it was witnessed by Mr. Kiersey and Mary Banks, that the execution of the will was recorded in the wills register, that the original was placed in the safe and remained in the custody of

T. Kiersey & Co. and that the deceased was given the carbon copy onto which the details of execution had been typed. This is not and does not purport to be direct evidence of the execution of the deceased's will. However, when taken with the document itself and the contents of the wills register, the record of instructions and the draft wills exhibited by Ms. Kiersey, it is, in my view, very strong circumstantial evidence that the will was duly executed. This is not just because there was a general practice but because the available documents are all consistent with the general practise as described by Ms. Treacy.

26. I accept that all of this evidence establishes, firstly, that the deceased intended to make a will consistent with the instructions he gave his solicitor and, secondly, that he attended at his solicitor's office on 20th May, 1980 and executed the will which had been drawn up on the basis of those instructions. Consequently, notwithstanding the absence of direct evidence of execution or attestation, I have no difficulty applying the principle of regularity to the execution of the deceased's will.
27. For the sake of completeness, I propose to address an argument made by the personal representatives of the deceased's widow that there is evidence to rebut the presumption of regularity. As a matter of principle the presumption can, of course, be rebutted by appropriate evidence. The written submissions set out a number of authorities in which the presumption was held to have been rebutted (see *Singh v. Ahluwalia* [2011] EWHC 2907; *Mason v. Robinson Solicitors* [2019] EWHC 4055 Ch) usually because the evidence of the attesting witnesses does not actually establish due execution or because the attesting witnesses decline to confirm the authenticity of the will. It is submitted that the evidence of due execution in this case is weak. Emphasis is placed on the fact that Mr. James Delahunty, who found the document, has not sworn an affidavit setting out the circumstances in which he found it.
28. I do not accept that the evidence of due execution in this case is weak. It is circumstantial but nonetheless there are a number of pieces of evidence which are strongly supportive of an inference that the will was duly executed. Whilst it would have been preferable to have had an affidavit from Mr. James Delahunty, the absence of such an affidavit is by no means fatal. Clearly, if a document were simply produced with no evidence as to how it was found and no other evidence to support the contention that it was a copy of the deceased's will, then the argument might have had some force. However, the court cannot ignore the evidence of the wills register, the handwritten instructions and the draft wills all of which are in the same terms as the document which was found by Mr. Delahunty. Further, there is evidence from Ms. Kiersey as to how she came to be in possession of the copy document which is supported by a letter written by solicitors on behalf of Mr. James Delahunty. It is true that there is no one to positively confirm that the original will and the copy will accord, but this is not something which Mr. Delahunty could have done even if he had sworn an affidavit. I accept that the evidence before the court as to the finding of the will is not necessarily the best evidence but, in my view, it is good enough. Further, there is no contrary evidence to suggest that the account given by Ms. Kiersey as to how the document came to be in her possession is not correct. Equally, there is no contrary evidence to suggest that the will was not executed. Looking at the

matter in terms of the second condition identified by O'Higgins C.J. in *Clarke v. Early*, there is an absence of credible evidence that due formality was not observed.

Knowledge and Approval of the Contents of the Will

29. Further, the same evidence establishes that the deceased had knowledge of and approved the contents of the will he executed. The will reflects the instructions given to Mr Kiersey and those instructions are peculiar to the deceased's personal circumstances including his marriage settlement and the fact that he and his wife lived with his brother in a house on his property. There is no reason to suppose that the general practice of Mr. Kiersey as described by Ms. Treacy whereby the will was read to a testator before it was executed was not followed in this case. Finally, I regard the fact that the deceased kept a copy of the will amongst his personal papers as supporting both the contention that the will was duly executed by him and that he had knowledge of and approved the contents of that will.

Admission of a Lost Will to Probate

30. The parties have set out slightly different versions of the criteria to be satisfied before a lost will can be admitted to probate. All are agreed that there must be evidence of due execution of the will and that the copy must be a genuine copy (or a genuine reconstruction) of the original. Based on the analysis of the available evidence set out above, I accept that both of these criteria have been met.

31. The difference between the parties lies in the way in which the other criteria have been framed. The applicant relies on the exposition of the relevant tests in Spierin, *Succession Act, 1965 and Related Legislation: A Commentary* (5th Ed., 2019) which stipulates inter alia that an applicant must prove:-

"The existence of the will unrevoked at the date of death, or if it was destroyed an explanation for the destruction so as to nullify any intention to revoke the will. This is usually done by some person who saw the will after the death of the deceased or it may become evident from the circumstances in which the will was lost;"

The personal representatives of the deceased's widow rely on a series of academic articles (Dowling & Grimes *"Lost Wills and Compromising Probate Proceedings"* *Irish Probate Law Journal* (2013) 1(1) and Tim Brackken BL *"Court Applications: Non Contentious Probate Applications"* (2013)) which stipulate that it must be proven:-

"that the original Will was in existence after the date of death of the deceased;"

In circumstances where the will was contained in a safe which was stolen in 1997 and never recovered, there is clearly no positive evidence available as to the existence of the will eighteen years later at the date of the deceased's death in 2015. A further article, *"Non Contentious Probate Applications"* (2012) by Rita Considine is more circumspect and advises this proof as necessary only *"[I]f an original will can be traced to the custody of the deceased prior to his death and is not forthcoming following the death of the deceased"*.

32. It is said that the judgment of Hanna J. in *In the Goods of Cafferty* [1940] 74 ILTR 161 is authority for the proposition that proof of the existence of the will after the testator's death is a mandatory requirement. *Cafferty* was a case in which, although the will was drawn up by a solicitor, the deceased had retained possession of the original and it had been seen by various of his family members at his home. The testator died in 1915 and no steps were taken to administer his estate until after the death of his widow in 1933. By then, the alleged will of the testator had been lost and no copy could be found. There was positive evidence before the court from one of the deceased's children that she had seen and read the deceased's will after his death from which it was possible to reconstruct the terms of the will. In my view, the finding of Hanna J. in granting the application that he was satisfied that the will was in existence after the death of the deceased and was subsequently lost does not constitute a test which must be satisfied in all cases before a lost will can be admitted to probate.
33. The emphasis placed on proof of the existence of the will after the death of the deceased arises from the need to rebut the presumption of revocation that arises if the deceased is known to have been in possession of his will and it cannot be found after his death. Since a will is an important document which is normally kept safely even when a testator elects to keep it in his own possession, it is reasonable to assume that if the will cannot be found that is because the deceased destroyed it as he no longer intended that the will should operate as his last will and testament. No such presumption arises when the original will is not in the possession of the deceased as there is no reason to presume that the deceased could have destroyed a document of which he was not in possession. Consequently, in circumstances where a testator leaves his will for safekeeping in the offices of his solicitor, his accountant or with a bank and there is no evidence that he removed the document from the safekeeping of that institution, there is no basis to apply a presumption of revocation just because the will cannot be located by that institution after his death. Therefore, there is no corollary requirement to prove that the will was in existence after the date of death of the deceased in order to seek the admission of a copy to probate.
34. Indeed, as the applicant in this case points out, imposing such a rule could have unintended and illogical consequences. In circumstances where a will is lost whilst in the custody of a solicitor, an accountant or a bank, the ability of the court to admit a copy of that will to probate and to give effect to the intentions of the testator would be entirely dependent on the happenstance of the date on which the document was lost relative to the date of the deceased's death. The imposition of a requirement to prove positively that the will was in existence after the date of the death of the deceased does not serve the same purpose where the will is not in the possession of the deceased. Consequently, I think that the rule is more accurately reflected in the expression of it in Spierin's text. The question for the court is whether, assuming that the will was destroyed, there is an explanation for the destruction which nullifies any intention to revoke the will. Clearly, in this case some 24 years after the safe was stolen from the offices of T. Kiersey & Co., it is reasonable to assume that its contents have been destroyed. Consequently, the issue is

whether the circumstances in which the will may have been destroyed nullify an intention on the part of the deceased to revoke the will? In my view they do.

Presumed Revocation of Lost Will

35. This last issue links into a related argument made by the parties opposing the admission of the copy will to probate to the effect that the deceased was known to be prudent in relation to his affairs and prompt in relying to correspondence (per the affidavit of Seamus Forristal, administrator of the estate of Kathleen Delahunty). Mr. Forristal believes it would be very surprising and out of character for the deceased not to have acted on correspondence from his solicitor informing him that the will had been stolen and requesting him to attend the office to re-do the same. The court is asked to infer from the deceased's failure in this regard an intention to revoke the will which he had executed some seventeen years earlier.
36. It is difficult to know how much credence can be given to the characterisation of the deceased as being prudent in relation to his affairs in circumstances where, at the time of his death, the only will which he had made had been made some 35 years earlier and had not been reviewed or updated since then. The deceased owned farmland and his estate is now worth well over a million euro. A prudent approach to an estate of this size would be to review the proposed disposition of the estate at regular intervals with the benefit of professional advice. This may, however, be a matter of subjective opinion. Equally, if the deceased was in fact as prudent as he is portrayed, perhaps he did not receive the letter which was sent to him by T. Kiersey & Co. on 25th June, 1997. The postal service is not perfect and, even when delivered, post may be inadvertently lost in the recipient's home. The available evidence is sufficient to allow the court to be satisfied that a letter was sent but, if the court were convinced that the deceased would have acted on it promptly after receipt, not necessarily sufficient to allow the court to conclude that the letter was actually received.
37. However, resolution of this issue does not have to turn on a description of the deceased's character. The fundamental difficulty with the argument is that the loss of the will through the theft of the safe did not itself operate so as to revoke the will. If it had transpired that the safe had been recovered with its contents intact weeks, months or perhaps even years after it had been stolen, no argument could have been made that inaction on the part of the testator in the intervening period had served to revoke the will. Can that argument now be made because the safe has not been recovered and a lengthy interval has passed between the theft of the safe and the death of the deceased? In my view, it cannot. It is one thing to presume that a deceased has revoked a will in his possession when that will cannot be found after his death. It is quite another to assert that a will should be presumed to have been revoked because of the inaction of a testator upon being informed that his solicitors have lost the original of his will. Clearly it would have been prudent for the deceased to attend at Ms. Kiersey's offices and to give positive instructions one way or another as to what he wished to do with his estate in the circumstances. However, I do not think that the legal consequences which it is now sought to attach to the deceased's inaction are ones which properly follow.

38. The presumption of revocation described above arises because the facts suggest that a deceased testator positively did something with a will in his possession. Section 85(2) of the 1965 Act expressly provides that the destruction of a will by a testator will operate to revoke the will, provided that the revocation is intentional. It also provides an exhaustive list of the methods by which a will may be revoked. Section 85 does not envisage that a will can be revoked through inaction nor that a will can be revoked unintentionally. To accept that the will was revoked by the deceased simply because he did not respond to solicitor's correspondence – which he may or may not have received – would be contrary to the entire scheme of the 1965 Act. It may well be, as suggested by his widow's family, that a more equitable outcome would ensure that the widow's family also benefitted in the distribution of the estate. However subject to certain restrictions under the Succession Act, 1965, it is a matter for a testator to decide how he or she wishes to dispose of their estate. The decisions made by a testator in making a will many decades earlier may seem unfair in light of how family relationships subsequently develop, but it is the prerogative of the testator to make changes to their will to reflect this, or not to do so if that is their choice. The court cannot assume an intention on a testator's part that is not grounded in or cannot be reasonably inferred from the testator's actions, much less compliance with the formalities necessary to give effect to any such intention.

Conclusion:

39. In light of the above, I will allow the application made by the applicant and will grant an order admitting the last will and testament made and executed on 20th May, 1980 of Thomas Delahunty, deceased, to probate in terms of the carbon copy of the original will of the deceased.