THE HIGH COURT

PROBATE

[Record No. 2023 PO 001048]

[2024] IEHC 670

IN THE MATTER OF THE ESTATE OF PATRICK (OTHERWISE PADDY) QUINN, LATE OF CARN, BALLYBOFEY IN THE COUNTY OF DONEGAL

-AND-

IN THE MATTER OF THE SUCCESSION ACT 1965

-AND-

IN THE MATTER OF AN APPLICATION BY ELIZABETH (OTHERWISE LILA) QUINN, THE EXECUTRIX AND SISTER OF THE AFORESAID PATRICK QUINN, FOR LIBERTY TO APPLY FOR PROBATE OF THE WILL OF THE SAID PATRICK QUINN IN TERMS OF A RECONSTRUCTED COPY THEREOF

JUDGMENT delivered by Ms. Justice Stack on 21 November, 2024.

Introduction

1. This is an application to admit to probate the purported last Will and testament of Patrick Quinn, late of Carn, Ballybofey, County Donegal ("the Deceased") dated 23 November, 1992, ("the Will") in terms of a reconstructed copy thereof. While applications to admit wills in terms of a copy are quite common in the Non-Contentious Probate List, applications to admit wills in terms of a reconstructed copy (where not even a photocopy is available) are less so.

2. It is common case that the Deceased executed the Will in the offices of John Foy, solicitor, who had offices at the time in Ballybofey. It is also common case that, in that Will, the Deceased named his sister, Lila, the applicant herein, as his Executrix and sole beneficiary. One of the witnesses to this Will was Mr. Foy, who has given evidence that he and his legal secretary, Ms. Mary McMenamin, witnessed the Deceased's signature, thus complying with s. 78 of the Succession Act, 1965. This evidence was given with the aid of the contemporaneous record in Mr. Foy's Will Register which recorded the identity of the witnesses, as well as various attendances made by Mr. Foy in November, 1992, when the Deceased attended to give instructions for his Will and to execute it.

3. However, after the death of the Deceased on 24 November, 2015, the Will could not be found. Ultimately, Anthony Quinn, one of the three surviving siblings of the Deceased and therefore one of the three persons entitled to extract a Grant in the estate of the Deceased if he were intestate, extracted a Grant of Letters of Administration on 18 September, 2018. At the time, Anthony was approximately 87 years of age, as I understand it. An application was made to this Court (Butler J.) on 25 July, 2022, to revoke that grant and to appoint him as a Joint Administrator together with his daughter Colette, a niece of the Deceased. Though not formally an administrator, I understand that Colette had provided significant support to her father in connection with the administration of the estate during the period for which he was the sole administrator. In any event, that application was granted and Anthony and Colette, who are the Notice Parties to this application, extracted a Grant of Letters of Administration in the estate of the Deceased on 1 December, 2022, and have since acted as joint administrators.

4. The Notice Parties do not dispute that the Will was validly made and executed, nor do they dispute its contents, that is, that it named Lila as sole Executrix and universal beneficiary. However, as the original Will cannot be found, the Notice Parties say that it was *"lifted"*, which is the expression apparently used in Donegal to describe a situation where a testator takes

custody of their own original will from the solicitor who drew it up. They say that the original Will was taken up by the Deceased from the relevant solicitor's office at some point between 1992 and his death in 2015, and that it is presumed that he destroyed it with the intention of revoking it and that he therefore died intestate.

5. By contrast, the applicant says that the evidence establishes that the Will was lost in the office of Messrs. P. McRory & Co., the solicitors' firm who took custody of Mr. Foy's wills after his retirement in 2006, and that it can therefore be admitted to probate in terms of a reconstructed copy.

6. It should be noted that the presumption of revocation does not apply unless it is found that the Deceased took custody of his Will. No presumption applies to the issue of fact which is key to this application, which is whether the Deceased in fact attended the offices of the solicitor who, at the relevant time, had custody of the Will and took it into his own possession, or whether it was lost in one or other of the solicitor's offices. That issue must be determined on the balance of probabilities having regard to all of the relevant evidence.

7. The estate of the Deceased is a modest one, comprising:

i. Approximately 30 acres of farmland which were valued in 2017 at €256,000.00 but which have since apparently increased in value.

ii. Cash held in credit union accounts, which Colette has sworn amounts to approximately €49,914.00, the remainder having been nominated in favour of two of the Deceased's nephews, Michael and Paul; and

iii. Personal effects of no significant value.

8. If the Will is admitted to probate, Lila will succeed to the Deceased's entire estate. However, if the Will is not admitted to probate, and as there is no evidence of any other will, the estate will fall to be distributed on intestacy. In this case, the Deceased died a bachelor (an expression I am using to indicate that he neither married nor entered into a civil partnership),

without issue, and of course had been predeceased by his parents. However, he was survived by three siblings and by the children of three other predeceased siblings. Accordingly, if he is found to have died intestate, his estate would be distributed in accordance with s. 69 (1) of the Succession Act, which provides that his estate shall be divided in equal shares between his surviving siblings, with the children of any predeceased siblings taking in equal shares the share that their parent would have taken had he or she survived the Deceased. Therefore, in the case of an intestacy, the persons entitled and the shares to which they would be entitled are:

a. Lila, who I am told is now 96 years of age, to the extent of a one sixth share;
b. Anthony, who I understand is now approximately 93 years of age, to the extent of a one sixth share;
c. The estate of his brother George, who died just over a year after the Deceased, on 14 Jan 2017, to the extent of a one sixth share;
d. The five children of his predeceased brother, James, to the extent of a one thirtieth share each;
e. The two children of his predeceased sister, Maureen, to the extent of a one twelfth share each;
f. The five children of his predeceased brother, Michael, to the extent of a one thirtieth share each.

Background to the proceedings

9. The Deceased lived all his life in what I understand to be his original family home. Significantly, he did not live alone as his brother, Michael, and Michael's family also resided there. Michael and his wife are now deceased, but their son, also named Michael, gave evidence. As was common in this country, particularly in the years prior to the Celtic Tiger, the

family appears to have been of modest means. No one in the house had the luxury of their own room, and Michael shared a bedroom with the Deceased when he was growing up.

10. Michael is a software developer living in Dublin but his brother Paul, who is significantly younger, has remained living in Donegal where he has a day job but also farms the lands originally owned by his father. These farms were farmed as a single unit with the Deceased's lands for many years, first by the late Michael Quinn and subsequently by Paul. However, Paul has vacated the Deceased's lands on foot of an Order of Letterkenny Circuit Court made in June, 2022, to which I will refer further below.

11. I understand that Paul is living with his family in the house where the Deceased lived prior to his death. This is material because, had the Deceased taken the Will into his custody and not revoked it by destruction, one would expect it to have been found in that property after his death. When the Deceased's father died in 1957, he left some of his lands to the Deceased, some to the Deceased's brother, Michael, and some to the Deceased's sister, Maureen. Unfortunately, there appears to have been a delay in registering the Deceased and Michael as owners of the lands bequeathed to them by their father, and there then appear to have been errors in the registration, with the Deceased becoming registered as owner of Michael's lands and Michael becoming registered as owner of the Deceased's lands. However, there appears to have been no dispute as to who was entitled to which lands.

12. Michael gave evidence that, about two or two and a half years before the death of the Deceased, there was something on the radio about a wills dispute and he said to the Deceased that he hoped he had made a will. The Deceased was very affirmative and direct in his reply, stating that he had made a will and his affairs were in order. Michael did not ask him what it said because he wanted nothing out of it himself.

13. I refer in more detail to some of his evidence below but I should say that I found Michael Quinn Junior to be a reliable and honest witness and I accept his evidence in full. His evidence

that his uncle had told him he had made a will is credible, first because his uncle had in fact made a will — a fact which is now accepted by everyone — and secondly, because Michael made two attempts to discover if the Deceased's Will was held in any solicitor's office. The affidavits filed show that, in September, 2016, he followed up with Messrs. V.P. McMullin as to whether a will had been found in response to their enquiries of 23 August, 2016. In addition, in early 2017, Michael himself went to the trouble of contacting all Donegal solicitors, together with some in Tyrone where the Deceased carried on business, in order to find the Will. I refer to the circumstances which seem to have prompted that enquiry in more detail below, but he was unlikely to have taken the steps that he did in early 2017 unless he genuinely believed that the Deceased had made a will. I am satisfied that he believed the Deceased had made a will because the Deceased had told him so himself some years before he died.

14. Notwithstanding that the Deceased had indicated that he had made a will, after his death on 24 November, 2015, the Will could not be found. By letters dated 23 August, 2016, Messrs. V.P. McMullin & Co., who identified themselves as acting *"on behalf of relatives of [the Deceased]"* and who had dealt with rectification issues arising out of the Deceased's father's estate, wrote to what I am told is every solicitor in Donegal asking if the Deceased had made a will. All of the replies indicated that no will could be found. It seems that the Notice Parties' solicitors made similar enquiries in August, 2016, but the letter of enquiry and the replies thereto have not been put on affidavit.

15. Some months later, on St. Stephen's Day, 26 December, 2016, when Michael was home from Dublin for Christmas, he arranged to go for a drink with his cousin, Raymond, Anthony's son, who was home from London. Apparently, it was usual for the two cousins to meet up in this way over Christmastime.

16. When Michael called over later that evening, Michael was invited in for tea with the family and it became clear that Anthony – and indeed his family – were exorcised about the

Deceased's estate which in turn was going to have ramifications for Paul's entitlement to remain farming the Deceased's lands. Anthony's wife, Pauline, and his two sons, Raymond and Kieran, were present. Raymond and Kieran swore affidavits stating that Michael told them during the conversation that evening, that the Deceased had made a will in which he had left the lands to Paul, his money to Michael's sisters and that he had not left his tractors to anyone. (The Deceased was, along with being a farmer, an agricultural contractor, and it appears that he had left some machinery, though this is not referred to in Colette's replying affidavit where she sets out the assets in the estate).

17. It is not entirely clear but it appears that this statement was being relied upon by the Notice Parties as evidence that the Deceased had revoked the earlier Will in favour of Lila, or it may have been relied upon to question the credibility of Michael's statement that the Deceased had told him relatively shortly before his death that he had made a Will, a statement which would tend to show that the Deceased had not revoked his Will and which would therefore assisting in rebutting the presumption of revocation, if it were found to apply.

18. On this issue, Michael accepted that he stated that the Deceased had made a will but denied that he had stated in definitive terms what it said. He said it was a highly speculative conversation in which everyone discussed what the Deceased might have done in his Will. He gave evidence that he said there was a will and that he thought the Deceased would have left his lands to Paul and that he hoped he would have left his money to Michael's sisters. He said he did not say that that the tractors had not been left to anyone but instead gave evidence that he did not think they had been mentioned at all, though he could not be definitive about this.

19. He said that he was questioned quite intensely, that he felt ambushed, and that there was quite a long conversation about whether the Deceased had made a will – perhaps 45 minutes – in which everyone speculated as to whether the Deceased had left a will and what it might say.

20. By contrast, Kieran said the conversation about the Will lasted about 15 minutes, whereas Raymond said it lasted 7 to 10 minutes, and that even this shorter period was prolonged by the need to repeat things for his father, who even then was hard of hearing.

21. Pauline said that it consisted of a single exchange where Michael was asked if he knew what was in the Will and that Michael had responded in the terms set out in the affidavits of Kieran and Raymond and which have been set out above. However, the notion that there would be no follow up conversation or questions, or even a reaction, as Pauline asserted in her oral evidence, is wholly incredible and I do not accept her account of events.

22. I am satisfied that it is more probable that this conversation took 45 minutes as described by Michael, rather than the shorter periods described by his cousins. The Notice Parties' current solicitors had already sought the Will from all 40 firms of solicitors in Donegal the previous August. If, as appears to have been the case, solicitors had been instructed by Anthony in August, 2016, to make enquiries, this in itself demonstrated that the administration of the Deceased's estate was already a matter of considerable interest to Anthony and possibly also to his wife and family. I do not think that five people, discussing a family matter of some importance to them all, would have confined themselves to a short conversation. I am satisfied that it was a longer conversation of the kind described by Michael.

23. Whatever the length of the conversation, I am also satisfied that Anthony, Pauline, Kieran and Raymond were quite concerned to find out what had happened to the Deceased's estate. In so far as they sought to downplay the exchanges and contradict Michael's account of the conversation, which was that it had been *"quite intense"*, I prefer Michael's evidence.

24. The Deceased had been dead for over a year. No will had been produced and nothing had been done about his estate. Anthony was entitled to a one sixth share in the event of an intestacy. It would be a natural concern of theirs on which they were entitled to express views. Furthermore, even if there was a will, it had not been produced and consequently there was

complete uncertainty as to who might benefit. This suggests that the conversation was of the more intense kind described by Michael.

25. Along with the overall uncertainty as to whether the Deceased had left a will, a number of discrete factual events also corroborates the conclusion that Anthony and his family were very focussed on whether the Deceased had left a will and what it might say.

26. First, Kieran gave evidence of insisting on speaking to Paul about the Deceased's estate after the funeral of their uncle, George, in January, 2017. By his own description of this interaction with Paul at his uncle's funeral, Kieran has made it clear that he had a keen interest in what had happened to the Deceased's estate as of January, 2017. He described seeing Paul across the road after the funeral Mass, and of crossing the road to talk to him. He said that Paul did not stop but kept walking and he walked alongside. When they got to Paul's car, Paul said not to worry about it, that the lands had been signed over to him, and Paul shut the door of the car, in effect - according to Kieran - in Kieran's face.

27. It is clear from that description that Paul did not want to discuss the matter but that Kieran had a sufficiently keen interest in it to press him on what was happening with the estate. I think it is highly unlikely that Kieran's interest suddenly developed at some point after 26 December, 2016. I am satisfied that Kieran had a similarly keen interest in the Deceased's estate by the time that Michael called around to the house on St. Stephen's night, 2016, and was anxious to get more information. As his description of his interaction with Paul demonstrated, he was prepared to press the matter. This is more consistent with Michael's account of the conversation on St. Stephen's night.

28. In addition, Michael and Raymond had spoken on the phone earlier on St. Stephen's Day and Michael had mentioned to Raymond that a will had not been found. I think it is probable that Raymond relayed this to his family, who would of course have been interested to know this, and, given that Michael was living in Dublin, it is quite natural that they might want

to discuss it with him while he was in Donegal for Christmas. I infer from the fact that Raymond had been told earlier in the day that the Will had not been found that Anthony and his family were anxious to discuss the matter further and to press Michael on the terms of the Will. Given that their current solicitors had made enquiries the previous August, they must have been disconcerted by the continued assertion that there was a Will, even though it could not be located.

29. In the circumstances, I accept Michael's evidence that he felt they were very preoccupied with it (he used the word *"obsessed"*) and that he felt somewhat ambushed. I am of the view that prior to his calling up to the house, there probably was a group decision to ask him about the Will when he arrived to meet up with Raymond.

30. It must be pointed out that, whatever the nature of the conversation on St. Stephen's night, Raymond and Michael still went for a drink. If Michael felt somewhat uncomfortable, it was not to such a degree as to amount to a row. If that had happened, he presumably would not have gone to the local pub with his cousin as originally planned.

31. Finally, I don't find it credible that Michael would have said that the tractors had not been left to anyone. This seems an awkward and implausible way to express oneself about the terms of a will. It seems to me much more probable that Michael did not express a view as to who the tractors would have been left to, or that he said he did not know to whom they might have been left. This is much more consistent with his account which is that he asserted there was a will but did not purport to say what was in it as he had never seen it or been told by the Deceased of his contents.

32. I therefore accept that Michael did not purport to positively state that the Will had been in favour of Paul. I accept his evidence that he and the others present were speculating as to what a will would say and that he speculated that the land would be left to Paul. This is not a surprising speculation given that Paul had been farming the lands for some time and he may

have appeared to be the natural successor. Michael did not know that the Will had been executed as long ago as 1992, when Paul was only 11, and he was unaware of the contents of the Will. Michael's reference to hoping that the monies were left to his sisters was also entirely natural given that the Deceased had lived with Michael's family until his death, and it would be expected that the Deceased would have them uppermost in his thoughts.

33. I am satisfied that Michael did no more on St. Stephen's night than say that the Deceased had a will and then speculate that that is what the Deceased would likely have provided for in that will. This is entirely consistent with the applicant's case here, which is that the Deceased had made a will and had never revoked it.

34. Shortly after Christmas, on 5 January, 2017, Michael took it upon himself to email all of the solicitors in Donegal again, as well as others in Tyrone where the Deceased also did business, looking for the Will. This has all the hallmarks of a decision by Michael to prioritise the finding of the Will as soon as Christmas was over. I infer that he had become aware from the intense questioning of him on St. Stephen's night that Anthony and his family were going to press the issue of the distribution of the estate. If Michael could find the Will which he believed existed, Paul's position might well become a lot easier, not least because Michael believed – though he was clear that he did not ask the Deceased what was in the Will and the Deceased did not volunteer the information – that the Deceased would most likely have left the lands to Paul. I find that he genuinely believed there was a will, and that this was because the Deceased had told him so. I also accept that Michael did not ask the Deceased what was in his Will because he himself did not want to benefit from it.

35. However Michael's emails again yielded no results and the Will could not be found.

36. Pauline gave evidence that Lila had said to her on the night of the Deceased's wake that Lila had been on to him to make a will but he hadn't done so and had *"left a mess behind him"*. This assertion, if proven, would tend to support the proposition that the Deceased must have

taken up his Will and revoked it. However, Pauline was cross-examined on this point and I do not accept her account of what was said on the night of the Deceased's wake. Lila, who gave evidence remotely on the second morning of the hearing, denied that the conversation happened, saying that she had not really spoken much to Pauline on the night of the Deceased's wake and did not have any conversation with her about the Deceased's Will. In fact, she volunteered that she and Pauline did not really get along, at least in part because she had not been invited to Anthony and Pauline's wedding many years ago, and – to paraphrase – that, although they certainly seem to have been on speaking terms, she would not be in the habit of conversing with Pauline too much.

37. I accept Lila's evidence on this issue. Pauline herself admits that, during what I believe to be an intense discussion of the Deceased's estate on the night of 26 December, 2016, she never mentioned this alleged conversation with Lila. If the Deceased had not made a will at all, it is simply incredible that Pauline would not have mentioned this in the course of what I am satisfied was a relatively lengthy and intense discussion on St. Stephen's night. I therefore do not accept Pauline's evidence that Lila had said to her on the night of the Deceased's wake that he had made no will. Had Lila said that to her, Pauline would certainly have mentioned in during the conversation in her kitchen on St. Stephen's night, 2016.

Administration of the Estate

38. As already referred to above, Messrs. V.P. McMullin took the common step of writing to all solicitors in Donegal asking them to check their will safe for the Will of the Deceased. These letters were dated 23 August, 2016. All of the firms replied, and they all indicated that they did not hold the Deceased's Will. This included Messrs. P. McRory & Co. who indicated,

by an endorsement dated 25 August, 2016, on the letter they had received from Messrs. V.P. McMullin, that they did not have a will for the Deceased.

39. There is reference in some of the exhibited correspondence to the fact that the Notice Parties' solicitors also wrote to their colleagues in August, 2016, seeking copies of the Deceased's Will so it seems that that they were instructed around that time by Anthony in connection with the Deceased's estate. No will was found in response to those enquiries either. In any event, in September, 2018, Anthony, as already stated, took out a Grant of Letters of Administration in the Deceased's estate.

40. Shortly afterwards, on 5 December, 2018, Anthony issued Circuit Court proceedings seeking, *inter alia,* to remove Paul from possession of the Deceased's lands. As mentioned above, the Deceased's lands had been farmed as a unit, first by his brother Michael and subsequently by his nephew Paul. Paul counterclaimed for adverse possession but, ultimately, this claim was abandoned and a consent order was made in Letterkenny Circuit Court on 15 June, 2022, granting a declaration that the Deceased was the sole legal and beneficial owner of the lands and directing the Property Registration Authority to register the Deceased as owner. An Order was also made directing Paul to vacate the lands. That Order has been complied with and the lands are now let to a third party with the rents being retained for the benefit of the estate.

Finding of the Wills Envelope

41. However, in February, 2021, in the course of the Circuit Court litigation, Paul's solicitors, Messrs. V.P. McMullin, rang the Notice Parties' solicitors, Messrs. McElhinney & Associates, indicating that Paul believed that the Deceased had made a will with John Foy, who had practised in Ballybofey but had since retired. This seems to have come about because the Circuit Court proceedings also sought to rectify the relevant Folio so as to register the Deceased

as owner of the lands he had inherited from his father. It appears that Messrs. V.P. McMullin, on checking their files, found an attendance dated 15 November, 2007, which recorded a consultation between Mr. Brian O'Mahony, the Deceased, and the Deceased's late brother, Michael, who died the following year. The solicitor advised both of them to make wills and then added *"[the Deceased] to review old will made elsewhere"*. This indicates that the Deceased was telling the solicitor dealing with the rectification of title to the farm in 2007 that he didn't need to make a will because he already had a will with another solicitor.

42. After this phone call, Messrs. McElhinney & Associates then wrote to Ms. McRory's firm, as they had taken custody of Mr. Foy's wills safe. Messrs. P. McRory & Co. responded by letter dated 17 February, 2021, producing a Wills Envelope which contained, *inter alia*, attendance notes recording the giving by the Deceased of instructions for a will and recording the execution of a will in accordance with those instructions.

43. There were three such notes: a handwritten attendance of Mr. Foy setting out the assets of the Deceased and indicating that everything was to go to Lila, a typed attendance note of a consultation on 11 November, 1992, and a typed attendance note of the consultation on 23 November, 1992, during which the Will was executed. For some reason, the Wills Envelope also contained the first page of a letter from November, 1999, written directly by Messrs. V.P. McMullin to the Deceased and referring to the rectification issues arising out of his father's estate, already mentioned above. (That page of the letter from November, 1999, is not exhibited in any of the affidavits filed in this case to date. However, it was produced during the cross-examination of Mr. Foy.)

44. Messrs. McElhinney & Associates then put an advertisement issue of the Law Society Gazette for October, 2021, asking anyone who had a will to make that known. There was no response to this advertisement. They also wrote again to all of the solicitors in County Donegal, and they sought discovery from Messrs. P. McRory & Co. of the file which they had. Finally,

they sought non-party discovery against Messrs. V.P. McMullin seeking a copy of their file. That file was received in April, 2022. That file contained nothing relevant to the Deceased's Will, other than the attendance of 15 November, 2007, already referred to.

45. The situation then was that evidence of the making of the Will had been produced but the Will itself had not.

How the Will came to be lost

46. Mr. John Foy and Ms. Philomena McRory were both cross-examined on their affidavits and I am quite satisfied from their evidence that the Will was transferred by Mr. Foy to Ms. McRory's offices in or about June, 2006, when he ceased practice. I am further satisfied that the Deceased never attended with anyone in Ms. McRory's office to recover possession of the Will and that it has been mislaid within those offices and indeed is quite possibly still there. (I gave my decision to this effect at the conclusion of the two day hearing of this matter and, with the agreement of the parties, indicated that I would give more detailed reasons in due course, which I am now doing in this judgment.)

47. First, Mr. Foy impressed me that, as a careful and thorough solicitor, he was embarrassed that it might even be possible that he had lost a will. He was, however, a credible witness, accepting that everyone – no matter how thorough – makes mistakes. Nevertheless, his evidence satisfied me that he did not make a mistake on this occasion and that the Will was not lost in his office but was transferred to Messrs. P. McRory & Co. in 2006, along with the other original wills and title deeds held by him for various clients, together with some closed files.

48. Mr. Foy maintained a Wills Book (in effect, a register of the wills held by him) which was an old-style ledger type book, designed specifically for the recordings details of executed

wills. Entries ran across two facing pages, with the Columns headed *"Name of Testator"*, *"Address"*, *Names of Witnesses"* and *"Date of Will"* on the left facing page and the headings *"Names of Executors"*, *"Whether given to Testator on date of execution or deposited in safe"* and *"Remarks"* on the right facing page. This corresponding entries for the Deceased's Will, which appear on page 3 of the Wills Register are as follows:

> *"Quinn, Patrick", "Carn, Ballybofey", "John Foy, Mary McMenamin", "23.11.92", "Elizabeth Quinn", "Deposited in Safe", "3.9".*

3.9 in the *"Remarks"* column merely records that it was the ninth entry on page 3, and *"3.9"* was also recorded on the face of the Wills Envelope, thus allowing it and its contents to be associated with the entry in the Wills Book.

49. Mr. Foy gave evidence that, when he retired, he wrote to his clients informing them of this fact, and a few collected wills. He said that, where this occurred, it was noted in the Wills Book and the client signed a receipt. This receipt would be placed in the Wills Envelope. No receipt was found in the envelope recovered by Ms. McRory in early 2021, and there is no note on the copy Wills Register produced in evidence by Mr. Foy suggesting that the Deceased collected his Will. As the entry above indicates that the Deceased had not taken the Will with him on the date of execution either, I am satisfied that the Deceased never took up his Will from Mr. Foy's office.

50. It was put to Mr. Foy that the receipt might have been mislaid in his office before placing the Wills Envelope back in the safe. This was denied by Mr. Foy. He said where someone came in to collect their will, he or she would make an appointment in advance and the solicitor would have the envelope (with the will in it) out of the safe, ready for the appointment, and would give the client the will and make sure they signed a receipt. The receipt would be immediately placed in the envelope, and the envelope would be put back in the safe without delay. It would also be noted in the Wills Book and the copy Wills Book recorded

instances of other testators collecting their wills. I am satisfied that there is no evidence that the Deceased collected his Will from Mr. Foy or that a receipt for same was lost in Mr. Foy's office.

51. In 2006, Mr. Foy transferred the Deceased's Wills Envelope and its contents to Messrs. P. McRory & Co. The wills, together with original title deeds and closed files (including a file relating to the Deceased) were transferred in cardboard boxes and, sometime later, Mr. Foy gave Ms. McRory a safe to put the wills in. Mr. Foy gave vivid evidence of the safe being carried over by a number of people, whereas Ms. McRory thought that she had put Mr. Foy's wills in a safe she had herself. She said Mr. Foy's safe was not transported to her office for some time as it was needed by another firm of solicitors who had gone into occupation of Mr. Foy's offices on his retirement.

52. It is not necessary to resolve this dispute as it is in any event clear from the evidence that the Wills were transferred to Messrs. P. McRory & Co. in cardboard boxes and left in a spare room in her offices until her staff had time to inventorize the wills. It appears this process did not conclude until May, 2007, at which time Ms. McRory sent a copy of the Wills Register back to Mr. Foy who filed away both her original letter and the copy of the Wills Register enclosed with it in a filing cabinet in his home office.

53. He retrieved these in 2021 when he heard about the loss of the Will and ultimately produced them in evidence on the first day of the hearing. The copy Wills Register shows that someone went through the entries in Mr. Foy's Wills Register and appeared to indicate that a will was not present by scoring a large X through the testator's name or at the far right hand side of the entry for that Will. Mr. Foy said that a will could remain on the Will's Register even if the will was probated. He said if that happened, everyone would know that the will had been dealt with (and of course it would not be necessary to retrieve it again). However, the result would be that original will which had in fact been admitted to Probate would remain unmarked

in the Wills Register. It was therefore necessary to check the contents of the Wills Register against the original wills received in order to identify precisely which wills had been transferred.

54. While Ms. McRory was somewhat unclear about the process and the precise meaning of the various Xs and other writings which appear form the copy Wills Register, I am satisfied on the balance of probabilities that the Xs were placed on various names on Mr. Foy's original Wills Register, or at the right hand side of the relevant entry, by members of Ms. McRory's staff to indicate that no original will of that particular testator had been received from Mr. Foy. There is no X through the name of the Deceased or any part of the entry relating to his Will on the copy of Mr. Foy's Wills Register which was sent by Ms. McRory to Mr. Foy on 9 May, 2007 and I am therefore satisfied that the contents of the original Wills Envelopes transferred by Mr. Foy were checked by someone in Ms. McRory's office and that the Deceased's Will was found in the Envelope relating to his Will.

55. Despite the transfer of the Wills Register along with the Wills, Ms. McRory drew up her own register for Mr. Foy's Wills. She produced in court an extract from that Register being the page dealing with testators whose surnames began with Q, R and S. The Deceased's Will was listed second under Q, explaining why Q2 now appears in black marker on the outside of the Envelope transferred from Mr. Foy's office.

56. Ms. McRory initially gave evidence that only the outside of the envelope in which the Will was contained would have been checked in her office and the significance of that is that the Will might not have been in the envelope when transferred over by Mr. Foy. (He himself acknowledged that he did not check the contents of the wills envelopes before he transferred them over.) However, I am satisfied that Mr. Foy was careful in his practices and that, if he had removed the Will, this would have been noted in the Wills Book. I am further satisfied that he

would only remove the Will from the Envelope if it were collected by the Deceased and that this did not happen, for the reasons stated above.

57. It was also suggested that the fact that the first page of a letter dated November, 1999, and sent directly to the Deceased, was in the Envelope meant that the Envelope had been opened in Mr. Foy's office sometime between 1999 and the transfer of the Envelope to Ms. McRory's office in 2006. However, Mr. Foy gave evidence that he had not been aware of the rectification issue and I am satisfied that he was clear in his recollection and that he had not seen the 1999 letter previously. I am therefore satisfied that he did not place the first page of the letter in the Envelope.

58. Secondly, and perhaps more tellingly, it became apparent in replies to questions from counsel for the applicant that the details entered on Ms. McRory's own Register were probably recorded from the contents of the Envelope itself. This is because Ms. McRory's Register, which in general contains less detail than Mr. Foy's Wills Register, noted that the Executrix was *"Elizabeth Quinn (sister)"*. The identity of the Executrix is not noted on the outside of the Envelope received from Mr. Foy. Furthermore, while identity of the Executrix is noted on Mr. Foy's Wills Register, her relationship to the Deceased is not. The information that Lila was the Deceased's sister was therefore obtained from a source other than Mr. Foy's Wills Register or the information written on the outside of the Envelope.

59. The only documents which state that Lila was the Deceased's sister were all contained *inside* the Envelope, which strongly suggests that the staff member in Messrs. P. McRory & Co. who drew up the new Wills Register in that office got the information about the Executrix's relationship to the Deceased by opening the Envelope and reading the documents.

60. There are three potential sources of the information. First, there is presumably, the Will itself – as it would be usual in drafting a will to indicate the close relationship enjoyed with the

sole Beneficiary and Executrix. Secondly, there is the handwritten attendance of Mr. Foy which states:

"Leave all to Sister [to?] Elizabeth Quinn of Carn, Ballybofey"

On the next line it is stated: "*EXECUTRIX*", and, while it does not explicitly say that the Executrix is the Deceased's sister, reading the two lines together, one could deduce that the Deceased's sister was to be not only his universal legatee but also his executrix.

61. Thirdly, the typed attendance of 11 November, 1992, which records the Deceased giving instructions for the drawing of the Will, also refers to *"his sister Elizabeth Quinn".* It seems unlikely that Mr. Foy's Wills Register was used to compile the new Wills Register in McRory's and in any event it did not state that the relationship of Elizabeth Quinn to the Deceased. I think it is therefore probable that the documents inside the Envelope, including the Will, were consulted in drawing up the new Wills Register in Messrs. McRory & Co.

62. Ms. McRory indicated that she knew the Quinn family well, so she would have known that Elizabeth Quinn was the Deceased's sister. However, the process of inventorizing the wills was done by her staff. Her evidence was that her staff over the years would all have been local to Ballybofey, and it is therefore entirely possible that they would have known the precise relationship between Lila and the Deceased. However, in my view, they were unlikely, as part of the formal process of inventorizing the wills, to have included any details that did not emerge from the documentation itself.

63. Furthermore, the drawing up of a separate Wills Register in McRory's was much more likely, in my view, to involve a process of conducting an independent check of the contents of the Wills Envelope. It is difficult to see, given that Ms. McRory had been supplied with a Wills Register by Mr. Foy, why Ms. McRory would compile her own register unless as part of a process of independently checking the contents of the wills envelopes. Mr. Foy's Wills Register in fact contained more information than was included on Ms. McRory's register. For example,

Ms. McRory did not record the identity of the witnesses to the Will. (The wisdom of this greater detail has been shown in this case as it has assisted in proving due execution of the Will and therefore compliance with the requirements of section 78.) This suggests that the new Wills Register compiled in McRory's was drawn up by checking the contents of the wills envelopes, without reference to Mr. Foy's Wills Register.

64. I am therefore satisfied that Mr. Foy transferred the Will to Ms. McRory in 2006 and that the Envelope was opened and its contents examined by Ms. McRory's staff when they inventorized Mr. Foy's wills. I think it is probable that the staff member in question then failed to place the Will back in the Envelope and it may well be in one of the other envelopes in the safe containing Mr. Foy's wills. Alternatively, given that the first page of a letter written directly to the Deceased was enclosed in the Envelope, it may be that the contents of the Envelope became intermingled with papers in the file held by Mr. Foy relating to the Deceased and that they are in that file, if it has been retained. Alternatively, the Deceased, who subsequently attended with Ms. McRory on business other than his Will, may have given the letter to Ms. McRory at that point. While Ms. McRory, I regret to say, was somewhat uncertain and confused in some of her evidence, she was very clear in stating that the Deceased had attended with her, and that it had been on other business. I accept this aspect of her evidence.

65. The Notice Parties relied strongly on the presumption of revocation and the fact that there was no evidence that the Will was in existence after the date of death of the Deceased. However, for the reasons set out by Butler J. in *In Re Martin Healy, deceased* [2022] IEHC 49, it is not in all cases necessary to prove that the Will was in existence after the date of death. If that can be proven, then there is no question of revocation by destruction by the testator prior to death. But if it is not proven, all of the evidence must be considered for the purpose of considering whether it is probable that it was lost in the solicitor's office or whether it was

taken up by the Deceased. In this case, I am satisfied to a very high degree of probability that the Will was lost in Messrs. P. McRory & Co.'s offices and was never taken up by the Deceased.

66. The reasons why I am satisfied of this are, first, I am sorry to say that there is evidence of a significant degree of lack of care in that office so far as the custody of Mr. Foy's Wills is concerned. For example, I am satisfied that Ms. McRory also mislaid Mr. Foy's Wills Register. Mr. Foy gave evidence that he asked to see this Wills Register in 2021 when the loss of the Will became apparent and when it could not be produced. Needless to say he was worried about what had happened the Will and concerned that he might have lost it himself. Ms. McRory showed him what he first described as a spreadsheet, though he acknowledged that might not be an entirely accurate description and that I might be more in the nature of a list. I think it is probable that he saw a copy of the separate register drawn up by Ms. McRory's staff. Ms. McRory produced in evidence the relevant page, which was the page detailing wills held by testators whose surnames started with Q, R or S. She said that she put the various sheets of that register into clear plastic covers and then into a ring binder (which in itself is somewhat less secure than the purpose made ledger used by Mr. Foy, as pages could be lost).

67. Ms. McRory suggested in evidence that she might never have received Mr. Foy's Wills Register or that she might have subsequently returned it to him. I am satisfied that she is incorrect on both of these points. It is clear from the original letter of 9 May, 2007 and the photocopy of Mr. Foy's Wills Register enclosed therewith that the Wills Register was photocopied in Ms. McRory's office and therefore it must have been transferred to her prior to that date. Furthermore, I am satisfied that it was not given back as, if it were intended to give the Wills Book back to Mr. Foy, it is difficult to see why they would need to send him a copy instead of retaining a copy themselves. Indeed, it is not at all clear to me why Ms. McRory would give the original Wills Register back given that she was taking custody of the Wills. I am satisfied that Mr. Foy's original Wills Register was also lost in Ms. McRory's office.

68. Furthermore, Ms. McRory herself volunteered that she lost the key to the safe containing Mr. Foy's Wills. Not only that, but she did not even realise she had lost it until February, 2021, when she was asked to search for the Deceased's Will. She had to get a locksmith to open the safe. She does not know when she lost the key, but she gave evidence that only one person ever came back to collect one of Mr. Foy's wills and it was not the Deceased. Evidently, the safe was not opened very often.

69. A further example of want of care, I am afraid, and one which has given rise to a great deal of difficulty for the Quinn family, is that Ms. McRory said that she did not check Mr. Foy's wills at all when she was written to in 2016, along with every other solicitor in Donegal, asking her if she had the Deceased's Will. With respect, this was an extraordinary want of care as a country solicitor is likely to be aware of which families attend with which solicitors and it should in my view have been known to her that the Deceased's Will was most likely in the safe containing Mr. Foy's wills. But even if she did not know that, all wills safes in her custody should have been checked at that time.

70. Finally, Ms. McRory gave evidence that Mr. Foy's wills were not put in a safe for some time. They were in the spare office room with original title deeds and closed files, all received from Mr. Foy. Mr. Foy gave evidence that the reference on the face of the Envelope was most likely a file reference. While he suggested that the first page of the letter from 1999 might have been in the Envelope as assistance in identifying assets on the death of the Deceased, the fact that only one page is included suggests to me that, unfortunately, that letter was not appropriately kept either as otherwise the entire letter would have been in the Envelope. Indeed, Mr. Foy said he didn't think he had ever seen that letter and he hadn't been aware that there was a rectification issue with the lands owned and farmed by the Deceased and his brother, Michael. I found Mr. Foy to be a reliable witness and I accept his evidence in full. Given that he was not aware that there was an issue about rectification, I am satisfied that he never saw

the letter from 1999, which was addressed directly to the Deceased at his home, and that the first page of it was placed in the Wills Envelope in error by someone in Ms. McRory's office.

71. All in all, I'm afraid that there were significant failings in Ms. McRory's office both in inventorizing the wills when received and in storing them thereafter. I am satisfied to a very high degree of probability that the Will of the Deceased was lost in that office and is, in all likelihood, still somewhere in that office, possibly in one of the other wills envelopes or perhaps in the Deceased's old file, if that has been retained.

Absence of any evidence that the Deceased collected his Will

72. While it is asserted by the Notice Parties that the Deceased took up his Will and must be presumed to have revoked it by destruction, there is no evidence that the Deceased ever collected his Will from either firm. First, the attendance from November, 2007 in which the Deceased told Messrs. V.P. McMullin that he had already made a will with another solicitor, is consistent with the Deceased not having collected his Will from Mr. Foy prior to his retirement in 2006, and indeed, with not having collected his Will from Ms. McRory prior to November, 2007.

73. Secondly, I am satisfied that both Paul and Michael made diligent searches in the Deceased's home and in the outhouses and other places where the Will might be found. Paul searched and Michael searched later, but neither found anything of note. Nothing to do with wills or solicitors was found.

74. Insofar as it was suggested by Colette in her oral evidence that the searches conducted by Paul and Michael were not reliable and that an independent person should have searched, I am satisfied that she has no basis whatsoever for taking this view. The evidence is to the effect that Paul and Michael were very concerned to find a will if they could. Michael sent the email

to over 40 firms of solicitors (by means of a blind cc) first thing on the morning of 5 January, 2017. This has all the hallmarks of his making it a priority shortly after his return from Christmas holidays. It must have been influenced by his experience on St. Stephen's night of 2016 when he realised (if he had not done so before) that Anthony and his family were quite exorcised about the Deceased's estate and that, if a will could not be found, Paul's ability to continue farming the lands would be in jeopardy. Similarly, Paul came under some pressure from Kieran at his uncle George's funeral in January, 2017 to say what was happening with the estate. He was then sued and evidently pursued the issue of whether his uncle might have made a will with Mr. Foy when consulting with his solicitors in the course of that litigation. In the circumstances, the actions of both Michael and Paul are consistent with a desire to find the Will and I do not believe that Colette's suspicions are to any degree rationally founded.

75. Indeed, it is the inability of Paul and Michael to find the Will that has permitted the Notice Parties to assert that the Will has been revoked. It is difficult, therefore, to understand why Colette would take the view that one should be suspicious of the inability of Paul or Michael to find the Will at home.

76. In the circumstances, I have no doubt whatsoever that either Paul or Michael, if they had found a will, would have disclosed it as it could hardly have been more disadvantageous to Paul than an intestacy with a large number of beneficiaries. An intestacy would mean, in effect, that the lands would have to be sold – either to Paul, if he had the means to buy out the remaining beneficiaries, or to a third party. I am therefore satisfied that Paul and Michael conducted a thorough and diligent search of the Deceased's home (including outhouses where papers might be stored), and his personal effects, and that they found no will.

77. As evidence that the Deceased collected his Will from the solicitors' office having custody of it, the Notice Parties relied on the fact that three pieces of Sellotape had been affixed to the back of the Envelope, indicating that it had been opened at least twice after it had

originally been placed in the Envelope. From this, it was suggested that it must have been opened on at least three occasions and Colette speculates in her affidavit of 4 May, 2023, that, after being sealed when the Will was first made, it was opened to put the first page of the 1999 letter in the Envelope and that it was opened again when the Deceased collected his Will from the solicitor's office.

78. The evidence demonstrates, however, that the Envelope was opened in the offices of Messrs. P. McRory & Co. when Mr. Foy's Wills were being inventorized between June, 2006 and early May, 2007. Even if it were the case, therefore, that the Envelope was opened at some point to insert the first page of the 1999 letter, on the facts of this case, the three pieces of Sellotape can be readily explained.

79. However, I think it is highly improbable that the Envelope was opened for the purpose of inserting the first page of the letter from 1999. Its presence in the Envelope is something of a mystery and is more indicative, in my view, of a want of care in the filing of documents in the offices of Messrs. P. McRory & Co. than to have been a deliberate act. Mr. Foy suggested that it might have been inserted as identifying the correct Folio number for the Deceased's lands but I think this suggestion was motivated by his desire to be helpful than anything else. It would be much more convenient to do that as part of a note of the assets, separately drawn up for the purpose of being kept with the Will, and the fact that only the first page of an original letter was inserted is more indicative of an absence of care as regards the filing of documents than anything else.

80. In any event, Mr. Foy said that it was not unusual to examine the contents of a wills envelope from time to time. As a result, this reliance on three pieces of Sellotape on the back of the Envelope amounts to nothing more than unreliable speculation as to how the Envelope containing the Deceased's Will was handled over the years.

81. I should add that, having looked at the original myself, it is quite difficult to identify three separate pieces of Sellotape as they are placed quite securely and neatly on top of each other. This is not an envelope with three readily identifiable pieces of Sellotape, one or two of which are obviously aged and discoloured. In this case, I not think it is safe to attempt to draw any inferences from the fact that there were three pieces of Sellotape.

The Deceased's attention to his affairs and family circumstances

82. Finally, counsel for the Notice Parties relied on the fact that the Deceased was a meticulous man and was likely to have taken a copy of his Will from Mr. Foy. In addition, it was common case that there had been no fire or burglary which would explain the loss of important documents. Counsel submitted that the fact that that copy had not been found indicated that the Deceased had in fact taken up his Will and revoked it, and that the copy had been destroyed along with it. I have carefully considered that submission but, while argued with skill, I cannot accept it. It seems that the Deceased was a man who was unlikely to leave his affairs in disarray and, as this case demonstrates, where a deceased will leave no spouse, civil partner or issue, the potentially large numbers of people entitled on intestacy would almost inevitably result in difficulties. Indeed, an intestacy would more than likely result in the sale of the lands which had been in the ownership of the Deceased's family for many years. It would be much more likely that the Deceased would take advantage of his testamentary freedom to say who should succeed to his estate after his death.

83. The evidence is that Lila and the Deceased were close throughout the Deceased's lifetime, that they lived near each other and that, up to his death, the Deceased visited every morning for a cup of tea, read his paper, and then left his paper for her to read before going about his day. Lila is, apparently, a person of modest means who does not own the house she

lives in. It appears entirely rational that the Deceased would have chosen her as his Executrix and universal legatee, given that, at the time, when the Deceased's nephews and nieces were much younger and Lila had few of her own resources.

84. Furthermore, as already stated, I am satisfied that the Deceased told his nephew, Michael, two to two and half years before he died that he had a will. It has not been suggested that he ever made a will other than that executed with Mr. Foy in 1992, and it appears therefore that he must have been referring to that Will. While he could of course have revoked it in the intervening two or two and half years, no evidence was tendered to explain why he would alter his long-standing intention to benefit his sister, with whom he spent part of every day and who is of modest means herself, and instead decide to die intestate with the necessary result that his modest estate, including an agricultural holding of only 30 acres, would be divided between at least 14 different people.

Conclusion and Proposed Order

85. In the circumstances, I am satisfied that the Will was never taken up by the Deceased and that it became mislaid in the offices of Messrs. P. McRory & Co. I will therefore make an Order revoking the Grant of Administration to the Notice Parties and will make an Order admitting the Will to probate in terms of the reconstructed copy exhibited at "DOM11" to the affidavit of Denis O'Mahony, Solicitor, sworn on 30 January, 2023.

86. I will list the matter for mention in early course for the purposes of making those orders and will at that point also hear the parties as to whether directions are required for the purposes of considering the question of costs.