[2019] EWHC 54 (Ch)

Case No: E30LS136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY TRUST AND PROBATE LIST (CHD)

IN THE MATTER OF THE ESTATE OF AGNES MOORE (DECEASED)

The Court House
Oxford Row
Leeds LS1 3BG

Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

Gail Blyth **Claimant**

- and –

(1) Leslie Sykes

Defendant

- -
- -

Mr Richard Carter for the Claimant
Miss Julie Case for the Defendant

Hearing date: 27 and 28 November 2018
Date draft circulated to the Parties 6 December 2018
Date handed down 15 January 2019

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JUDGMENT

1. Mrs Agnes Moore, who was born in October 1934, died a widow on 9 January 2016 aged 81 years old. Amongst her possessions at the time of the death was an envelope containing a copy of a will executed on 11 April 2008 (the Will). The envelope also contained an unsigned draft of the Will and an invoice from solicitors, Messrs Banks Carrington, dated 7 April 2018 in respect of the preparation of the Will. The original Will was absent from the envelope and has never been found.

2. The envelope was one specifically produced for the purpose of containing a will. It contained some printed instructions relating to what to do if the testator's intentions changed and when the will might become invalidated. It also bore the printed statement "YOUR ORIGINAL/COPY WILL IS ENCLOSED". The word "ORIGINAL" was struck through on the envelope in this case so that the impression was that the envelope contained merely a copy. It is, however, also right to say that one of the printed instructions on the envelope, as well as those I have mentioned, was to "*keep a note in this envelope if the Original Will is deposited elsewhere".* There is no evidence that there was such a note in this envelope.

3. The copy of the Will found in the envelope was endorsed by a certificate by Banks Carrington to the effect that it was a true copy of the original. This certificate was dated 15 October 2010. The significance of 15 October 2010 is that that was the date of a codicil to the Will. The envelope contained the original codicil rather than merely a certified copy.

4. By the terms of the Will Mrs Moore appointed her daughter, Gail Blyth, the claimant in this case and Mrs Blyth's husband, Frederick as her executors and trustees and directed that her net estate be held by them on trust equally for 4 beneficiaries. These beneficiaries were Mrs Blyth, Mrs Moore's other daughter, Debbie Sykes, Mrs Moore's son, William and Mr Leslie Sykes who was Debbie Sykes's former husband and is the defendant in this case[1]. There was a default provision whereby if any of the beneficiaries died before Mrs Moore then the share that they would have inherited would be divided equally by the children of that deceased beneficiary.

[1] Mr Sykes and Debbie Sykes had actually separated in 1997 since which date Mr Sykes had resided in accommodation provided by Mrs Moore.

5. The codicil did not interfere with the devolution of the estate save to the extent that it sought to substitute Mr Leslie Sykes as an executor in place of Frederick, Mrs Blyth's husband. It should be said however that the codicil does make reference to the Will by directing that it should be:

> "*construed and have effect as if the name of Leslie Sykes had been inserted in it throughout in place of the name of Frederick Blyth as an executor and trustee AND in all other respects I CONFIRM my will*".

6. This dispute arises because it is contended by the claimant that the Will was revoked by destruction by Mrs Moore on a date after 26 February 2015. That is why it was absent from the envelope and has never been found elsewhere. The significance of 26 February 2015 is that it was, regrettably, the date upon which Mrs Moore's daughter, Debbie, passed away. Mr Sykes does not accept that the Will was destroyed. His position is that Mrs Moore's estate should be administered in accordance with its terms, as varied by the codicil.

7. The claimant contends that, the Will having been destroyed, the estate should pass in accordance with the rules of intestacy. An application of those rules would result in the claimant and Mr William Moore obtaining one third each of their mother's estate while the remaining third is shared equally between Debbie's children, Ben and Chelsey. Under the rules of intestacy there would be no provision for Mr Sykes.

8. This is to be contrasted with the manner in which the estate would have devolved under the Will. The claimant and Mr Moore would receive only one quarter of the estate each. Ben and Chelsey who, by reason of their mother's death, became beneficiaries under the default provision in the Will would each share equally in the third quarter and Mr Sykes would receive the fourth quarter. In stark terms, under the terms of the Will, the Sykes family would receive half the estate. On intestacy the Sykes children would receive one third of the estate but Mr Sykes personally would receive nothing.

9. The estate is not large, in money terms the difference in outcome may well be disproportionate to the costs involved but it is a sad fact that, in claims over the division of an estate, like many boundary disputes, the quest for a solution based on commercial pragmatism is not given the weight it may deserve.

10. The Will was not the first that Mrs Moore had made. In September 1991 she made a home-made will in which Mr Sykes was appointed an executor along with Mrs Moore's accountant. That will bequeathed to Mr Sykes, Mrs Moore's Mercedes car and provided for the division of the residue between her 3 children, William, Gail and Debbie. It contained unusual default provisions in the event that one of the residuary beneficiaries predeceased her. William Moore's share would go to his children but on trust until they attained 21. There was a similar provision in respect of Gail Blyth's children in the event of her death before her mother. If Debbie predeceased her mother then her children were to receive only £10,000 each on trust until the 21st birthday, the balance would go to Leslie Sykes absolutely.

11. A will made in May 1996 revoked that earlier will. Mr Sykes and the accountant were replaced as executors by Mrs Moore's 3 children. There was a specific bequest to Leslie Sykes of £50,000 as well as the Mercedes car that had figured in the earlier will and the residue was to be held for the benefit of Mrs Moore's 3 children. The default provisions in the event of any of the residuary beneficiaries predeceasing were simplified so that the children of a deceased parent would simply inherit the share that such deceased parent would have received had he or she not predeceased Mrs Moore.

12. A further will was made on 6 February 2007. This was prepared by firm called Apfel Carter which firm was subsequently became part of Messrs Linder Myers. By that will the 3 children of Mrs Moore were retained as the executors. There were no specific bequests. The net estate was to be divided between the 3 children and Leslie Sykes so that each should obtain one quarter. The default provisions in the event of the death of a beneficiary prior to the death of Mrs Moore were the same as those contained in the 1996 will. It will be recalled that when this 2007 will was made Debbie and Leslie Sykes had separated and had been separated indeed for about 10 years.

13. In addition to making her will on 6 February 2007, Mrs Moore made an enduring power of attorney by which Mr Sykes was appointed her attorney in respect of all her property and affairs. There is no suggestion that that was revoked prior to Mrs Moore's death. It was still in the possession of Linder Myers after Mrs Moore's death.

14. The will of 2007 was revoked by the Will which, as I have already mentioned, was varied by the codicil of 15 October 2010

15. In this case the claimant is represented by Mr Carter of counsel and the defendant by Miss Case of counsel. I have had the benefit of helpful skeleton arguments and final submissions for which I am grateful.

The law relating to revocation of a will

16. It seems to me to be appropriate to deal with the law at this stage and then to assess what issues arise from that analysis of the law that require determination and then consider the evidence in that context.

17. S20 of Wills Act 1837 deals with revocation of a will:

> "….. *No will or codicil, or any part thereof, shall be revoked otherwise than ….. by another will or codicil executed in manner hereinbefore required or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed or by burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same*"

The claimant's assertion is that Will was revoked by its tearing up by the testator with the intention of revoking it.

18. It is not just a case of tearing up the will. In order for there to be an effective revocation, it must be torn or otherwise destroyed with the intention that, by doing so, the will is revoked. As is stated in *Williams on Wills* 10th edition paragraph 18.5:

"*an act which is not shown to have the intention to revoke, is wholly ineffectual for that purpose, even though it results in the total destruction of the will*".

19. The editors of *Williams* at paragraph 18.5 go on to say that a will is not treated as having been revoked where:

> "*it is destroyed through inadvertence or under the belief that it is useless or invalid or has already been revoked*".

And that it is not revoked if:

> "*it is destroyed on the basis of any assumption of fact which proves false where the revocation is based on the assumption being correct…".*

20. This latter assertion is one of importance in this case because it is the oral evidence of the claimant (I emphasise, the claimant) that, after the death of Debbie in February 2015, Mrs Moore intended that her estate should be divided equally between her, that is, the claimant, Mr Moore and Mr Sykes and that Mrs Moore specifically did not want her grandchildren to inherit, preferring instead for them only to benefit from their grandmother's wealth as a result of their parent's largesse, if that is what the parent wanted, or, alternatively, for the grandchildren to benefit on the death of their parent.

21. The claimant asserted that the reason Mrs Moore destroyed the Will was because the Will would not have achieved that objective but rather would have divided the estate 4 ways and in a way which included one quarter going to Debbie's children. It is accepted that the apparent wishes of Mrs Moore are not achieved by the application of the rules of intestacy either because Mr Sykes gets nothing under those rules and two of the grandchildren, namely Debbie's children, Ben and Chelsey, do indeed inherit directly from their grandmother's estate.

22. Mr Carter takes no issue with the statement of the law set out in *Williams* insofar as it relates to destruction through inadvertence or a belief that the will is useless or invalid or has previously been revoked but he suggests that the assertion by the editors to the effect that the revocation is also ineffective if it is based on an incorrect assumption of fact actually oversimplifies the law.

23. He took me to the case of Re *Southerden's Estate, Adams v Southerden* (1925) P177 in support of his contention that the law is somewhat more nuanced and that essentially, revocation is only effective if the revocation is actually <u>conditional</u> upon destruction of the will having the effect that the testator intended or expected.

24. The facts in *Southerden* are interesting. The testator, under the mistaken belief that in the event of his dying intestate his widow would be entitled to the whole of his property, burnt his will in which he had indeed left everything to her with a default provision leaving his estate to his father and his wife's father equally. In fact, as a matter of law on his death his wife was not entitled to everything. The court held that the revocation of the will, being dependent on a condition which was not fulfilled, was inoperative and the contents of the will that he had destroyed were admitted to probate.

25. There are obviously similarities between that case and this but Mr Carter, in support of his contention that each case depends upon its facts and what might be a condition in one case does not mean it is a condition in another, refers me to the observations of Atkin LJ in *Southerden* to the effect that

> "*the intention (to revoke) may be conditional, and if the revocation is subject to a condition which is not fulfilled, the revocation does not take effect*."

and

> *"you must prove that there was in fact a condition.* <u>*It is a question of fact*</u> *(my emphasis) in each case. With great respect to the learned judge I should not myself be satisfied with saying that the testator was under a misapprehension of fact – he may have been so, that the misapprehension may not have been as to something that he intended to be conditional –* <u>*whether it was or not is a question of fact in each case*</u> (my emphasis)"

26. Mr Carter draws attention to the fact that the judge in *Southerden* refers to the doctrine of "*dependent relative revocation*". It is right to say that the judge in that case does not really

explain what that is, although clearly he had it firmly in mind and applied it in his judgment. The doctrine of dependent relative revocation has nothing to do with family relatives. It arises when revocation is relative to another disposition which has been made or is intended to be made and is so dependent on that disposition that revocation is not intended unless that other disposition takes effect. In such a case, if that other disposition fails to take effect, the will remains operative as it was before the purported revocation. The principle is explained in *Williams* paragraph 19.3 which in fact cites *Southerden* as an example of the application of the doctrine.

27. It seems to me that dependent relative revocation is merely a subspecies of conditional revocation addressed at paragraph 19.1 of *Williams*. That paragraph also makes reference to *Southerden* in support of the contention promulgated by Mr Carter that "*a revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the revocation is conditional on the fact being true*".

28. Mr Carter refers me to *Theobald on Wills* which, he argues, takes more account of the nuances identified by the court in *Southerden*. At paragraph 7 – 066 the editors of that work address the doctrine of conditional revocation. By reference to *Southerden* they define it as the situation which arises where:

> *"the testator destroys his will, intending to revoke it conditionally on the existence, or future existence, of a particular fact: if this condition is not satisfied the will is not revoked. But the doctrine is not applicable simply because the testator made a false assumption when he revoked his will. The true view is that a revocation grounded on an assumption of fact which is false takes effect unless the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is contingent upon the fact being true."*

29. Mr Carter's point is that there is no evidence to support a construction that the revocation of the will was specifically conditional on it having the effect that Mrs Moore believed it might have namely that, as result of the revocation, her estate would pass to her 2 surviving children and Mr Sykes and not to any of her grandchildren. In other words, whilst he accepts that there is evidence that that is what Mrs Moore would have wanted, there is no evidence that the revocation of the will was contingent on it.

30. Before I move on, for the sake of completeness, it is as well to make reference to of 19.5 of *Williams*:

> *"a revocation which is shown to be upon a mistake either of fact or of law and is considered by the court not to be intended by the testator except conditionally on the mistaken assumption being correct is inoperative*.

In my view it does no more than repeat what has been said before but it is perhaps worth observing that, in footnote 2 to the text, *Southerden* is once again cited as authority of the proposition.

31. Of course, the discussion above addresses the issue of whether a will which has, as a fact, been destroyed remains effective or not. I now go on to consider the concepts which govern the question of how a court approaches the issue of determining whether, as a fact, a will has actually been destroyed with the intention that it is revoked where the question of its actual destruction is in issue.

32. If a will was last traced to the possession of the testator and is not forthcoming at his death, there is, prima facie, a presumption, in the absence of circumstances tending to a contrary conclusion, that the testator destroyed it with the intention to revoke it[2].

33. The presumption however may be rebutted by evidence which must be "*clear and satisfactory*" [3]. If the presumption arises it is up to the propounder of the will, in this case Mr Sykes, to establish, on balance, that the presumption has been rebutted. The strength of the presumption depends on the level or degree of security with which the testator had custody of the will during his lifetime.[4]

34. The presumption does not arise in circumstances where it is more likely than not that the will was not in the possession of the testator before his death but rather was in the possession of a third party such as a solicitor. In such a case then, where the proper execution of the will is not in doubt, the onus of proof is on the party asserting revocation to prove that, on balance, revocation occurred. In this case that is the claimant, Mrs Blyth

35. Mr Carter made it clear, in his final submissions, that he acknowledged that it was for the claimant to establish, on balance, that Mrs Moore had been in possession of the Will sometime between 2010, when it was executed, and her death in order for the presumption to arise. He acknowledged that if the court was not satisfied that the claimant had discharged that burden then there were significant "*difficulties*" for the claimant in establishing her case. In short, he conceded that the claimant's case that the Will was destroyed is dependent upon the presumption being engaged and the assertion that the evidence brought by the defendant to rebut it is inadequate to do so.

36. The revocation of a will does not resurrect any earlier will. That is the effect of s22 Wills Act 1837 which provides:

    "…… *No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and showing an intention to revive the same*……."

37. It is not in dispute that the Will contained a provision revoking all previous wills. It is for this reason that the parties are agreed that, if the Will is revoked, the estate passes as per the rules of intestacy.

38. Let me finally turn to issues relating to the codicil. In this case, as I have said, the codicil, the original of which still exists, actually makes reference to, and confirms, the Will (subject to the amendment as to executors). The effect of the codicil is to republish the Will as at the date of the codicil, namely 15 October 2010.

39. A codicil can survive even the valid destruction of the will. It does not automatically cease to have validity in such circumstances. The authority for that is *Western Australian Trustee Executor and Agency Co Limited v O'Connor* (1955) 57WALR 25. This is an Australian case but is cited at paragraph 18.17 of *Williams* as authority of the proposition that that is the law in England and Wales. However, in the case of *Formaniuk Estate* (1963) 44 WWR 686 it was held that:

[2] Williams on Wills 10th edition paragraph 18.28

[3] ibid paragraph 18.29

[4] Rowe v Clarke (2006) WTLR 347

"*where after a will or codicil was executed giving a specific bequest and confirming the will and later the testator destroyed the will with the intention revoking it, it was held that the special bequest in the codicil was good but the will was revoked and ineffective*"

40. This would suggest that where a codicil makes testamentary dispositions it is effective even if the will is revoked but in so far as it does not then the codicil dies with the will. That does appear to make some sense. If it is accepted that a codicil is a document supplementary to a will then, on the destruction of the will, there is, as a general proposition (and in the absence of any testamentary dispositions made in the codicil), nothing for the codicil to be supplementary to and the very reason for its existence is therefore negated except insofar as it can stand alone by virtue what it contains. In this case the codicil is able to stand alone in terms the appointment of trustees but it does not stand alone in terms of testamentary dispositions and so, at best, the presence of the codicil and the absence of a valid will give rise to a partial intestacy.

The issues

41. In my judgment it is necessary for me to determine:

    a. Whether the presumption in favour of revocation arises. At first sight that would mean that I have to be satisfied, on the balance of probabilities, that the Will was in Mrs Moore's possession sometime between 2010 when she executed the codicil and the date of her death. In fact, in my judgment, the relevant dates are between February 2015 and the date of her death. It will be recalled that it was in February 2015 that Debbie passed away and it is the claimant's evidence that it was that event which prompted Mrs Moore to destroy the Will. The burden of establishing on balance that it was in her possession at some time during that period lies with the claimant. Clearly however, if it was in her possession prior to February 2015, it is more likely to have been in her possession thereafter.

    b. In the event that I am not satisfied that the claimant has discharged that burden, then, on the basis of Mr Carter's sensible concessions, there is, it is conceded, an insufficient basis to conclude that the Will was destroyed, much less that it was destroyed with the intention of revoking it.

    c. If I am satisfied that the Will was in possession of Mrs Moore during the relevant time then I must consider whether I am satisfied that the defendant has rebutted the presumption that, because the Will cannot now be found, the Will has in fact been destroyed by Mrs Moore and that she did so intending that the will would be revoked.

    d. If I conclude, on the basis of the presumption and the lack of "*clear and satisfactory*" evidence to rebut it, that the Will was indeed destroyed with the intent of revoking it, the issue then arises as to whether that revocation was conditional and whether the condition was met or not. This involves the determination of:

        i. what Mrs Moore's beliefs were when revoking the Will about the consequences that would flow from revocation

        ii. whether the revocation of the Will was conditional upon the accuracy of those beliefs

        iii. if it was, whether those beliefs were accurate or not.

e. If I take the view that she was motivated into revoking the will by a mistake as to the consequences of revoking the Will and that the revocation was indeed conditional upon her mistaken assumptions being true then, as a matter of law, this will has not been revoked.

The evidence

42. I do not intend to dwell on the evidence at a substantial length. I have taken account of it all but recount below only what I regard to be the more salient details.

43. First, it is appropriate to record that it is not the evidence of any witness in this case that they have ever seen the original of the Will. At best, all that has been seen is the certified copy to which reference has already been made.

44. Following her husband's death in 1982, Mrs Moore opened and ran a care home, Clovelly. That closed in 2008[5]. Mr Sykes had played an important part in running it until its closure. Initially, until her death Debbie was also instrumental in running the home. When Mr Sykes and Debbie separated Mr Sykes moved into rooms at Clovelly where he has remained ever since, notwithstanding that it is no longer care home and has not been for some considerable time.

45. It is not disputed by Mrs Blyth that her mother's relationship with Mr Sykes was a close one which survived Debbie's and his separation and Debbie's ultimate death. Indeed, Mrs Blyth does not deny that her mother intended that Mr Sykes should benefit from her estate. At paragraph 40 of her witness statement she states that, following Debbie's death, Mrs Moore had told her that her will no longer made provision which Mrs Moore found acceptable because it provided for a four-way split of her estate when, as a consequence of Debbie's death, she now wanted a three-way split "*one to me and my family, my brother and his family and Les and his family*".

46. It is in this same paragraph of Mrs Blyth's witness statement that she mentions having been told by Mrs Moore that she (Mrs Moore) had torn up her will. She has this to say:

> "*after a number of these chats and me offering to arrange the appointment (with a solicitor) and take her, she told me she had torn her will up, she said you and William would get it all but I want you to split everything 3 ways so Les and his children get the same as you and William*"

47. In her oral evidence Mrs Blyth enlarged upon these conversations with her mother. Her evidence was that in fact Mrs Moore wanted to split the estate between her (Mrs Blyth), Mr Moore and Mr Sykes with no direct benefit to the children save in so far as their respective parents took the view that they, in their discretion, wished to benefit the children. Later in her evidence she spoke of Mrs Moore intimating to her that this provision did not extend to her jewellery which Mrs Moore wished to be divided between Mrs Blyth, her daughter Courtney, and Debbie's daughter Chelsey. It is right to remark that William Moore also has a daughter but apparently she was excluded from this arrangement. The jewellery is not of insignificant value. One ring, now worn by Mrs Blyth, appears to be worth tens of thousands of pounds.

[5] or possibly 2011. In her witness statement at paragraph 27 Mrs Blyth states that it closed in 2011 but in her oral evidence she said it was 2008. 2008 appears to be consistent with the evidence of Mr Sykes

48. The reference to which I refer in paragraph 46 above is the only reference that Mrs Blyth makes in her witness statement to the Will having been torn up. She said that the conversation took place at her house and that William Moore and Courtney were there too. The conversation was in the context of Mrs Blyth suggesting to her mother that it was time she saw a solicitor to put her affairs in order particularly following Debbie's death. Indeed it was Mrs Blyth's evidence that she actually made an appointment for Mrs Moore with a solicitor but that appointment was not kept.

49. In her oral evidence she spoke of having been told by her mother in the course of telephone conversations that she had torn up the Will. This does not figure in her witness statement. Nevertheless, her oral evidence is that once again this was prompted by her (Mrs Blyth) raising with Mrs Moore the issue about getting her affairs in order and Mrs Moore's response was that really she "*could not be bothered with it*" and that she had torn up the will and that Mrs Blyth knew what she wanted to happen to her estate.

50. It is right to say that the Particulars of Claim are also somewhat light on the assertions as to the circumstances in which the will was revoked. It is covered in 2 lines at paragraph 5.3 to the effect:

> *"The deceased informed the claimant in 2015 that she had torn up her will and that she wanted the claimant and the claimant's brother to "get it all".*

51. That led to a Part 18 request to the claimant to provide for particulars of the date the deceased is alleged to have informed the claimant that the Will had been torn up, where the conversation took place, the words used and if anyone else was present.

52. The response was that Mrs Moore informed Mrs Blyth on:

> "*many occasions after Debbie's death, in her bungalow at the rear of the Clovelly, at the bungalow in Castle Lane and also at my home that she had torn her will up, she told me clearly her wishes to which I agreed and understood. This conversation took place on many occasions in front of Courtney, Kate (Moore) Fred (Mrs Bligh's husband) and anyone else who would be present when she was reminiscing*"

53. Mrs Blyth does not suggest that she ever saw the original of the Will in the possession of her mother. Indeed she was clear that she had never seen the codicil either.

54. Courtney Ellis, Mrs Blyth's daughter has a recollection of her grandmother announcing one day at Mrs Blyth's home that she had torn her will up. Her recollection was that in addition to her mother being present, a family friend, Kay Roberts was also there. She did not suggest that her uncle William Moore was there. It will be recalled that it is Mrs Blyth's evidence that he was. Mrs Courtney Ellis's evidence is that she too recalls Mrs Moore indicating that she expected her estate to go 3 ways which would have involved one equal share passing to Mr Sykes. She clearly recollects Mrs Moore making it clear that she did not intend her grandchildren to benefit directly from her estate "*if you think I am leaving you anything I am not, you kids have to wait your turn."*.

55. Mr Moore gave evidence. In his witness statement he makes no reference to having been told either by his mother at a family get together at Mrs Blyth's home or elsewhere that his mother had torn up a will. All he says in his witness evidence was that Mrs Moore clearly gave the impression that she wanted her estate to pass to himself, his sister and Mr Sykes in equal shares.

56. He was clear in his oral evidence that he himself had never heard his mother say that she had destroyed a will. His view of her was that she was not sufficiently organised to do that. His evidence was that it would not come as a surprise to him to learn that his mother might have said that she had torn up her will when in fact she had not done so, either because she was disorganised and a little chaotic as result of heavy drinking or alternatively simply with a view to bringing an end to unwelcome conversations. His evidence to the effect that he never heard his mother say that she destroyed will is of course at variance to Mrs Blyth's evidence that he was at her home when Mrs Moore said that she had done so.

57. Mrs Kate Moore, Mr Moore's former wife also gave evidence. Notwithstanding that she and Mr Moore are divorced, she gets on well with him and the family and often goes around to Mrs Blyth's home to see both her and Courtney with whom she is very close. She was also close to Mrs Moore and it seems that the family were not reluctant to discuss matters relating to Mrs Moore's estate in her presence. She spoke in her witness statement of Mrs Moore talking about her will after Debbie died:

> "*She did not seem to want to be fussed. Gail would try and organise her to put things in order but she would say often "I have torn it up, Gail knows what I want". That since Debbie had died she was only going to leave it to Gail, William and Les. There was to be no benefit to any grandchildren. I heard this on many occasions. She would speak freely about it*".

58. Kate Moore's evidence suggests that there were frequent references by Mrs Moore to the fact that she had torn up her will. It is right to observe that that is not the picture painted by Mrs Blyth in her witness statement although it is in her Part 18 replies. In her witness statement Mrs Blyth's evidence seems to be confined to Mrs Moore disclosing that information during a family get together at Mrs Blyth's house and then, on another occasion, over the telephone.

59. Mr Sykes evidence is that he had no involvement in the making of the Will albeit that he was aware that Mrs Moore was making one. After she had done so the envelope to which I referred was placed in a drawer in her home but not before, as he vaguely recollects, Mrs Moore had shown it to him. His recollection is that what he was shown was simply the certified copy, not an original.

60. The document was then returned to the envelope and the drawer and remained there until 2010 when Mrs Moore resolved to make the codicil changing the identity of one of her executors from Mrs Blyth's husband to Mr Sykes. His involvement in the making of the codicil was simply to take Mrs Moore to Banks Carrington whom she has instructed to prepare the codicil. His recollection is that she took the envelope containing the copy of the Will to Banks Carrington for her appointment.

61. When she returned to the car after having had her meeting with Banks Carrington she still had the envelope, the contents of which she showed to Mr Sykes when they got home. Once again, his recollection is that he saw only a copy of the Will and no original but that he saw the original codicil. His understanding is that the original Will was always retained by Banks Carrington. He gave evidence to the effect that Mrs Moore told him that Banks Carrington had a copy of the will but he understood that to be the original Will bearing in mind that Mrs Moore possessed merely a copy. He cannot explain why this envelope contained the original codicil but only a copy will. He did not argue that either the originals of both or copies of both would have been more logical.

62. In any event, the envelope containing the documents was returned to the drawer from whence it had come and there it remained until 2014, when at Mrs Moore's request, he transferred it

to her safe where, so far as he is concerned, it remained until her death in January 2016. He acknowledges of course that from the moment of the discharge from hospital until her death she had the opportunity to destroy the documents in the envelope but he is clear that had she done so she would have told him. Such was the closeness of their relationship and the trust that she reposed in him, evidenced not least, by the fact that she had appointed him her attorney in 2007 and that appointment had never been revoked.

63. There is one matter about which Mr Sykes evidence accords with that of Mrs Blyth and the witnesses upon whom she relies. That is that Mrs Moore specifically did not want her estate to go to her grandchildren. She wanted it to go to her surviving children and to Mr Sykes. The bequest to him was to reflect their close relationship of some 40 years.

64. Mr Ben Sykes, Mr Sykes and Debbie's son also gave evidence. He contends that his relationship with his grandmother was a close one indeed so much so that in 2015 she showed him the contents of the envelope having withdrawn them from the safe into which Mr Sykes had put it in 2014. He recollects that what he was shown was a copy of the Will because he specifically recalls seeing the endorsement that it was a true copy of the original. His evidence is that his grandmother specifically pointed out to him that the Will provided for himself and his sister, Chelsey, because they would inherit the share that Debbie, their late mother, would have received.

65. Mr Ben Sykes is the only person who asserts that Mrs Moore intended to leave anything directly to her grandchildren. It will be recalled that that is not even the evidence of Mr Les Sykes.

66. There are some events post Mrs Moore's death about which I heard evidence on the basis that it was informative as to whether Mrs Moore had indeed destroyed the Will or indeed, told Mrs Blyth that she had done so.

67. At the date of her death there was some £5179 belonging to Mrs Moore in a Halifax bank account. In addition there was, according to Mrs Blyth, £1075 in cash at her home at the time of the death. In fact Mr Sykes acknowledges that there was cash in the home but this was limited to £800 and it is still there. In any event Mrs Blyth took responsibility for dealing with the distribution of this money and she distributed it on the basis that she, Mr Moore and Mr Sykes were each entitled to one third. It is contended that she would not have done this had she truly believed that the Will had been revoked because, in that event, Mr Sykes would not have been entitled to any of that money. That is of course true but on the other hand it is also right to observe that if the Will had not been revoked the distribution in this way would have been inappropriate. That money should have been divided four ways with the 4th quarter going to Debbie's children, Ben and Chelsey equally.

68. On 5 February 2016 Mr Sykes says that he was told by Mrs Blyth that she was outside what had been the offices of Banks Carrington. Mr Sykes's position is that she told him that she had gone there in order to locate the original Will. It was at that point that she learnt that Banks Carrington has ceased to trade and their business had been taken over by Fylde Law. His evidence is that he was told by Mrs Blyth that she was attending at Fylde Law to make enquiries about the whereabouts of the Will. Subsequently he was told by her that they could not locate it.

69. Mrs Blyth denies that. She denies that she ever attended at Banks Carrington or that she told Mr Sykes that she had done so. She does not deny going to Fylde law but that was not for the purpose of locating an original Will but was rather for the purpose of them running through some inheritance tax forms before she sent them off. She states that Mr Sykes knows that

because he accompanied her to that meeting. Mr Sykes asserts that he was asked to attend that meeting with the Will is envelope and its contents and did so. Mrs Blyth denies that. In any event, Mr Sykes does not deny that inheritance tax documents were briefly discussed but he asserts that the documents in the envelope were also produced and copied by the solicitors. When the documents were returned to the envelope for Mr Sykes to take away in fact the codicil was omitted and instead there were simply 2 photocopies of the will.

70. It is right that Fylde Law were eventually asked whether they had the original Will. That request however appears to have emanated from Ben Sykes who went into see them some weeks later. They perused their wills safe and the wills book. The existence of the Will was not revealed by either, nor was there a receipt for the Will as would have been expected when a will was retrieved from the firm by a testator.

71. Ben Sykes evidence is that he told the person to whom he was speaking at those offices that there was a certified copy. The response was that, in those circumstances, there must have been an original and that it may have been lost whilst in the custody of Banks Carrington or in the transfer of their wills bank from that firm to Fylde Law.

72. On 8 November 2016, following a request from Mr Sykes solicitors, Fylde Law indicated that they had "*undertaken an extensive search of our records but have been unable to locate either the original Will or a receipt for its release*". The solicitors have not been further approached to offer any sort of explanation as to why that might be or with a request for a more in-depth search for the will possibly on the basis that it may have been misfiled.

73. On 3 May 2016 Mr Sykes consulted solicitors who wrote to Mrs Blyth pointing out that there was a will and codicil by which Mr Sykes had been appointed an executor and that the proper course of action was for an application for grant of probate of the certified copy of the Will to Mr Sykes and Mrs Blyth.

74. The response on 18 May from Mrs Blyth was that she had "*taken legal advice*". A point made by Mr Sykes is that there is no reference in this response to her contention that the Will had been torn up and thereby revoked. That contention did not see the light of day until 16 September 2017 notwithstanding further letters from the solicitors on 13 June 2016 and 8 September 2016. It was not until 16 September 2017 that Mrs Blyth contends that her mother:

> "*left no will, she having destroyed the original which she confirmed to me. If your client or anyone else can produce the original will please let me see it.*"

Mr Sykes argues that the lack of particularity surrounding the alleged destruction of the Will together with the tardiness in making the assertion at all casts doubt upon the reliance that can be placed upon that contention.

Determination of the issues

Does the presumption referred to in paragraph 41a above arise because the claimant has established that the Will was probably in the possession of Mrs Moore between 2010 and/or 2015 and her death?

75. The evidence that Banks Carrington had the Will prior to 2010 takes the form predominantly of the fact that the wills envelope, clearly issued by Banks Carrington when the Will was executed, clearly indicates that the envelope merely contains a copy. There is the obvious inference that, if Mrs Moore is given a copy, then the original stays with the solicitors.

76. Mr Carter does not suggest that this is not indeed an obvious inference. But, he argues, that does not inform as to what happened once the codicil came into existence. He argues that there is every reason to believe that Mrs Moore must have collected the original Will when

she executed the codicil. It would make no sense, he argues for her to have the original codicil but only a copy of the Will. It is of course a powerful argument that the Will and the codicil would usually be kept together.

77. There is however some evidence to suggest that the Will and the codicil were not kept together. It is not disputed that the certification of the Will as being a true copy of the original was made by Banks Carrington on 15 October 2010, the date of the codicil. In my view, this gives rise to the scenario that the Will may not have been kept with the codicil. There would be no obvious reason to certify the copy if the original is there for all to see. A document is usually certified as being a true copy of the original where the original is not readily available for inspection.

78. Mr Carter argues that there is no evidence in the form of an entry in the Will Book that Banks Carrington retained the Will. That, he suggests, would militate against them having done so. Add to that, he argues, the fact is that the Will is not in the possession of Banks Carrington or their successors, Fylde Law and it is inherently unlikely that solicitors will lose wills.

79. The difficulty with drawing conclusions arising out of the lack of any records of the Will having been retained by the solicitors is that there is no record of Banks Carrington having the original Will even between 2008 and 2010. A contingency which even Mr Carter accepts is more likely than the Will being the possession of Mrs Moore during this time. One might have expected such a record to exist if those solicitors held the Will between 2008 and 2010.

80. Furthermore, if they did have the Will during that period and it was then given to Mrs Moore when she executed her codicil, one might have expected them to require a receipt for it. It appears that that firm did seek receipts when they consigned wills to the custody of testators where they had previously been previously been retained by the solicitors. That is the evidence of Mr Ben Sykes and accords with what might be seen as the usual practice of solicitors. It is accordingly open to conclude that, if, as was more likely than not, Banks Carrington did have the Will originally and there is no record of that and there is no record of a receipt from Mrs Moore when she took custody of it that is simply indicative of the fact that the records of Banks Carrington were not comprehensive.

81. Additionally, whilst it may be true that, as a general rule, solicitors do not lose wills, in this case the Wills Bank has been transferred from one firm to another which gives rise to some scope for difficulties to arise. Also, it does not necessarily follow, in my judgment, that the issue is whether the solicitors have lost a will or not. A will may well be in the wills bank but simply misfiled and thus, depending of course on the size of the Will Bank, difficult to find. It is unclear whether this contingency was considered by Fylde Law when they were asked to carry out a search. Their letter of 8 November 2016 throws no light on the extent of that search other than that it was "*extensive*".

82. Additionally, Mr Carter argues that even on the basis of Mr Sykes's evidence, Mrs Moore did not intimate that she believed that she did not have an original will and Mr Sykes did not suggest that she ever told him that the original was at the solicitors.

83. What does Miss Case say in support of her contention that this Will was not in the possession of Mrs Moore at the relevant time, other than the matters to which I have already referred by way of counter to Mr Carter's arguments?

84. First, that none of the witnesses has ever said that they have seen the original Will in the possession of Mrs Moore. On the contrary the only 2 witnesses who gave evidence of seeing

testamentary document at all, namely Leslie Sykes and Ben Sykes, say that all they saw was a copy of the Will

85. Secondly, that merely because logically there would have been no reason to separate the Will and the codicil does not mean that that was not done inadvertently and that, in error, the original codicil was placed in the envelope by Banks Carrington once it had been executed rather than an intended copy.

86. She suggests that Mr Ben Sykes evidence is significant. His evidence is that in 2015, when he was invited to look at the contents of this envelope, all he saw was a copy of the Will. She argues that in this context Ben Sykes is giving evidence against his own interests because the intestacy which would ensue from a finding that the Will had been revoked would see him receiving 1/6 of the estate whereas under the Will he receives only 1/8. There is indeed a well recognised principle that a witness whose evidence is contrary to their interests is more likely to be giving truthful evidence. It is right to say that Mr Ben Sykes recognised that, in the event that the terms of the Will are upheld, he will be personally worse off. On the other hand, it is right to recognise that the Sykes family as a whole would be better off if the terms of the Will are upheld because, as a family, they would have one half of the estate rather than one third and in that respect the importance of the principle to which I refer above is tempered somewhat.

87. Additionally, Miss Case contends that if Mrs Moore had ever had the original Will and had indeed intended to destroy it then it is much more likely than not she would have destroyed the certified copy at the same time. If the certified copy remains intact, as it clearly does, then it suggests that, not only did she not destroy the original, but that she never had it.

88. Mr Carter recognises that the burden is on his client to establish, on balance, that the Will was in the possession of Mrs Moore. Having weighed up the evidence, and notwithstanding Mr Carter's powerful submissions in support of his contention that the evidence points that way, I am not satisfied that the claimant has established that, on balance, this Will was in Mrs Moore's possession either from 2010 to the date of her death or perhaps more importantly from 2015 to the date of the death.

89. The fact is that there is a clear implication from the wording on the envelope that the Will was retained by the solicitors at least before 2010. It is difficult to see why else the envelope should specify that the document retained by Mrs Moore was nothing more than a copy. Indeed, at that stage it was not even a certified copy, it was merely a copy of the original. As Mr Carter accepts, in my view quite rightly, it is more likely than not in the circumstances that the original was then with the solicitors.

90. The question which has to be asked is why that should change merely because a codicil was executed in 2010? If it was appropriate so far as Mrs Moore was concerned for the solicitors to retain the Will from 2008 to 2010 why did it become inappropriate thereafter?

91. In addition, I am exercised by the fact that it was only at the time that the codicil was executed that the copy Will was certified. In my view this too militates in favour of the original Will remaining with the solicitors or at least not being in the possession of Mrs Moore. As I have said above if an original document is available, a certified copy becomes superfluous.

92. The absence of a record of the Will in the archives of Banks Carrington is troubling but, as can be seen, the evidence would suggest that their records in respect of their Wills Bank were

not complete if, as Mr Carter accepts, they had this Will between 2008 and 2010 but still there is no record of that, nor any receipt for its consignment to Mrs Moore in 2010.

93. I do not overlook the important point made by Mr Carter that it is much more likely that original testamentary documents will be kept together rather than a will with the solicitors and a codicil elsewhere especially where both have been prepared by the same solicitor but I accept that it is equally possible that their separation in this case arose through inadvertence.

94. Having found that the presumption does not arise then I acknowledge Mr Carter's concession to the effect that he acknowledges that there is insufficient evidence to find that the Will has been revoked. Accordingly it is appropriate to propound in favour of the Will, or at least in favour of the certified copy. However in the event that I am wrong in my initial conclusion I shall briefly consider the remaining issues that I set out in paragraph 41 above.

If I had found that the Will had been in Mrs Moore's possession

95. I have to say that even had I found that the Will had been in Mrs Moore's possession and that thus the presumption of destruction and revocation had applied, I would have concluded that there was "*clear and satisfactory*" evidence to rebut it.

96. Of course, I appreciate Mr Carter's argument that there was clearly a trigger for a change in Mrs Moore's testamentary intentions following the death of Debbie. But tearing up the Will did not achieve those intentions even as they were expressed by Mrs Blyth and it is difficult to see why Mrs Moore, even bearing in mind that she was a layperson, could have believed that it would.

97. It is difficult to believe that even a layperson would believe that her ex-son-in-law would inherit on intestacy. Even if she believed that tearing up the Will would resurrect the will of 2007, it is clear that that would not have achieved her objectives which, according to Mrs Blyth, were that none of the grandchildren would inherit directly as result of her death. That will makes clear that Ben and Chelsey would recover the share that would have otherwise gone to Debbie. There is no reason to believe that Mrs Moore would not have known that. The 2007 will in that connection is not shrouded in the sort of legal terminology which would make it difficult to recognise that that situation was going to eventuate bearing in mind Debbie's premature demise.

98. I do not overlook the evidence of Mrs Blyth, Courtney Ellis and Kate Moore that they were told by Mrs Moore that she had torn up her will. There is some concern that Mrs Blyth's evidence as to the frequency with which she was told this is somewhat confusing. Her witness statement suggests one occasion her oral evidence suggests 2 occasions and her Part 18 reply suggests many occasions. I remind myself however that Mr William Moore has no recollection of ever being told that the Will had been destroyed.

99. The fact is that, whilst I appreciate that there is an issue about whether, in fact, Mrs Moore ever announced that she had torn up the Will (and the events recounted above that occurred post Mrs Moore's death were adduced in order to assist in the resolution of that issue), even if Mrs Moore did tell Mrs Blyth, Courtney Ellis and Kate Moore that the Will had been destroyed, it does not follow that it had actually been destroyed. Mr Moore recognised that it was not beyond his mother to have said this even though it was not true bearing in mind that, to quote the expression used by Kate Moore, Mrs Moore could not "*be fussed*" to address these issues but Mrs Blyth was consistently, and perhaps understandably, pressing her to do so.

100. I have to say that Mrs Blyth's letter to Mr Sykes's solicitors of 16 September 2017 to which I refer in paragraph 74 above suggests that Mrs Blyth may herself have harboured that belief when she says *"If your client or anyone else can produce the original will please let me see it*." Mrs Blyth argues that that is not what she meant and that essentially she knew that no original Will could be produced because it had been destroyed but nonetheless, it is, in my judgment, an interesting sentence to use.

101. Furthermore, there is the fact that the evidence suggests that Mrs Moore was conscientious in terms of ensuring that she left written directions for the devolution of her estate in the form of a will. She had made wills in 1991, 1996 and 2007 as well as of course the Will in 2008 and a codicil in 2010. Is it likely, I ask myself rhetorically, whether someone who has gone to the repeated trouble of consistently setting out her testamentary intentions in writing would tear up a will without making arrangements to replace it with another.

102. Finally, it would be odd indeed to tear up the original Will yet leave a certified copy completely intact. The prospect that to do so could give rise to enormous complications on death would, I apprehend, be obvious to even the most unimaginative testator. I recognise that Mrs Blyth believes that her mother had a drink problem but there is no suggestion in this case that Mrs Moore was not compos mentis or even intermittently irrational.

Had the Will been revoked, was the revocation conditional?

103. Even if I am wrong and the Will had been in in the possession of Mrs Moore and the presumption arises that, since it cannot now be found, she destroyed it with the intention of revoking it and even if that presumption is not rebutted then nevertheless I would have concluded that this was a conditional revocation in the sense considered in *Re Southerden.*

104. I am able to reach that conclusion on the evidence of the claimant. I have set out at paragraph 20 above what the claimant's evidence was as to Mrs Moore's intentions following the alleged destruction of the Will. As I have said, it was her clear evidence that Mrs Moore wanted her estate to be divided into 3 equal parts with Mrs Blyth, Mr Moore and Mr Sykes each having one such part and on the basis that there would be no bequest to any of Mrs Moore's grandchildren on the basis that they were to benefit only from the estate to the extent that their respective parents chose to distribute their largesse upon their children.

105. I accept that there is no direct evidence that Mrs Moore specifically revoked the Will on the condition that revocation would have that effect, but I am satisfied that nonetheless, on the evidence of Mrs Blyth, it is clear that, had Mrs Moore revoked the Will, she would actually have done so contingent upon the revocation having that effect and would not have done so had she been aware that it would not have that effect. There is no dispute that the revocation would not have had that effect.

106. Mr Carter argues that Mrs Moore did not revoke the Will because she wanted to die intestate. She revoked it because she was mistaken as to the consequences of dying intestate. He argues that that is different. A conditional revocation would only have occurred if there was evidence that in fact she wanted to die intestate. I understand the distinction but I do not accept that it assists Mr Carter. In my judgment, had Mrs Moore revoked the Will it would inevitably have been on the basis that her estate would devolve on her death to Mrs Blyth, Mr Moore and Mr Sykes rather than to those 3 and Chelsey and Ben. I am satisfied that she would not have revoked it had she been aware that that was not the effect and that, importantly, revocation would disqualify Mr Sykes from any entitlement at all.

107. I am satisfied that that is not a contingency which she would have wished for. It is clear from the evidence of Mrs Blyth that Mrs Moore always expected, and wanted, Mr Sykes to share in her estate to the same extent as her children. It seems to me clear that in those circumstances any revocation of the will would have been conditional on that revocation having that effect.

108. I do not overlook that not revoking the Will means that a will comes into effect that does not appear to reflect Mrs Moore's expressed intentions that her grandchildren should not directly benefit financially from her death. But in my view, on Mrs Blyth's own evidence, it appears to me that Mrs Moore's overriding wish was that Mr Sykes personally should benefit from her estate in the same manner as Mrs Blyth and Mr Moore.

109. Whilst I appreciate that the issue of conditional revocation/dependent relative revocation is fact sensitive, in truth it is difficult to draw any meaningful distinction between events here and those which occurred in *Re Southerden*. If the testator's revocation of his will in that case was sufficient to be regarded as conditional then it is difficult to see any basis for holding that Mrs Moore's revocation (had there been one) was anything other than conditional also.

110. I am accordingly satisfied that a revocation would have been contingent upon its effect being that her estate will be divided between her 2 surviving children and Mr Sykes and that, since that would not have been the effect, the revocation would have been inoperative.

111. In those circumstances, even had I concluded that this will had been revoked, I would have concluded that the revocation was inoperative such that the Will would have remained in effect.

Summary

112. I propose to propound in favour of the certified copy of the Will

Final Remarks

I am grateful to counsel for their very able assistance in this matter.

HHJ Saffman