

**THE HIGH COURT
PROBATE**

[2022] IEHC 49

PROBATE 2021 PO 007478

**IN THE MATTER OF THE ESTATE OF MARTIN HEALY, LATE OF BOARMANSHILL,
MURROE, IN THE COUNTY OF LIMERICK, RETIRED FARMER DECEASED**

AND

IN THE MATTER OF AN APPLICATION BY GERARD HEALY

JUDGMENT of Ms. Justice Butler delivered on the 31st day of January, 2022

1. Although the Succession Act does not require that a will be drawn up by a solicitor, the circumstances of this case are a good example of why it is prudent to seek the assistance of a lawyer in respect of a step as important as the preparation of a will. As it happens, the difficulties in this case do not concern the statutory requirements for a valid will as the evidence is sufficient to allow the court to conclude that the deceased did make a valid will. Rather, the difficulties arise because the original of that will has not been found after the death of the deceased and there is an absence of any evidence as to where the original was kept or what might have happened to it.
2. This application was made by the executor named in the will who is also the main beneficiary under the will to admit a photocopy of the will to probate. Most of the deceased's next of kin have consented to the application and none have actively opposed it. Nonetheless the court must be satisfied either that the original will was in existence at the date of death of the deceased or that there is an explanation for its destruction which nullifies any intention to revoke it. The circumstances in which the application came to be made are as follows.
3. The deceased was an elderly man who died a bachelor and without issue in June, 2019. At the time of his death, he owned a house and land at Murroe in County Limerick where lived and farmed and a separate parcel of land in County Tipperary. The grounding affidavit lists the deceased's surviving next-of-kin. This list includes three surviving siblings (one of whom has since died), eighteen nieces and nephews being the children of his predeceased siblings and one nephew being the child of a surviving brother. The applicant is a grandnephew of the deceased but has not identified which of the siblings was his grandparent nor which of the nieces or nephews was his parent. The applicant resides in the same townland as the deceased's former residence and I accept, as he states, that the applicant knew the deceased all his life and that their relationship was close. In a supplemental affidavit, the applicant indicates that he visited the deceased daily on his way to and from work and helped him with his cattle and with general work around the farm.
4. The deceased made a will on 12th June, 2003. He did not attend with a solicitor for this purpose. Instead, he made the will with the assistance of a Dominican priest, Father Cyril Ross, and it was executed at the Dominican Order's holiday house at Murroe, County Limerick. The deceased lived next door to this holiday house and, in addition to farming his own lands, he was employed by the Dominican Order as a groundsman, a position which the applicant took over on the deceased's retirement. The witnesses to the will

were Father Ross and a Father Foley, both of whom were Dominican priests and, since their addresses are both in Dublin, it is reasonable to assume that they were on holiday at the time. Father Ross has since died but an affidavit as an attesting witness has been provided by Father Foley. The affidavit of Father Foley is a pro forma type of affidavit which identifies the date and place of execution of the will, confirms that Father Foley was a subscribing witness along with Father Ross and that the will was duly executed. It does not provide any information as to what happened the will immediately after it was executed. The court was informed that Father Foley was 98 years of age at the time of the application and, consequently, would not be in a position to provide any further assistance to the court. I am satisfied on the basis of this evidence, which is consistent with what appears on the face of the will, and taking into account the fact that the will includes an attestation clause, that the will was duly executed.

5. The will itself appointed the applicant as executor and made three dispositions. A parcel of land in County Tipperary was left to the deceased's brother, Brendan Healy; a portion of a separate parcel of lands at Murroe in County Limerick was left to his nephew, Shane Healy and the remainder of that second parcel being the bulk of the deceased's farm was left to the applicant. The division of this parcel of land is stated in the will to be shown "*delineated on the map annexed hereto*" and coloured in green. There was no residuary clause. As the deceased's estate includes a sum of money in a bank account, this means that the deceased died at least partially intestate.
6. The affidavit evidence provided by the applicant was initially unclear in many respects and unhelpfully makes many assertions in very strong terms for which little or no supporting evidence is provided. The applicant stated that, in 2003 (the year in which the will was prepared), the deceased showed him a brown envelope and told him that his will was inside. Without expressly stating that the deceased took the will out of the envelope to show him, the applicant goes on to say that the envelope contained what both the applicant and the deceased believed to be the deceased's original will with a map annexed to it and that these are the same documents exhibited in the affidavit. At an earlier point in the affidavit, the applicant states that the deceased thought the photocopy of the will was authentic as he had confirmed this in 2003 "*when he showed it*" to the applicant. The applicant reiterates that he, the applicant, believed the copy will and map were the original and asserts that the deceased also held that belief.
7. When this matter first came before me on 8th November, 2021, I indicated that it was not clear to me from the applicant's affidavit whether he had actually seen the will in 2003 and that the court was, in effect, being asked to infer that he had done so from the evidence set out above. The matter was adjourned to allow the applicant to file a further affidavit to clarify exactly what he had seen. That affidavit was duly filed. In it, the applicant states that, in 2003, the deceased showed the applicant a sealed A4 envelope which the deceased indicated contained his will. The deceased did not take out the contents of the envelope and consequently the applicant did not see them. The applicant reiterates that both he and the deceased believed that his original will was in that

envelope. The applicant states that there was writing on the envelope to the effect that the envelope contained Martin Healy's will.

8. Obviously, the fact that the applicant never saw the contents of the envelope undermines the value of much of the evidence in his original affidavit. The applicant's statement that, at all times, both he and the deceased believed the copy will and map were original is of little evidential value in circumstances where he saw neither in the context of the only exchange he had with the deceased about his will and it is not clear from the evidence when the applicant first saw the copy. For similar reasons, his statement at para. 20 of his original affidavit that the documents exhibited in that affidavit are the same documents that were in the envelope is of absolutely no evidentiary value as he cannot say what was in the envelope. Indeed the assertion at paragraph 16 of the applicant's first affidavit that *"I never saw an original will, indeed at all times I believed the copy will and map exhibited hereto were the original"* has significant potential to mislead as it certainly suggests that in the context of the 2003 exchanges the applicant had seen a will which he assumed was the original but which was not in fact the original. Notably the applicant does not provide any information as to when or how he came to be in possession of the documents which are now exhibited to the affidavit.
9. The applicant further states, in categorical terms, that he does not believe the deceased ever held the original will. There is no evidential basis provided for this belief, save the applicant's view that the deceased would not have destroyed the original will if it had been in his possession, apparently because he was disorganised and reluctant to throw anything out.
10. The assertion that the deceased never held the original will begs the question as to where the original will was kept immediately after its execution if not in the custody of the deceased. In normal course when a client instructs a solicitor to draw up a will, the solicitor will keep a record of the client's instructions, copies of various drafts of the will, a record of the execution of the will and, crucially in light of the facts of this case, a record of whether the original of the will is being kept in the solicitor's office or being returned to the client. It is common practise for a solicitor's office to make copies of an executed will. Where the original will is stored in a solicitor's safe, a copy is usually provided to the client. Conversely, where the client keeps the original will, their solicitor will usually retain a copy of the will on the client's file. The solicitor's wills register, if properly kept (which they usually are), will record exactly what was done with the original will. Where a will is initially held by the solicitor, the wills register will record if it was subsequently provided to the client at the client's request. Even where the records kept are imperfect or have been lost through time, frequently the solicitor or members of their staff, sometimes retired members of staff, are in a position to provide evidence of the usual practises of that firm in relation to clients' wills at the time the will in question was executed. Information of this type is of great practical assistance to a court if an application is made to admit a copy will to probate when the original has been mislaid. No information of this type is available in this case.

11. To add to the complexity of the situation, what is before the court is said to be and appears to be a photocopy of the original will. No explanation is provided as to why a photocopy would have been made and, in fairness to the applicant, he may simply have no knowledge of why this was done. As is indicated above, copies of a will are routinely be made in a solicitor's office because either the client or the solicitor will keep a copy depending on who keeps the original. Whilst historically it was not unusual for people to seek the assistance of the clergy in making wills, I do not understand there to have been a general practice whereby the clergy retained wills for safekeeping. There is no suggestion or evidence in this case that the Dominican Order retained the original of the deceased's will. Enquiries have been made of the Dominican Order for the purposes of this application and the provincial bursar has confirmed in correspondence that the Order has no knowledge of the whereabouts of the deceased's last will and testament. It is reasonable to suppose that if the Dominican Order had a practice, even historically but as recently as 2003, of keeping the original of third party wills, the bursar would know of it. It is also reasonable to suppose that if, despite the lack of a general practice, Father Ross had kept the original of the deceased's will as a favour to him, then it would have been found among Father Ross' personal papers after his death in 2011. Given that the deceased was the immediate neighbour of the Order's holiday house at Murroe and was employed by the Order, it is likely, in those circumstances, that the significance of the document would have been appreciated and it would have been returned to him.
12. A major difficulty with this case is that there is no evidence at all as to what might have happened to the original will. Counsel for the applicant speculates that the original will may have inadvertently left in the photocopier when the copy was made. This begs the question as to when and where the copy was made and by whom as that person was, at the very least, in physical possession of the original at that time. Again, the lack of evidence is stark.
13. One of two possible things must have occurred. Either there was a photocopier present in the holiday home at Murroe (and the court has no evidence that this was the case) or the original must have been brought to somewhere that photocopy facilities were available. In the former case, if Counsel's supposition is correct, then it is reasonable to expect that the original will would have been found on the next occasion the photocopier was used and that the Dominican priests would have returned it to their next-door neighbour, the deceased. On the other hand, if the photocopy was made at another location, then although it may be less likely that the original would have been returned to the deceased when found by the next user of the copier, it is more likely that the deceased took the original to that location.
14. All of this is relevant because the application has been presented to court on the basis that the deceased never held the original will. Indeed, letters of consent, presumably drafted by the applicant's solicitor, have been signed by almost all of the next-of-kin who would be entitled to succeed on an intestacy. These letters recite as part of the narrative that "*there is evidence that the deceased never held the original will and map annexed thereto*". In my view, there is no such evidence. There is an absence of any evidence as

to what happened the original will immediately after its execution which, in my view, does not necessarily lead to an inference that the deceased never held it. On the contrary, in circumstances where a person makes a will without professional assistance, the likelihood is that that person will keep the original of their own will. There is no evidence that the will was, at any stage, kept by Father Ross or by the Dominican Order and the Dominican Order do not now have any knowledge of the whereabouts of the original will. As a copy was made somewhere, it is likely that the deceased brought the will to that place for the purposes of making a copy. There is no evidence of any of these matters but I do not think that it can be inferred that this lack of evidence amounts to positive evidence that the deceased never held a copy of his own will.

15. I should also point out that the letters of consent recite that there is evidence that the deceased thought the copy was the original will "*and showed and gave it to the applicant in that belief*". As discussed above, it is now clear that the deceased did not in fact show the applicant any document purporting to be his will; he showed him an envelope which he said contained his will. The applicant has not put any evidence before the court to show that the deceased gave him the copy will; he has remained silent as to how the copy came into his possession. Whilst it is always preferable that the next-of-kin of a deceased person reach agreement as to the appropriate steps to be taken after a death, it is concerning that the next-of-kin should be asked to consent to something on the basis that there is evidence of certain matters when no evidence of those matters is then put before the court.
16. As I understand the evidence, the basis on which the applicant asserts that the deceased was never in possession of the original will is because the document available after his death was a copy. The applicant assumes that this is the same or the only document that was contained in the envelope shown to him by the deceased in 2003. Although his initial affidavit certainly suggested that he was saying this because he had seen the document in 2003, his supplemental affidavit clarifies that all he saw in 2003 was a sealed brown envelope with writing on the front indicating that it was the deceased's will. Rather interestingly, the applicant does not give an account of how he came into possession of the copy of the deceased's will which is the subject of this application. It seems that the deceased went to live in a nursing home in 2018 about a year before his death and the applicant went out to his house to check that there was nothing valuable left there. His affidavit states that he did not come across any original will or map and that he disposed of utility bills and other papers of the deceased going back years. He does not state that he found the copy will on that occasion. In his supplemental affidavit, he simply states that he brought the will and map to his solicitor after the deceased's death in the full belief that it was the original will of the deceased.
17. No account is given of when the applicant came into possession of the copy will and, in particular, whether this was in 2018 when he tidied up the deceased's papers or during his search of the deceased's house after his death. He does not state that the will was found in a sealed brown envelope nor does he indicate whether any envelope in which the copy will might have been found was similar in appearance to that which he saw in 2003.

Of course, even if the copy will was found in a brown envelope, sealed or otherwise, I acknowledge that it would be difficult to confirm that it was the same brown envelope that the applicant had seen on a single occasion fifteen or sixteen years earlier. However, positive evidence that the copy will was found in an envelope similar to that which the applicant had seen years earlier, particularly if the same handwriting was present on the outside of the envelope, might have been of some assistance.

18. There is an additional factual complexity in that the map attached to the copy will may possibly be the original map. The will refers to the portion of the County Limerick lands left to Shane Healy as being delineated on the map annexed to the will and coloured green. The exhibited map shows the relevant portion of land shaded a turquoise colour which could be described as either green or blue but which would have shown up as black or grey in a regular photocopy. The map has a handwritten note in block capitals added at the foot of it saying "*map referred to in Martin Healy's will made on 12/6/2003*". This does not appear to be the deceased's handwriting and it is not known when or by whom this note was added. However, on the assumption that this is the original map, it means that if the original will still exists then, contrary to what is stated on the face of the will, it does not have the original coloured map annexed to it. In fairness, if this were the only difficulty then it would probably be capable of resolution. Unfortunately, it is one of a series of problems arising in this case.
19. To summarise the evidence, the applicant was shown an envelope by the deceased in 2003 and told that it contained the deceased's will. The applicant did not see the contents of the envelope and, consequently, there is no evidential basis for the averment at para. 20 of his original affidavit that the documents exhibited in that affidavit are the same as those which were in the envelope in 2003 nor for the assertion that the deceased mistakenly believed the copy will to be the original. The applicant simply does not know what the envelope contained, save that he was told it contained the deceased's will. The court has no information about the circumstances in which the applicant came to be in possession of the documents which are now exhibited before the court such as the physical circumstances of the copy and whether it was at any time contained in an envelope similar to that which the applicant describes having seen in 2003. There is simply no evidence of any of these matters before the court. If the court leaves aside for a moment the applicant's assumption that the envelope he was shown in 2003 contained the copy rather than the original will (or possibly both), the first factual mention of the copy will in the affidavits is of the applicant taking it to his instructing solicitor after the death of the deceased.
20. Based on this absence of evidence, the applicant asserts definitively both that the deceased never held the original of his own will and that the deceased positively but mistakenly believed the copy will (which the applicant assumes to have been in a sealed envelope in 2003) to have been the original. Finally, the applicant confirms that the only occasion on which the deceased discussed his will was that single occasion in 2003. In subsequent conversations, the deceased indicated that the applicant would inherit his farm but did not mention a will in this context.

21. This evidence, or lack of evidence, is relevant as the court has to consider whether the presumption of revocation of the deceased's will should apply in these circumstances. Whilst the presumption is of historic origin, the classic statement of it is that of Parke B. in *Welch v. Phillips* (1836) 1 Moore's PC 299 to the effect that if a will traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by the deceased. Further, Parke B. acknowledged that the presumption was an evidential one which must be applied unless there is sufficient evidence to rebut it and that the onus of proof lies on the party propounding the will, i.e. in this case on the applicant.
22. Spierin in the leading Irish text on the subject (*The Succession Act, 1965 and Related Legislation: A Commentary*, 5th Ed., 2017) identifies three proofs which must be satisfied in order for a copy will to be admitted to probate. These are (a) the due execution of the will; (b) the existence of the will unrevoked at the date of death or, an explanation for destruction which would nullify any intention to revoke the will and (c) the authenticity of the copy.
23. The fact that the presumption is an evidential rather than a legal one was reiterated in two recent judgments of Baker J. in the High Court, namely *Re McDermott, Deceased* [2015] IEHC 622 and *Re Curtin, Deceased* [2015] IEHC 623. In *McDermott*, Baker J. approved the approach taken by Rimer J. in *Wren v. Wren* [2006] EWCH 2243 (Ch). In admitting a copy will to probate and holding that the original had been destroyed or lost by accident, Rimer J. emphasised that it was open to the person seeking to propound the will to adduce evidence to rebut the presumption which would otherwise apply. The evidence in question should point to a higher probability that any loss or destruction of the will was accidental and not accompanied by an intention on the part of the deceased to revoke it. Rimer J. noted that the evidence can include the contents of the will itself, the probability that the deceased would want his estate distributed in accordance with the terms of the will or, conversely, the improbability that a deceased person who had made a highly elaborate will containing detailed bequests in favour of a wide range of beneficiaries would decide to substitute it for a disposition of his estate under the laws of intestacy. Affirmations by the deceased of the contents of the will subsequent to its execution may support the view that he did not intend to revoke it.
24. Baker J. noted that the evidence on which a court must form an opinion "*can be, and perhaps almost always will be, circumstantial evidence*". Thus, inferences can be drawn from the circumstances of the custody of the will and the circumstances, meaning the contents, of the will itself insofar as it relates to the property of the deceased and those whom he intended to benefit. In addition, the character and position of the deceased including the care or lack of care shown by the deceased as regards his private papers will be relevant to the court's assessment of whether a will is likely to have been inadvertently lost or mislaid.
25. The difficulty the court faces on this application is not just that the evidence is circumstantial but that there is almost no evidence at all to support the key assertions on

which the applicant relies. To start with, the applicant contends that the presumption of revocation does not apply because the original will was never in the possession of the deceased. The basis for this assertion is the applicant's belief that the envelope which he was shown by the deceased in 2003 contained only the copy rather than the original will. However, the applicant was not shown the contents of the envelope and simply cannot state what the envelope contained. It seems that the applicant's belief in this regard is largely retrospective. In other words, he is currently in possession of the copy will and, therefore, assumes that the deceased must have been in error in referring to his will (inferentially his original will) in 2003. However, if the applicant's reconstruction of events is left aside, then the evidence, insofar as it suggests anything at all, tends to suggest that the deceased was in possession of his original will in 2003. Firstly, the will was not made by a solicitor or other professional person who might, in addition to providing professional services in the drawing up of the will, have retained the will for safekeeping at the deceased's request. Rather, the will was drawn up with the assistance of a priest who was a friend of the deceased and a member of a religious order who owned the property immediately next door to the deceased. Secondly, there is no evidence before the court to suggest that that religious order would have kept possession of a third party will or that it actually kept possession of the deceased's will. The priest in question signed the will as a witness giving an address at one of the Order's houses in Dublin. It seems likely that he was on holiday at the time the will was signed and, presumably, unlikely that he would have taken the deceased's will to Dublin for safekeeping thereafter. In circumstances where the court is not advised that it was common place for either religious orders generally or the Dominican Order, in particular, to retain custody of wills on behalf of third parties, the more logical conclusion is that, having executed his will, the deceased retained custody of it. Thus, the case is distinguishable from *Chana v. Chana* [2001] WTLR 205 in which the evidence established that the original will had been passed to a third party for safekeeping. There is no equivalent evidence available in this case. Instead, the applicant invites the court to assume that the deceased was never in possession of the original will because it was not found in his possession after his death. I do not think that I can make that assumption.

26. There is no evidence before the court as to how or when the copy came to be made nor the purpose that might have been served by the making of such a copy. Equally, there is no evidence before the court as to the circumstances in which the applicant came into possession of the copy will that is now before the court.
27. It is difficult to draw any firm conclusions from the circumstances of the deceased insofar as they are known to the court. The applicant advises that the deceased was not good at organising his personal effects and papers and was reluctant to throw anything out. The deceased remained residing at his home until he entered a nursing home in 2018. The applicant conducted an examination of the deceased's papers at that stage and did not find the original will. In normal course, if a deceased is the type of person who was reluctant to throw documents or papers out, then in my view the fact that an important document such as a will is not amongst his papers after his death tends to support rather than rebut a presumption of revocation. However, in this instance, the applicant points to

this aspect of the deceased's character to make the case that the deceased must never have been in possession of the original will. For the reasons already discussed above, in the absence of any evidence tending to suggest that the original will was retained elsewhere, I have concluded that on balance the likelihood is that the deceased kept possession of the original will after its execution. Therefore, the fact that it cannot be found after his death tends to support the application of the presumption.

28. I accept that the applicant was close to the deceased both in 2003 and at the time of his death. However, it is apparent from the addresses of the other next-of-kin that a significant number of them remained living either in Murroe or in the surrounding areas in County Limerick and County Tipperary. Thus, without doubting the good relationship the applicant had with the deceased, the court is not in a position to conclude that the deceased did not also have good relationships with other members of his extended family such that he might have revisited his original intention to leave his estate to only three members of his family. Of all of the elements in the case, this is the one which most supports the applicant's application. Nonetheless, in my view, it is not sufficient of itself to justify the admission of a copy will to probate in light of the other difficulties which I have identified.
29. In summary, I do not accept the applicant's assertion – which is not based on evidence – that the deceased never had possession or custody of his own will. The likelihood is that the deceased had possession of the original will after it was executed. Consequently, in circumstances where the original will cannot be found after the death of the deceased, the presumption of revocation is engaged. I am satisfied on the balance of probabilities that the applicant has discharged the burden of showing due execution of the will and also, perhaps more marginally so, the authenticity of the copy. However, I am not satisfied that the applicant has discharged the onus which lies upon him of showing the existence of the will unrevoked at the date of death of the deceased or of providing an explanation for the likely loss or destruction of the will so as to nullify any intention to revoke it.
30. The real difficulty in this case is not that the evidence on which the applicant seeks to rely is circumstantial but simply that there is no evidence at all before the court on any key matter which would allow the court to conclude either that the original will was still in existence or, alternatively, that it had been inadvertently lost or destroyed. In order to have found in favour of the applicant, the court would have had to make a number of assumptions for which there is no evidence, whether direct or circumstantial. To do so would, in my view, have the effect of reversing the presumption of revocation. Rather than it being a presumption which will normally apply in the event that the original will of a deceased cannot be found after his death, it would mean that a copy will would almost automatically be admitted to probate unless there was positive evidence available as to why that should not be done. There is a significant difference between accepting that the presumption is an evidential one which can be rebutted by appropriate evidence, including circumstantial evidence, and allowing the presumption to be treated as having been rebutted in the absence of any evidence on key issues. The applicant has failed to

discharge the evidential burden which lies upon him to rebut the presumption of revocation in order to admit the copy will to probate.