Neutral Citation Number: [2005] EWHC 3068 (Ch)

Case No: HC 04 02383

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2005

Before :

MR MARK HERBERT QC SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

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Between :

MARK ANDREW ROWE	**Claimant**
- and -	
KENNETH ANTHONY CLARKE	**Defendant**

- -
- -

Simon Calhaem (instructed by Church Bruce Hawkes Brasington & Phillips) for the Claimant
Miss S L Harrison (instructed by Metcalfe Wright & Platt) for the Defendant

Hearing dates : 18, 19 July 2005
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APPROVED JUDGMENT

Mark Herbert QC :

Introduction

1. This action relates to the presumption that a will traced to the possession of the testator, but not forthcoming at his death, is presumed to have been destroyed by the testator with the intention of revoking it.

2. The basic facts are that the testator Barrie James Clarke (whom I shall call 'Barrie') lived in the same house as the claimant Mark Andrew Rowe ('Mr Rowe') for a period of about 10 years before his death. Mr Rowe claims that this was a homosexual relationship. On 28 June 2000 Barrie made a will in favour of Mr Rowe, and sent a copy to Mr Rowe's mother. That copy survives and is in evidence

before me, but the original is not. Barrie died on 20 January 2004, and on 14 April 2004 his brother Kenneth Anthony Clarke ('Kenneth Clarke') obtained a grant of administration on the footing of intestacy. It is common ground that Kenneth Clarke is solely entitled to the estate in the event of intestacy. Now Mr Rowe applies for probate in solemn form of the will made in 2000 (by the copy sent to his mother at that time) and for revocation of Kenneth Clarke's grant of administration. Kenneth Clarke resists that by saying that his brother should be presumed to have destroyed the will with intent to revoke it.

3. At this stage it is convenient to set out a summary of the law from Williams, Mortimer & Sunnucks, *Executors, Administrators and Probate* (18th edition), paragraph 14-29 :

> Where a will, or codicil, is last traced into the testator's possession and is not forthcoming at his death after all reasonable search and inquiry, the presumption arises that he has destroyed it with the intention of revocation (*animo revocandi*). The burden of proving, in these circumstances, that the will was not destroyed *animo revocandi* is upon the party propounding its contents.

In the present case it is therefore for Mr Rowe to persuade me, on the balance of probabilities, that Barrie did not deliberately revoke the will by destroying it. The two practical alternatives to that destruction are either that Barrie lost the will, or even destroyed it, but without any intention to revoke it, or, as will appear, that the will was still in existence at Barrie's death but was then removed by Kenneth Clarke and fraudulently suppressed or destroyed by him. Little was said during the hearing about the first of those alternatives, but it is not one which I can ignore.

4. The strength of the presumption depends on the level or degree of security, or lack of it, with which the testator had custody of the will during his lifetime. I shall therefore need to make findings about where and how Barrie looked after the will during his lifetime and, having assessed the strength of the presumption in this case in the light of that finding, examine all the relevant facts to decide whether I am persuaded on the balance of probabilities that it was (1) fraudulently removed after Barrie's death, or (2) lost or destroyed without revocation, or (3) destroyed with intent to revoke in accordance with the presumption.

Witnesses

5. I heard evidence from several witnesses, all of whom had served witness statements and were cross-examined on them. On Mr Rowe's side I heard evidence from Mr Rowe himself, from Father Patrick Zammit (the parish priest at the church sometimes attended by Barrie and Mr Rowe), Anthony Page (a friend of Barrie's who for a time shared the ownership of a flat in St Malo with him), and from Mr Rowe's mother Mrs Marina Rowe. There was also evidence of due execution of the will by the two witnesses who attested it. On the other side I heard evidence only from Kenneth Clarke himself.

6. Mr Rowe is in his early forties. He gave his evidence in what I can, with some understatement, describe as a combative, over-hasty and emotional way. He is easily agitated and highly excitable. His cross-examination by Miss Sarah Harrison (who appeared before me for Kenneth Clarke) was not unduly hostile, but at times he seemed close to breakdown in the witness box. He seldom gave a direct answer to a direct question. But in my view this was not driven by evasiveness in the ordinary sense of the term but rather by a misplaced eagerness to answer some other accusation which he perceived to lie concealed in the original question.

7. I must mention one other aspect of his evidence. It is part of Mr Rowe's case that he was Barrie's partner in a homosexual relationship. And yet during their life together at Barrie's house they both represented to the local authority, on several occasions, that Mr Rowe was Barrie's tenant, resulting in the regular receipt of housing benefit. Miss Harrison cross-examined Mr Rowe on this, pointing out that if he and Barrie were living together as partners in a homosexual relationship they were not entitled to housing benefit and appeared to have conspired to obtain it by fraud. Mr Rowe's various responses to this line of questioning, apart from accusing Miss Harrison (without foundation) of homophobia, were that (1) Barrie had been the dominant partner in this matter, having had experience in local government (which itself was the case), and that it was Barrie who had led him unwillingly into describing himself as a tenant for this purpose, (2) that 'legally' he was the tenant (and had to have a status of some sort), and ultimately (3) simply that 'Barrie needed the money'.

8. I have no doubt that Mr Rowe's evidence before me, that he was Barrie's partner in a homosexual relationship, is true. Other witnesses confirm that they were generally open about the situation. It is not impossible that he was also his tenant (though if they were also in a relationship this would disentitle them to housing benefit). But the exchange as whole showed a casual attitude to the truth in other circumstances which meant that I have had to treat his evidence with considerable caution. The other side of this coin is that Mr Rowe is not secretive and wears his heart on his sleeve. He tends to reveal his thoughts and attitudes with unusual openness.

9. Father Zammit gave his brief evidence quietly and diffidently. Essentially his evidence was no more than that Barrie and Mr Rowe were parishioners of his, and he knew that they lived at the same address. In his witness statement he states that he knew them as partners, but in the witness box he said that he knew only that they shared the house. He says that, if he had been asked to bless their relationship, he would have refused to do so. I accept his evidence as true.

10. Anthony Page's evidence was brief and largely uncontroversial. He and Barrie had owned a flat together in St Malo for about nine years, and the flat had been sold at Barrie's request in 1999. This evidence has been useful in putting a date to a letter written by Barrie to his brother. Mr Page stated that Barrie represented his relationship with his brother Kenneth Clarke as not close, and that he regarded Kenneth Clarke and his family as disapproving of his homosexual relationship with

Mr Rowe. I accept Mr Page's evidence as true also, though recognising that it is only hearsay evidence of Barrie's relationship with his brother.

11. Mrs Marina Rowe is something of a contrast to her son. She is thoughtful, quietly spoken and generally composed. I regard her generally as a witness of truth, but on occasion she was inclined to be defensive when faced with hard questions in cross-examination, though not at all in the same way as her son.

12. Kenneth Clarke could hardly be more different from Mr Rowe as a witness. He gave his oral evidence in the briefest possible terms, doggedly and unemotionally, playing his cards, so to speak, close to his chest. In other words he revealed little of his character, and this has made it difficult to evaluate some of his evidence.

The facts

13. I turn now to a detailed account of the factual evidence. Kenneth Clarke has given some background information about his brother in his witness statement. Barrie was born in 1944, so that he was 59 years of age at his death. They were brought up in the Stockport area. After leaving school Barrie had started in the railways and became involved with the trade union. In the mid 1960s, after a period working in Germany, he worked as a Labour Party agent in the Huyton area (where Harold Wilson, the Prime Minister of the time, was MP), and soon moved south to Gravesend, working for a time at Transport House. Later Barrie became a member of Kent County Council, serving for a time as chairman. Mr Page records that Barrie worked for the Police Federation as a public affairs adviser for a time until the mid 1990s and did some occasional work for the Federation after that time.

14. When Barrie moved south he was still in his twenties, and from this time he saw far less of his brother Kenneth Clarke. There is evidence that they remained in contact with each other throughout the remainder of Barrie's life, with Kenneth Clarke claiming that they were on good terms and that they spoke regularly on the telephone. But in my judgment the relationship was distinctly cool, with occasional telephone calls and the exchange of Christmas cards being about the sum of it. They met from time to time at funerals, but neither Kenneth Clarke nor any member of his family had visited him at his house in Dartford (which he acquired on 17 March 1987). Nor did any of them visit him in hospital on the two occasions when he was there in 2002 and 2003.

15. Mr Rowe is some 18 years younger than Barrie. He says that they met socially in about 1984 and that they were in a homosexual relationship from soon afterwards. It is possible that Mr Rowe has exaggerated the length of their relationship here, but it is clear that in 1994 they decided to live together at Barrie's three-bedroom house in Dartford, Kent. For this to happen, Mr Rowe gave up his council flat in Ruislip which he had otherwise hoped to buy. (I do not know how realistic that hope was.) At this stage both were unemployed and receiving state benefits, and I have mentioned that this included, from the outset, housing benefit paid to Barrie for Mr Rowe's rent.

16. It is Kenneth Clarke's case that Mr Rowe was no more than Barrie's lodger or tenant, and he denies that Barrie was homosexual or that he was in a homosexual relationship with Mr Rowe. I do not accept that, and I do not accept that he was unaware of the relationship. All other indications, including the evidence of Mr Page and Mrs Rowe, point to the fact that Barrie was normally quite open about the relationship, and it is inconceivable that Kenneth Clarke would have been unaware of it if his own relationship with his brother was as good as he claims. Mr Rowe and, more importantly, Mr Page say that Barrie's relationship with his brother was not close (and Mr Rowe says that it was virtually non-existent), and they both say that Barrie attributed this to Kenneth Clarke's disapproval of the relationship. In the witness box Kenneth Clarke made no secret that he does disapprove of homosexuality, and Barrie would have been right to suppose that his brother would disapprove of the relationship if he knew about it, as in my view he did.

17. Certainly Kenneth Clarke formed an instant dislike towards Mr Rowe. He refers in his witness statement to the only telephone conversation which he had with Mr Rowe during Barrie's lifetime, a conversation which took place during 2001 and ended with him telephoning Barrie later to say that he did not want to speak to Mr Rowe again. He now attributes his dislike to Mr Rowe's being drunk and aggressive, but in my view it was associated with his disapproval of the relationship.

18. Barrie and Mr Rowe were both of the Roman Catholic faith and sometimes attended the church of which Father Zammit was the parish priest. Mr Rowe says that Barrie would have liked Father Zammit to perform a service of blessing for their relationship, but I have said that I accept Father Zammit's evidence that this did not happen.

19. Mrs Rowe was a frequent visitor at the Dartford house and was aware of the homosexual relationship between Barrie and her son, which she accepted. She was indeed positively supportive, and I accept her evidence that she sometimes helped them with the shopping and from time to time gave them money, and presents for the house.

20. On 28 June 2000 Barrie made a will appointing Mr Rowe as his executor and leaving his whole estate to him absolutely. The will was drawn up by Barrie himself on a purchased will form, and it was executed at the local Citizen's Advice Bureau, witnessed by two employees there, Marion Vesey and Nellie Chandler. They both provided brief witness statements of due execution and gave oral evidence before me. I am satisfied by this evidence that the will was duly executed and attested in accordance with section 9 of the Wills Act 1837.

21. Mr Rowe confirms that Barrie brought the will home with him. Soon afterwards he sent a photocopy to Mr Rowe's mother Mrs Marina Rowe. On the back of that copy is a note in what is acknowledged to be Barrie's handwriting (but is not claimed to be part of the testamentary instrument admissible to probate) :

> ‘Dear Mrs Rowe. As promised I have copied you the will I have made in Mark’s favour. I look forward to discussing matters in due course. Yours Barrie.’

This suggests that it had been discussed between Barrie, Mr Rowe and Mrs Rowe (who was and remains close to her son), whether Barrie would make a will in Mr Rowe’s favour so as to allow him to have a place to live after Barrie’s death. That is consistent with Mrs Rowe’s own evidence, which I accept, that this copy of the will was sent to her not for safe keeping but to reassure her that her son (and indeed Barrie’s dog Buster) would be looked after following Barrie’s death. I also accept Mr Rowe’s own evidence that Barrie told him that he had made a will in these terms so that his brother Kenneth Clarke would not become entitled to the house.

22. After this Mr Rowe says that he did not see the will again, and that it was never again discussed or mentioned between Barrie and him. He believes that the will was first kept in an old filing cabinet in which Barrie then kept other important documents as well. But even that is not certain, because other documents were kept in other rooms in an even less orderly way. Mr Rowe also says that he and Barrie later got rid of the filing cabinet and moved all the papers in it to the bottom of wardrobes, both in the main bedroom which he says they shared and in one of the other rooms. He is sure that the filing cabinet was empty before it was taken away. At the same time he says that much of the contents of the other rooms was thrown away with even less care or formality, this being done because Barrie was contemplating a sale of the property.

23. Barrie had two spells in hospital after the date of his will. On 8 April 2002 he was admitted to Darent Valley Hospital near Dartford, and the medical records and nursing notes from Dartford and Gravesham NHS Trust were in evidence before me. Mr Rowe describes this episode as Barrie having a ‘seizure’, and as having convulsions while trying to come down stairs, then being kept in hospital for a number of weeks, and finally discharging himself against medical advice. That account appears to be broadly true, though in some respects exaggerated (and perhaps partly confused with the later episode mentioned below). The hospital records report a head injury following a fall when drunk and a small sub-dural haematoma following a history of alcoholism. They also record physical and verbal aggression and considerable lack of co-operation on the part of the patient, though with periods of relative calm as well. Mr Rowe is described in the hospital notes as his friend or partner. In the late afternoon of 15 April 2002 (after one week only) Barrie did discharge himself, against medical advice, and Mr Rowe took him home by taxi.

24. Eighteen months later, on 26 September 2003, Barrie was admitted to the same hospital again. The first reason for his admission was given as ‘status epilepticus’. In some ways this period in hospital was similar to the first, though it was three times as long, and on 15 October 2003 Barrie again discharged himself, again against medical advice, and again went home with Mr Rowe in a taxi. In between, however, the hospital notes contain several references to apparent difficulties in the

relationship between Barrie and Mr Rowe. Miss Harrison has made much of these difficulties.

25. Thus on 1 October 2003, about a week after his admission, Barrie is recorded as having told the staff that Mr Rowe was not his next-of-kin, or his lover, or his partner. His patient details were amended to reflect this, pasting paper over the box in the notes where Mr Rowe had originally been entered as next-of-kin. On the following day, 2 October 2004, the notes record that Barrie did not want Mr Rowe visiting him, and that he appeared under 'duress' (which I take to mean distress) when this visitor was present. Late that evening Mr Rowe telephoned the ward, and the nurse who took the call described him as drunk and abusive and refused to speak to him further.

26. These episodes were not mentioned in Mr Rowe's witness statement, as he says because he was unaware of them. In cross-examination he denies that he was drunk or abusive, but I believe the nurse's records on that point. When asked about Barrie denying the description of him as partner or lover, Mr Rowe says that Barrie must have been embarrassed to admit his homosexuality to the hospital staff, and points out that at this time Barrie was extremely ill. I am not persuaded about his embarrassment, seeing that Barrie had evidently described Mr Rowe as his partner throughout the previous stay in hospital in 2002. But his illness was a fact. The notes show that he was in a sad condition, confused, incontinent, not co-operative, climbing out of his bed at night (despite raised cotsides), and difficult to control. I accept what Mr Rowe says about this, so far as it goes, but the consistency of the hospital notes (written in several different hands at different times) remains a strong indication that the relationship between Barrie and Mr Rowe was, at the least, experiencing significant problems at that time.

27. By 8 October 2003 Barrie was showing signs of some recovery. At that time he is recorded as expressing concern about his house, his other property, and his bank accounts being under Mr Rowe's control. On 10 October 2003, at Barrie's request, the social services were contacted. On 14 October 2003 a conversation described in the notes as bizarre took place, during which Barrie is said to have indicated that his tenant Mr Rowe was not wanted any more, that he had taken his clothes with his door keys and had his bank book and cards, and that he (Barrie) wanted to telephone his bank to check that all was well. There was also a reference to Kenneth Clarke having written to the hospital supporting his brother's account of his life at home, and suggesting that he (Barrie) did not want Mr Rowe to remain with him but was afraid to raise it with him.

28. Even so, on 15 October 2003, the very next day after the 'bizarre' conversation and later exchanges, the hospital notes record that Mr Rowe explained that he had not taken Barrie's clothes (he had been admitted to the hospital in his underwear) and, when asked, duly brought some clothes from home. Barrie then discharged himself, not before Mr Rowe had pointed out (apparently correctly) that Barrie's foot was swollen, and the doctor had again advised (unsuccessfully) that he should stay in hospital overnight.

29. These notes are a clear indication of significant problems in the relationship between Barrie and Mr Rowe. Indeed I have no doubt that the relationship was at times extremely volatile, and in view of Mr Rowe's own volatile and emotional character, and Barrie's own history of alcoholism (which is also evident from the hospital notes), it would be surprising if it were otherwise. There is also evidence from earlier medical records that Mr Rowe had assaulted Barrie and injured him in 1997, some three years before the date of the will. At the same time Barrie's dependence on Mr Rowe had by late 2003 become an increasingly important reality, and Barrie must have recognised this, except perhaps at times when he was significantly confused.

30. Barrie and Mr Rowe continued both to live at the Dartford house. Mr Rowe says that Barrie was in bed for weeks after leaving hospital, and that he looked after him. This involved not only shopping and cooking but also giving medication, changing a urine bottle and generally looking after Barrie for 24 hours a day. I accept Mr Rowe's analysis that Barrie was not really fit to be at home, that he should have been in hospital, but that he had discharged himself. I accept also that, between significant periods of difficulty of the kind which I have mentioned, the relationship continued one of affection on both sides, on Barrie's side fed to some extent by his inevitable and necessary dependency on Mr Rowe.

31. On 20 January 2004, about three months after leaving hospital, Barrie died. Mr Rowe or his mother telephoned Kenneth Clarke to inform him of the death, and it was agreed that Kenneth Clarke would travel down to Dartford from the Manchester area on the following Saturday 24 January 2004. The agreement was to meet at about noon, or in the early afternoon, to discuss funeral arrangements, and Mr Rowe arranged for Father Zammit to be there to take part in that discussion.

32. This visit turned out to be exceptionally traumatic, even granted the unhappy circumstances. In the first place Kenneth Clarke arrived at 6.00 pm, with his son and daughter, and by that time Father Zammit had had to leave. On arrival, according to both Mr Rowe and his mother, he became demanding, bordering on the aggressive. They describe him as saying that he was there for Barrie's possessions and that he wanted to know where the filing cabinet and the bunch of keys were. Mr Rowe says that he explained that there was no longer a filing cabinet, and that he showed him the wardrobe in the main bedroom where Barrie's and his own personal documents were kept. He says that he felt intimidated by Kenneth Clarke's son, who is in the army and whom Mr Rowe described as a large man (Mr Rowe is of slight build). Mrs Rowe, too, was in tears. Mr Rowe did not stay upstairs in the bedroom when Kenneth Clarke and, from time to time, his son were there looking at documents. He was downstairs trying to keep the dog calm.

33. Mrs Rowe too remembers the visit as intimidating, as well as freezing cold. She says that Kenneth Clarke's son kept walking about the downstairs room wearing a puffa jacket without sitting down. This also upset the dog. She asked Kenneth Clarke by what authority he was there and why he should have the keys. She says that she pointed out that her son Mr Rowe had been Barrie's partner and that Kenneth Clarke's reply was, 'We don't do anything like that up north.'

34. Kenneth Clarke says that he, his son and his daughter were invited into the house, conducted themselves politely, asked for access to the filing cabinet, were shown into the master bedroom, where they found a number of paper documents in the bottom of the wardrobe but none elsewhere (including two bedside cabinets which they found to be empty, to their surprise). They did not go into any of the other rooms. He says that he or Mrs Rowe mentioned giving Mr Rowe six months' notice to leave, and that Mrs Rowe suggested that she might buy the property. She denies that. The atmosphere was tense, but Kenneth Clarke puts this down to Mr Rowe being increasingly agitated, and they cut short their investigation of the house, leaving when a front-door key was given to them. They took with them a number of documents, in a box and in a bag which they found in the bedroom (which was, unknown to them, Mr Rowe's laundry bag, which he did not give them permission to take). There is no contemporary list of the documents taken, and it is not suggested that Mr Rowe (or his mother) was invited to look at them, or that they asked to do so.

35. I accept Mr Rowe's evidence and that of his mother that this was an intimidating occasion for them. Kenneth Clarke arrived several hours after he had arranged, too late properly to discuss the funeral arrangements which they thought had been the purpose of his visit, and which they discussed only briefly before leaving. Instead he had, apparently without prior warning, embarked on a process of asserting ownership of documents and the house, leaving with a collection of documents and a set of keys to the front door. The whole episode took about an hour. Given Mr Rowe's personality and his recent bereavement (on any view they had at least shared the house for ten years or so), it is no wonder that he became agitated and upset, as I know he easily does. I accept also that Mrs Rowe was tearful from time to time, though she was able to compose herself in Kenneth Clarke's presence. I find that Mr Rowe's status as Barrie's partner was mentioned, and I believe Mrs Rowe's recollection of Kenneth Clarke's reaction. I also find that Kenneth Clarke said that he regarded Mr Rowe as no more than a tenant, and that there was some discussion about notice being required before he could be made to leave.

36. Kenneth Clarke expressly denies finding, or removing, or destroying, any will. He says that he had the written authority of a written note from Barrie, and brought this note with him, but in the event he kept it in his pocket and did not produce it to show to anyone at the house. The note is in evidence before me, and it does indeed say that all his 'insurances, deeds receipts for my house and the flat in France' were kept in the top drawer of a filing cabinet at the Dartford address. The note is undated, but the reference to the flat in France shows that it was written before March 1999. It was not executed as a will. Be that as it may, the note did mention the filing cabinet, and I accept that this was Kenneth Clarke's reason for asking to see it.

37. It is common ground that the possibility of a will was not mentioned, either in the context of Mr Rowe's right to stay at the house or in the context of checking what documents Kenneth Clarke left with at the end of the meeting. It was put to Mr Rowe and his mother that, if they thought at this time that Barrie had left a will in

favour of Mr Rowe which was still valid, they would have mentioned it during this visit. Mrs Rowe's explanation is that they were both scared and intimidated. She went on to say that there was good reason not to mention the will, namely that if she let Kenneth Clarke think that Mr Rowe was Barrie's tenant he and his family would leave the house. She felt that she had no choice but to bring the confrontation to an end without further controversy.

38. At some points in this evidence Mrs Rowe was somewhat defensive, but the explanation seems to me to be justified. Until the arrival of Kenneth Clarke and his family, Mr Rowe and his mother were contemplating a discussion about making funeral arrangements for their friend, recently deceased. Mr Rowe says that he had not made a search for the will in the period since Barrie's death, and I do not find that surprising. There was no particular concern about the administration of Barrie's estate but, if he had thought about it, he might have recalled that Barrie had made a will in his favour. By late afternoon Father Zammit had had to leave, so that the intended discussion about the funeral would probably be fruitless. Then at six o'clock on this cold January evening Kenneth Clarke arrived, a man whom neither had met before, accompanied by his son and daughter, 'mob-handed' as Mr Calhaem (who appeared before me on behalf of Mr Rowe) put it. (Kenneth Clarke's explanation of their attendance, that they were curious to see how their uncle lived, is one which I do not accept, seeing that their curiosity could have been better satisfied by a friendly family visit during Barrie's lifetime.) And all Kenneth Clarke appeared to be interested in was a filing cabinet and a bunch of keys, Barrie's property and documents, and even the house keys, not to mention a strongly dismissive reference to Barrie's relationship with Mr Rowe. In those circumstances it strikes me as reasonable for Mr Rowe and his mother to do what they could to get Kenneth Clarke and his family to leave the house as soon as possible, and certainly not to alert them then and there to the existence of a will of which they were evidently unaware. The lack of any reference to the will on this occasion does not strike me as good evidence that Mr Rowe knew that there was no valid will.

39. After Kenneth Clarke and his family left, with a set of keys to the front door which he had demanded (and having checked to make sure that it worked), Mrs Rowe arranged to have the locks changed. They had tried to telephone a solicitor earlier, but could not find one open on the Saturday evening. They had telephoned the police, but the police had regarded the matter as domestic and did not otherwise respond.

Authorities

40. At the beginning of this judgment I set out a textbook statement of the presumption with which this action is concerned. That statement is based on authorities of undoubted validity, including in particular *Welch v Phillips* (1836) 1 Moore 299. In that case Parke B said at page 302 :

> 'Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this : 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 himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary.
>
> 'The onus of proof of such circumstances, is undoubtedly on the party propounding the Will.'

Parke B cited authorities in support of the final sentence.

41. The nature of the presumption was described further in the well-known case of *Sugden v St Leonards* (1876) 1 PD 154, in which Cockburn CJ said at page 217 :

> 'Now, where a will is shewn to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course that presumption may be rebutted by the facts. Although presumptio juris, it is not presumptio de jure, and of course the presumption will be more or less strong according to the character of the custody which the testator had over the will.'

42. In somewhat more recent times the nature of the presumption was described in this way in *In the Estate of Yule deceased* (1965) 109 Sol J 317, a decision of Wrangham J cited by Mr Calhaem. The case concerned a testator whose mental condition was deteriorating over a period during which he had possession of his will. The report uses indirect speech :

> 'It was clear from the older authorities that those presumptions were not intended to be regarded as rigid statutory rules, when they would produce absurd results, but as indications of the inferences which would always be drawn by the court from a given state of evidence. The court would approach the question by considering what was the most probable explanation of the absence of the will on the testator's death. Having regard to his business-like nature, to the fact that he intended the disposition of his property to be governed by his will, and that there was never any deterioration of relations between him and the beneficiaries, the most probable explanation was that the will had been destroyed by the testator by mistake.'

43. Mr Calhaem also relies strongly on the case of *Finch v Finch* (1867) LR 1 P&D 371. On the facts it bears some striking similarities to the present case. The

deceased was a retired cabinet-maker in Islington who died in 1866 leaving two children, a daughter (who was the plaintiff) and a son (the defendant). They both lived in the house with their father. In June 1865 the deceased had made a will in favour of the daughter alone. He told her about the will, and later, about three weeks before his death, he spoke to her about it again and showed her where it was kept, in a locked drawer with the key kept in a different drawer. He said that he was leaving the property to her because he feared that 'when he was gone her brother would turn round on her'. There was no other reference to the will during the three-week period.

44. The deceased died at 2.30 in the morning, with the son and daughter together with him. They both then went into another room. Sir J P Wilde continued the account in his judgment at page 374 :

> 'Then come the most important facts. The plaintiff says, (About half-past nine in the morning, I met my brother coming out of the room where my father's dead body was lying. He went past me up to his own room. He appeared to have something concealed under his coat. He was holding one side of his coat with his hand. He went upstairs, and remained in his room about half an hour. When he came down, he said to me, 'I must administer the property.' I said, 'Why, father has left a will.' He said, 'If it is in your favour, you had better go and look for it.' I went with him into my father's room. He looked into the drawer, and said, 'There is no will here.' He opened the drawer. He had the key. The key was usually kept in the bottom drawer.) I afterwards asked this witness some questions as to whether he took the key from the bottom drawer, before he opened the drawer in which the will had been kept, and she said she felt confident that he did not take it from the bottom drawer, but that he had it in his hand.'

His judgment continued (at pages 374-375) :

> 'Now, if this evidence be true, it is obvious that this young man, while alone in his father's room, possessed himself of the key of this drawer, and, coupling that with the evidence of his leaving the room subsequently, as he did, a strong inference arises that he abstracted this will. But the Court is not bound to come to a conclusion one way or the other on that question. It is enough that the Court is satisfied that there is no proof that this will was not found in the depository of the testator. It is the non-existence of the paper at the time of death which leads to the legal presumption of revocation. A will is good unless revoked; but this will is not revoked, unless the legal presumption arises; and to support that presumption the Court must be satisfied that it was not in existence at the time of death. The evidence which has been produced does not satisfy the Court that it was not in existence at that time; on the contrary, looking at the expressed intention of the testator to leave the property to his daughter, and the fact that he continued to express that intention up to the last occasion when he spoke about the will, the Court is satisfied that his determination remained unaltered until the time of his

> decease. This conclusion is much strengthened by the circumstance that the defendant, although challenged to explain his conduct, does not appear here and submit himself to cross-examination. If he had appeared, he would have had an opportunity of explaining, the fact of the key being in his possession when he searched the drawer, and the suspicious circumstances to which I have referred.'

45. On the face of it therefore Sir J P Wilde had more than a strong suspicion that the brother had removed the will and fraudulently suppressed or destroyed it, but did not make a positive finding to that effect. Instead he held that the presumption did not arise (so that the daughter had no need to rebut it) if the will was in existence after the death, and he was not satisfied on the evidence that it was not. This impliedly shifted the burden of proof onto the brother, who did not appear in the action, to prove a negative, namely that the will had not been in existence at the time of their father's death. I find that a surprising line of reasoning.

46. As Miss Harrison pointed out, if that reasoning is correct it virtually removes the force of the presumption altogether. She is not alone. In *Allan v Morrison* [1900] AC 604 the Privy Council were faced with what they described as an attempt to minimise the force of the presumption by reference to, amongst other cases, *Finch v Finch*. They rejected that attempt by saying at page 611 :

> 'In *Finch v Finch* the court inferred from the facts proved that the will was in existence at the date of the testator's death.'

47. I would not myself describe the effect of *Finch v Finch* in those words. If Sir J P Wilde had made the positive inference that the will was in existence after the testator's death, then there seems no reason for him to recoil from finding that the brother had taken it. I do not see any other alternative. It seems to me that he was providing a different and additional hurdle for the brother to overcome, namely for him to show that the will was not in existence at the date of the death. That would indeed be a difficult task in most, if not all, cases, and it would indeed destroy the effect of the presumption.

48. And *Finch v Finch* has also been disapproved by the Court of Appeal. In *Sykes v Sykes* (1907) 23 TLR 747 Buckley LJ, with whom Fletcher Moulton LJ agreed, referred at page 749 to part of the passage from *Finch v Finch* which I have cited above : 'It is the non-existence of the paper at the time of death which leads to the legal presumption of revocation. A will is good unless revoked; but this will is not revoked, unless the legal presumption arises; and to support that presumption the Court must be satisfied that it was not in existence at the time of death.' The report of *Sykes v Sykes* continued (using indirect speech) :

> 'If he [Buckley LJ] rightly understood the presumption, that passage was wrong; and Lord Davey in *Allan v Morrison* did not adopt any such proposition. To require evidence of the non-existence of the will would be to deny the presumption.'

The dissenting judgment of Vaughan Williams LJ is not reported as referring to this point.

Conclusions

49. In my judgment there is no requirement on the party relying on the presumption (Kenneth Clarke in the present case) to prove the non-existence of the will at the time of death. On the authority of *Sykes v Sykes*, and the persuasive authority of *Allan v Morrison* to similar effect, *Finch v Finch* was wrong to the extent that it stated otherwise.

50. It follows that the presumption does arise in the present case. But I am mindful that the strength of the presumption in any given case depends on the character of the custody which the testator had over the will, and the character of that custody in the present case was exceptionally weak. Miss Harrison submits that Barrie was efficient and well-organised, and she points to the fact that he was in charge of the household finances and points also to business letters written by him. But I am not prepared to accept that the ability to write simple business letters is much evidence of a meticulous mind, and in truth there is no evidence showing how well the household finances were handled. I therefore do not accept that Barrie was meticulous or well-organised.

51. Nor was the will carefully looked after. Far from it. To begin with it may have been kept in an old filing cabinet (I was not told whether or not it was locked), but after that filing cabinet was discarded all important documents were kept in the bottom of wardrobes. If it was not in the filing cabinet, it may even have been thrown away with other things cleared from other rooms at the same time. I accept the evidence of Mr Rowe that Barrie was not house-proud, and that he was untidy. I bear in mind also the hospital evidence that he had a history of alcohol abuse. 'Custody' is therefore hardly the word to describe the manner in which the will was kept. It is true that there were few opportunities for anyone with an adverse interest to gain access to the house so as to make better security necessary. Certainly Kenneth Clarke and members of his family never visited the house during Barrie's lifetime. Even so, after the departure of the filing cabinet, there is no suggestion that the will was even kept in a locked drawer, let alone any more secure container.

52. I therefore accept Mr Calhaem's submission that the presumption in the present case is an exceptionally weak one. In that context he points to eight factors which in his submission are sufficient to rebut the presumption, and I shall paraphrase and abbreviate them as follows : (1) Barrie continued in his affection for Mr Rowe, underlined by Mr Rowe nursing him through his final illness; (2) Barrie did not inform Mr Rowe of an intention to revoke the will; (3) nor did he tell anyone else of such an intention; (4) he sent a copy to Mrs Rowe and did not tell her of any such intention; (5) Barrie was disorganised; (6) he had no legal advice in regard to the will and would not have been advised of the importance of retaining the original; (7) the first person to make a search for documents had an interest adverse

to the will; (8) Barrie was not on good terms with his brother, the beneficiary under an intestacy.

53. The weakness of that list, as Miss Harrison has pointed out, is that few of the items on it are truly positive. Most are negative. Subject to that, however, the factors on which Mr Calhaem relies are all properly factors which are indeed to be taken into account in assessing how strong the presumption is or whether the presumption has been rebutted. That includes the continuing affection between the two men, which I do accept even after reminding myself of the caution with which I approach all of Mr Rowe's evidence. Their relationship was volatile in late 2003, but then it often had been, including at a time before the will itself was made. Mr Page said in the witness box that he spoke to Barrie at Christmas 2003 and that Barrie had not mentioned any rift with Mr Rowe, which confirms Mr Rowe's evidence so far as it goes, but equally Mr Page said that he did not ask. He knew that Mr Rowe still lived at the property, and he had no cause to do so.

54. The three main choices before me are to find either (1) that Barrie destroyed the will with the intention of revoking it, perhaps during a period when his relationship with Mr Rowe was at a low point, or (2) that the will was in existence at his death and was found and removed by Kenneth Clarke, or (3) that the will was lost or accidentally thrown away or destroyed during Barrie's lifetime without any intention to destroy it. If I am persuaded of either of the last two of those options, the will should be admitted to probate in the form of the copy sent to Mrs Rowe. If not, the presumption will leave Kenneth Clarke as the administrator of an intestate estate. The choice between the three options is difficult.

55. As to the possibility that Kenneth Clarke has removed and suppressed the will, there was sufficient motive and opportunity for him to have removed the will on 24 January 2004 if it was still in existence at the house on that day. I accept his evidence that he was not previously aware that his brother had made a will, and that he was relying on the years-old written authority which he had brought with him to Dartford but which he had not needed to take out of his pocket. He was not therefore looking for a will or expecting to find one. But if it was there in the bottom of the wardrobe, it would not have been hard for him to understand its effect and that it was directly adverse to his own interests. Like the brother in *Finch v Finch* he had an opportunity and a motive to slip the will into a pocket or elsewhere before rejoining the others downstairs. As for motive, the value of the house is no doubt sufficient in itself. In addition I have in mind Kenneth Clarke's barely concealed aversion to the idea of his brother's homosexuality, and that for a long time he had had an unconcealed dislike of Mr Rowe. There was ample opportunity during the confrontation at Dartford to re-kindle both aversions.

56. But suspicion is not enough. There is even said to be a presumption against fraudulent abstraction, as it is called : see for example *Allen v Morrison* [1900] AC 604. I bear in mind that Kenneth Clarke's own evidence was clear and simple, that he did not find a will in the wardrobe on 24 January 2004, he did not go anywhere else in the house, and he would have duly investigated the validity of a will if he found one. But the decisive point is that there is simply no positive evidence at all

that the will was in existence at Barrie's death. Mr Rowe admits that he never saw it after the date of its execution, and that it was never discussed between them again, even apparently when the filing cabinet was cleared and taken away.

57. As in *Finch v Finch* (above) the true controversy here is whether the will was in existence at the testator's death. If it was, then there is really no alternative but that it was taken away and fraudulently suppressed or destroyed. But, unlike in *Finch v Finch*, there is in the present case no positive evidence that the will was still in existence at the death, or indeed during a short period before the death. I am therefore not satisfied that the will was in existence at Barrie's death, and it follows that I am not persuaded that Kenneth Clarke removed it after Barrie's death.

58. It follows also that the will was either deliberately destroyed by Barrie himself with intent to revoke, or it was lost or destroyed without that intention.

59. As to deliberate destruction with intent to revoke, I have said that I accept Mr Rowe's evidence of the continued affection between Barrie and himself, despite the volatility of their relationship, and Barrie's dependency on him during the later part of Barrie's life. In addition Barrie had sent a copy of the will to Mrs Rowe with the intention of reassuring her that her son would be taken care of after his death. If he then decided to revoke the will, perhaps in the autumn of 2003 or at some other crisis-point in his relationship with Mr Rowe, it would have been only right to warn Mrs Rowe that his previous reassurance to her was no longer valid. He might indeed have given that warning, in which case Mrs Rowe has omitted to say so in her evidence. Or he may have feared an emotional outburst from Mr Rowe when he was told, and he doubtless realised that he depended on Mr Rowe in ways which he could not afford to jeopardise. Having observed Mr Rowe in the witness box, I realise that this would have been a rational, if selfish, view to take. Revocation by destruction is therefore entirely possible.

60. On the other hand a deliberate destruction (or other simple revocation) of the will would have been a surprising way for Barrie to react to a nadir in his relationship with Mr Rowe (if that is how it should be described). The point of the will was not only to look after Mr Rowe, but also to provide that Kenneth Clarke did not become entitled to the estate. This shows that Barrie knew well enough that Kenneth Clarke would inherit his estate under intestacy, and there is no hint of any other will having been executed. Barrie believed, rightly or wrongly (but rightly in my judgment) that his brother disapproved strongly of his homosexuality and he knew that he disapproved of Mr Rowe in particular. Thus a finding that he destroyed the will to revoke it, without making other testamentary provision in its place, would mean not only that he had lost his affection for Mr Rowe, not only that he was prepared to allow Mrs Rowe to be falsely reassured about his intentions, but that he was prepared to allow his estate to pass to his brother, with whom he was on the most distant terms and whom he had earlier taken deliberate steps formally to disinherit.

61. For those reasons I do not regard it as probable that Barrie deliberately destroyed the will. The relationship was volatile, at times perhaps frighteningly so, and I do not rule out the possibility of low points quite additional to the one revealed by the

hospital notes in late 2003. Deliberate destruction is therefore possible, but for the reasons I have mentioned I do not regard it as probable.

62. Turning to the third and final choice, that the will was lost or destroyed by Barrie during his lifetime, but without any intention to revoke it, this strikes me as not only possible but probable. I have given my reasons for finding it improbable that Barrie would have destroyed the will deliberately, and I have also given my reasons for finding the lack of security with which the will was kept. I also bear in mind the other evidence which I have heard about the household, Barrie's level of education, his working life, his relative lack of experience with legal transactions (there was evidence that he did not know that a will did not need to be drawn up by a solicitor) and his history of alcohol abuse. In the context of all that, Barrie had in April 2000 taken the formal step of drawing up and executing a will, in the relatively formal location of the Citizens Advice Bureau. The context was a discussion concerning security for Mr Rowe, and Barrie took the unusual step of sending Mrs Rowe a copy of the will in order to reassure her that her son was indeed secure. In my opinion he regarded that as sufficient, and that is why he was not overly concerned about the security of the original document itself, any more than other documents. As Mr Calhaem pointed out, there is nothing to suggest that Barrie knew the importance of retaining the original will, if a copy was in safe hands, however obvious that might be to members of the legal profession.

63. I therefore find that the unintentional loss or destruction of the original will during Barrie's lifetime, with no intention to revoke it, is not only possible but probable. And I find that this alternative is more probable than that the will was deliberately destroyed with the intention of revoking it. I am therefore persuaded, on the balance of probabilities, that the will was not revoked and that the presumption, weak as it is in this case, is rebutted.

64. I shall therefore allow the claim, pronouncing in favour of the will of 28 April 2002 in solemn form, in the form of the copy in Mrs Rowe's possession until the original should be produced, and revoking the grant issued to Kenneth Clarke in April 2004.

Counterclaim

65. Kenneth Clarke has also served a counterclaim under Part 20 of the Civil Procedure Rules, claiming possession of the Dartford house. In view of my finding on the main claim, this counterclaim falls to be dismissed. If I had dismissed the main claim, I would have ordered a stay or adjournment of the counterclaim in order to enable Mr Rowe to pursue his claim under the Inheritance (Provision for Family and Dependants) Act 1975, which I understand is itself at the moment adjourned or stayed. It seems to me that, in that hypothesis, the occupation of the house might be a major element of Mr Rowe's claim, and it would not be right for me to prejudice that claim by ordering possession of the house now.
