THE HIGH COURT
PROBATE

[2021] IEHC 387
[Record No. 20/6796]

IN THE MATTER OF THE ESTATE OF MARY EASTWOOD

LATE OF "LYTTLETON", COOLOCK LANE, IN THE CITY OF DUBLIN, DECEASED

AND IN THE MATTER THE SUCCESSION ACT, 1965
AND IN THE MATTER OF AN APPLICATION BY ROBERT EASTWOOD

OF "LYTTLETON", COOLOCK LANE, IN THE CITY OF DUBLIN

JUDGMENT of Mr. Justice Allen delivered on the 4th day of June, 2021

Introduction

1. Mary Eastwood, late of *"Lyttleton"*, Coolock Lane, Dublin, died on 12th December, 2018, aged 85 years. She was survived by her five children, Robert Eastwood, who is the applicant, Jimmy Eastwood, Dolores Eastwood, Annette Richards and Jennifer Eastwood. The deceased's husband, Jimmy Eastwood, Pre-deceased her on 8th July, 2016.

2. On 29th November, 2016 the deceased made a will by which she appointed Robert and Jennifer to be her executors but following her death the will was not to be found. This is an application by Robert, with the support of Jennifer, for permission to prove the will in terms of a copy. The application is opposed by Annette, Dolores and Jimmy.

The evidence

3. There is no issue as to the formal validity of the will. It was engrossed by the deceased's solicitor Mr. Fintan Lawlor and executed in his office in his presence and in the presence of a trainee solicitor. Neither is there any issue but that after it was executed the original will was for some time retained by Mr. Lawlor.

4. On 29th January, 2019, about six weeks or so after his mother's death, Robert had a letter from Mr. Lawlor. Mr. Lawlor extended his condolences and advised Robert that he had been contacted by Annette and Dolores who were looking for information in relation to their mother's estate. He said that from his records the original will had been sent to the deceased at her home in or about January, 2018 and enclosed a copy letter dated 18th January, 2018.

5. The enclosed copy letter was marked "**By POST**" and read:-

> **"Our ref: FL/LL/EAS0002/1**
>
> **Re: Letter dated 10th January, 2018**
>
> *Dear Mrs. Eastwood,*
>
> *Previous correspondence in this matter refers, resting with your letter dated 10th January 2018.*
>
> *We enclose herewith original Will and Power of Attorney relating to you. These are the only documents we have relating to you.*

We note that you collected title deeds to 6 properties in November 2016.

We trust that this is satisfactory."

6. Robert was very surprised to receive the letter of 29th January, 2019. He knew about his mother's letter to her solicitor of 10th January, 2018 because he had typed it and posted it for her after she had signed it. That letter, addressed to Mr. Lawlor, had said:-

"To whom it may concern

*I wish to get a copy of **all** documents you have in your possession relating to me please. I can arrange for my son Robert, he lives with me at the above address, to collect these for me from your office when they are ready.*

You can either send me a letter letting me know that they are ready for collection or alternatively you can call Robert on [mobile telephone number] and he will collect them for me." [Emphasis original.]

7. Robert has deposed that when, some days later, he collected the post in what he described as the normal way that he did every morning it included an A4 envelope from Mr. Lawlor's office which he opened and which he found contained a copy of his mother's will of 29th November, 2016, a copy of an enduring power of attorney dated 23rd April, 2015, and a compliment slip from the firm. The deceased's and Robert's object in asking for the copy documents had been to regularise the management of a number of what he refers to as his father's rental properties. The copy documents received in reply were of no value for that purpose and Robert filed them away in an accordion folder.

8. Robert has deposed that following receipt of Mr. Lawlor's letter of 29th January, 2019 he searched the house high and low but could not find the will or any other document concerning it: save the copy will, copy enduring power of attorney, and compliment slip, which were in the accordion folder where he had put them.

9. Robert was very unhappy that his mother's will had gone missing, not least, as he said, because he was at risk of losing the house at *"Lyttleton"* which had been devised to him. In correspondence with Mr. Lawlor, Robert made the point that the solicitor had not been asked for the original will, or to post it (or anything else) out to his mother. It is not necessary to dwell on all of the detail of the exchange of correspondence but it finished with a letter from Mr. Lawlor to Robert of 13th May, 2019 by which Mr. Lawlor confirmed that he had conducted a thorough search of his office and off site files and by which he said that:- *"… I can confirm that from my records, it would appear that the original Will was sent to your Mother in January 2018 further to her request for her Will."* I pause here to say that there was no suggestion that Mr. Lawlor had ever had an instruction or request from the deceased other than the letter of 10th January, 2018 which in my view could not fairly be said to have been a request by the deceased for her will.

10. Several questions as to the practices and procedures in the solicitor's office as to the safekeeping, storage and release of original wills went unanswered.

11. There was some conflict in the evidence as to how post delivered to *"Lyttleton"* was managed.

12. The deceased's husband, to whom I will refer as Mr. Eastwood, was seriously injured in an accident on 10th March, 1997. Following the accident Mr. Eastwood lived at home until his death on 8th July, 2016 but needed full-time care. That care was provided by the deceased and the children generally and Robert in particular who remained at home or returned home to help his parents. As I will come to, there was talk in 2005 of the sale of the family home to a developer, which, if it was to happen (which in the event it did not) would have required an application to take Mr. Eastwood into wardship. As the deceased grew older her health declined and Robert's role as carer expanded to caring for his mother.

13. In his affidavit grounding this application Robert deposed that one of his daily tasks was to look after all of the post to and from the family home. He said that he checked the post box every morning at about 8:00 a.m. and brought the post into the house, opened it, and inspected it all. He said that he would pass on any private post unopened but otherwise would deal with any *"non-private/administrative"* post on behalf of his parents.

14. Robert's account of the post routine was contested by Annette and Dolores. Annette deposed that her mother was generally concerned to receive and manage her own post. Both Annette and Dolores deposed that on their regular visits they often saw their mother receiving her post and speaking to the postman. Annette recalled that there was no post box (I think that she may have meant letter box) at her parents' house until about three years before her mother's death and that the post would be left in the porch or on an outside post box. Annette's firm recollection and belief is that her mother would be awake before Robert most mornings and that she would leave Robert's post unopened on a radiator in the hall. Dolores recalled that Christmas cards and the like addressed to her at her mother's address were passed on to her by her mother. In a second affidavit Annette deposed that she visited her mother in January, 2018 (as she had for some time previously) every Monday and Thursday morning, arriving at about 9:30 a.m. Her evidence was that her mother would usually be awake and up and would have received the post, but that Robert would not usually be awake. Annette says that it was her mother's practice to open anything addressed to her or to Mr. Eastwood but to leave anything addressed to anyone else on the radiator in the hall.

15. In a supplemental affidavit Robert explained that he had not, in his grounding affidavit, intended to indicate that he had operated a rigid system in respect of the post for many years. He agreed with what his sisters had said about the collection and distribution of the post by his mother but that, he said, was years ago. Robert reiterated what he had said about the envelope which had arrived from the solicitor's office in response to his mother's letter of 19th January, 2018 and its contents.

16. As all of the Eastwood siblings put it – adopting the customary euphemism – there have been unhappy differences between them for some years. Those differences extend to the terms of the will made by their mother on 29th November, 2016 and the circumstances in

which it was made. I emphasise that the only issue now before the court is whether that will may be admitted to probate in terms of the copy but its terms and the circumstances in which it was made are relevant to the core issue on this application, which is whether it was later revoked.

17. The deceased's death certificate shows that at the time of her death on 12th December, 2018 she was suffering from advanced dementia. Soon after her death, Annette, Dolores and Jimmy, by their solicitors, challenged the deceased's capacity at the time she made her will and raised the possibility of an application under s. 117 of the Succession Act, 1965. Robert, in his grounding affidavit, deposed that his mother's dependence on him accelerated towards the end of her life as she gradually began to develop dementia.

18. In her affidavit in answer to this application Annette has expressed the belief that over the years following their father's accident Robert adopted an aggressive and possessive approach to their parents and their property.

19. Over the years prior to Mr. Eastwood's accident he acquired a number of investment properties. Robert refers to them as his father's properties. Annette refers to them as her parents' properties. While the evidence was uncertain, it was agreed at the hearing before me that at the time the deceased made her will she owned one property only. The others were held in the name of Mr. Eastwood who had by then died, intestate. The deceased in her will devised or purported to devise the investment properties as if they were hers. These investments properties – there are six of them – are described as having been in various states of repair and they were each managed by one or two of the children who collected the rents and commissioned repairs from time to time.

20. Annette recalls that in late January, 2013 Robert began applying pressure on the deceased to recover the title deeds to the investment properties from Dolores, who had them for safekeeping. Robert, she recalls, was unhappy that he was not in full control of the lettings and this was the cause of frequent arguments. Annette recalls that her mother spoke in February, 2013 of making a will. She was not then sure what she wanted to do, except that she wanted to be fair. Annette has deposed – without saying why – that she believes that at the time her mother was being pressured to make a will. If the court is asked to infer that it was Robert who was applying the pressure, Annette does not say so. As I understand the evidence, this belief is a present belief. It is not said that Annette believed at the time in 2013 that her mother was being pressured.

21. One late afternoon in March, 2013 Annette had a telephone call from her mother who said that she was going to the solicitors in the morning to make a will with Jennifer but was unsure as to what she should do. Annette went over to her mother's house and from there spoke on the telephone to Dolores and Jennifer. Annette found her mother's passport and a utility bill and prepared a list of names of possible executors, a list of the names of the siblings, and a list of the properties.

22. On the following morning Annette arrived at "*Lyttleton*" to accompany her mother and Jennifer to the solicitor's office and after an initial disagreement it was agreed that all

three sisters would attend. While the meeting with the solicitor took place, is not said that the deceased then made a will. Instead, on 1st April, 2013 there was a family meeting attended by Mr. and Mrs. Eastwood and their five children at which, Annette recalls, there was a heated discussion and decisions were made, but none of them by the deceased. The deceased is said to have said at the meeting with the solicitor in late March, 2013 that she wanted to be fair and to divide her estate equally between her children. Robert denies that he put pressure on his mother in 2013 to make a will but does not deny there was some attempt at that time to regularise the management of the investment properties.

23. It is common case among the deceased's children that the deceased attended Mr. Lawlor twice in 2016 for the purpose of making her will: firstly to give her instructions and later to execute her will. Robert recalls that he attended on the first occasion with Annette and Jennifer and that on the second occasion she was taken by Annette and Jennifer. Annette recalls that on or about 16th August, 2016 she was told by Robert that he had brought their mother to make a will but that nothing had been finalised, which suggests that she did not attend, or does not recall attending at the solicitor's office. In her first affidavit Annette deposed that subsequently – she did not say when – she understood – she did not say how – that her mother was diagnosed with congenital dementia in 2015. In her second affidavit Annette deposed – from a review of her records – that it was on 16th August, 2016 (the same day on which Robert had told her that he had brought the deceased to a solicitor) that Dolores and Jennifer brought their mother to a clinic in Swords, at which appointment *"the deceased was diagnosed with some form of cognitive impairment as far as I am aware."*

24. Dolores, as I have said, supports Annette's evidence as to the collection and distribution of post in the house. Dolores recalled that at one of a number of meetings in 2005 or so – the immediate purpose of which was to discuss a possible sale of "*Lyttleton*" – the deceased discussed making a will. The deceased was then advised by another solicitor. Dolores has deposed that she believed at the time – although she does not say that her mother said so – that her mother did not want to take the responsibility of the decision but that she wanted to be fair and to treat all of her children the same. Dolores has deposed that she was not aware that her mother was brought to see a solicitor in November, 2016 and that she believed that her mother's mental health and strength had been declining for many years by that time.

25. Annette and Dolores both say that they do not believe that the copy will reflects what the deceased communicated to them as her wishes and can only presume that she later caused the will to be destroyed.

26. Jimmy swore a short affidavit to say that he never discussed with his mother her intentions in relation to her estate or her will, but he is with Annette and Dolores in their opposition to this application.

27. In about June, 2019 Robert instructed his present solicitors who, by letter dated 28th June, 2019 embarked upon what turned out to be a very protracted – and in the event

not terribly fruitful – quest to get to the bottom of the question as to what had happened to the original will. In particular Mr. Lawlor was repeatedly asked, but persistently failed, to provide details of his office procedures in relation to releasing original wills to clients.

28. Eventually, about eighteen months after he was first asked, and four months after the application now before the court was issued, Mr. Lawlor swore a short affidavit by which he deposed that *"Correspondence from this office shows that the original will was posted by ordinary pre-paid post to the deceased at her home under cover of a letter dated 18th January, 2018."* He said that it was unusual for someone to request an original will and that his office procedure was that anyone making such a request would be asked to attend in person to collect it. In the event that that the requester could not attend in person, the procedure was that the original will would be sent out by registered post. Those procedures, he says, were not followed in this case. Mr. Lawlor has deposed that following the death of the deceased he was contacted by the applicant and caused searches to be carried out in his offices and of his off-site files but the original will was not to be found.

29. Mr. Lawlor does not say whether he has a will safe or a wills register, or whether he had any record of posting, or by whom the searches which he caused to be carried out were carried out, or where – whether in his offices or elsewhere – whoever it was who carried out the searches looked, or what it was that whoever was searching was looking for. Mr. Lawlor does not say whether it was he or someone else in his office who wrote the letter of 18th January, 2018. The letter, as will have been seen, carries Mr. Lawlor's reference and that, presumably, of his secretary, but Mr. Lawlor does not personally avow it but refers to it as "*correspondence from this office*." It will be recalled that in his letter of 29th January, 2019 Mr. Lawlor did not say that he had posted out the original will but that "*from [his] records"* it had been *"sent"* to her. Most of all, Mr. Lawlor did not engage with the question as to how it might have happened that the original will and original power of attorney could have been sent to his client following a request for copy documents, or how – by reference to Robert's correspondence, and by the time Mr. Lawlor swore his affidavit Robert's evidence – it might have come to pass that copies as well as the originals might have been posted out.

30. I observed earlier that it appears to be common case among the Eastwood siblings that the deceased attended with Mr. Lawlor in August, 2016 to give her instructions and again on 29th November, 2016 to execute it. Mr. Lawlor's evidence is that she attended to give her instructions on 28th November, 2016 and returned the following day to execute it.

31. Incidentally, Mr. Lawlor has deposed that:-

> *"Before the Testatrix executed her said Will, in the manner aforesaid, same was truly, audibly and distinctly read over to her and she fully understood same and was at the time of execution thereof of sound mind, memory and understanding."*

The issues

32. The first question I need to decide is whether I can decide this case on the evidence which is before the court.

33. The application comes before the court by motion on notice, grounded on the affidavit of Robert, with the support of Jennifer, to which Annette, Dolores and Jimmy have replied. It came into the so-called non-contentious Monday probate list and following a number of adjournments to facilitate the filing of further affidavits and written legal submissions I heard it in the afternoon of 15th March, 2021. At the time the written submissions were filed counsel were agreed that the application was one which could be dealt with – or at least decided in their favour – on the basis of the affidavit evidence and without cross-examination: but having heard the exchange between the court and counsel for the applicant, counsel for the respondent submitted that the *"appropriate and responsible thing"* was that the court should hear oral evidence.

34. In *Estate of Mary Ann (otherwise Maureen) Horan, deceased* [2020] IEHC 21 McDonald J. cited with approval the decision in *Re: Estate of Charles Gillespie* [2015] 3 I.R. 46 in which Baker J. explained the purpose and limitations of the Monday probate list. Starting at para 17, under the heading The Monday motion list, Baker J. said:-

> *"[17] This matter comes before me as a motion on the Monday probate list. That list is intended to deal with so called 'non-contentious' probate motions, and although that description is clearly a misnomer in that many applications are contested, the purpose of the list is administrative and it operates to adjudicate on disputes which may be resolved on affidavit, or determined on matters of law. It is possible, although unusual, that a motion in this list would throw up contested facts that would require to be resolved following cross-examination of the deponent of an affidavit. The Monday probate list is not a substitute for a full probate action, or an action with regard to the validity of a will, nor can an application in that list normally resolve a contested question of testamentary capacity, or an assertion that a deceased had executed a purported testamentary document as a result of undue influence or duress which resulted in a lack of true understanding of the will or intention to execute a will in that form.*
>
> *[18] Section 36(3) of the Succession Act 1965 allows the court to adjudicate with regard to doubts or questions that arise in the administration of an estate and the Monday probate list is primarily a list by which the High Court exercising its probate jurisdiction may give directions to the probate registrar with regard to certain matters in the probate jurisdiction.*
>
> *[19] While the distinction between the class of matters which is suitable for the Monday probate list is not one in respect of which I wish in this judgment to make a definitive statement, I consider that a good starting point for the purposes of determining the issue in dispute in this case, is whether the issue is one that may be resolved on affidavit, or is properly speaking a matter in respect of which a full plenary hearing is required."*

35. The application in *Re: Estate of Charles Gillespie* was an application to set aside a caveat which the respondent resisted by introducing affidavit evidence which sought to raise suspicions as to the legitimacy of the will. Having explained the purpose of entering a caveat is to ensure that no grant issues *unknown* to the caveator, Baker J. found on the facts that the legitimate purpose for which the caveat had been entered had become spent. While the substantive challenge to the will presaged in the respondent's affidavit was not something that could be determined in the Monday probate list, the applicant's application to set aside the caveat was.

36. The application in *Estate of Mary Ann (otherwise Maureen) Horan*, deceased was an application under s. 27(4) of the Succession Act, 1965 to pass over an executor, which was brought by motion on notice in the Monday list. Counsel for the respondent contested the procedure which had been adopted, arguing that the applicant should have moved by special summons under O. 3 of the Rules of the Superior Courts. McDonald J. in his written judgment recalled that he had made an *ex tempore* ruling on the respondent's preliminary objection in which he had identified a number of written judgments in cases in which the court had dealt with contested s. 27(4) applications in the Monday probate list and had concluded that he could only determine the issue as to the appropriate procedure after a full consideration of the affidavits and the arguments of counsel. Having done so, McDonald J. concluded that:-

> *"39. Notwithstanding the case made by counsel for the executor, it seems to me that the present application can, quite properly, be determined on the basis of the affidavit evidence before the court. In my view, a plenary hearing is not necessary. While there is some level of conflict, on the affidavits, between the parties, it seems to me to be possible to resolve this application by reference to those aspects of the evidence which are not seriously in dispute. Insofar as these (largely uncontested) aspects of the evidence are concerned, I do not believe that there is any basis to suggest that any of these matters are of a speculative kind. As noted above, I have excluded any consideration of matters which have no proper evidential basis."*

37. The test, in a nutshell, is whether it is possible to determine the application by reference to those aspects of the evidence that are not seriously in dispute.

The presumption of revocation

38. It has been settled law for hundreds of years that where a testator makes a will and retains the original or subsequently comes into possession of it and it cannot be found after his death and there is no evidence as to what became of it, there is a presumption in law that the will was destroyed by the testator with the intention of revoking it.

39. In *Re the Goods of Coster Deceased* (Unreported, Supreme Court, 19th January,1979) 1981 WJSC-SC 151 Kenny J. cited as the classic statement of the rule that given by Parke B. in *Welch v. Phillips* (1836) 1 Moore's P.C. 299:-

> *"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. The onus of proof of such circumstances is undoubtedly on the party propounding the will."

40. That is as far as Kenny J. quoted from the advice of the Privy Council, but Parke B. immediately went on to say:-

> *"It is a presumption founded on good sense, for it is highly reasonable to suppose that an instrument of such 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, is not found in his usual repositories or else where he resides, it is in a high degree of probable that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others, which raises a higher degree of probability to the contrary."*

41. It is accepted on behalf of the applicant that there is a conflict in the evidence as to the deceased's access to the morning post and it is acknowledged to be highly unlikely that the court could decide in favour of either party on that issue. However, it is said, a resolution of that issue is not essential to the overall determination of the matter. Counsel for the applicant, citing *Thierman Estate v. Thurman* 2013 BCSC 503, submits that the presumption of revocation does not apply where the will cannot be traced into the possession of the testator. I accept that. He submits that the absence of the original will and possession by the testator are "*dual, conjunctive requirements*" which must be demonstrated before the presumption arises. I accept that. Where I respectfully part company with counsel is in his submission that the onus of demonstrating possession by the deceased is on the party setting up the presumption of destruction with the intention to revoke.

42. In *In Re the Goods of Coster* Kenny J. citing Parke B. in *Welch v. Phillips* was clear that the onus of proof of circumstances sufficient to rebut the presumption of revocation is undoubtedly on the party propounding the will, but I do not understand that to mean that the onus of proof is on the respondent to establish what happened to a lost will. In *Thierman Estate v. Thurman* 2013 BCSC 503 Ehrcke J. applied the principles laid down by the Supreme Court of British Columbia in *Haider v. Kalugin* 2008 BCSC 930, which approved what had been said by Davis J. in the Supreme Court of Canada *Sigurdson v. Sigurdson* [1935] 2 D.L.R. 445:-

> *"It needs very clear and convincing evidence to establish what is alleged to be a lost will. … The person propounding such a will has a burden of proof that persists throughout the whole trial to satisfy the court at its conclusion that the will is in fact lost and was not destroyed by the testator with the intention of putting an end to it. Every case of course turns upon its own facts but the principles respecting the well-settled presumption against the will must be applied to the facts."*

43. The authorities are all clear that the presumption of revocation is an evidential presumption, that is to say a presumption of fact. If it might be said that the tracing of the will into the hands of the testator raises the bar for the applicant, the onus is always on the applicant to establish what became of the will. This is illustrated most Monday mornings in the probate list by applications to admit copies of wills which have been lost by solicitors, the object of which is to show that the original did not come into the possession of the deceased.

44. *In Re the Goods of Coster*, as counsel points out, was a case in which the testatrix, having left her will with her solicitors after she executed it, called to the solicitors office about two years later, asked for the original, and took it away with her. *McDermott v. Kennedy* [2015] 3 I.R. 255, as counsel points out, was a case in which it was shown that the deceased had retained custody of her will after executing it. To the cases referenced by counsel I would add *Estate of Curtin, Deceased* [2015] IEHC 623 a case in which the will was a home-made will, retained by the deceased; *Thierman Estate v. Thurman* 2013 BCSC 503 in which the will, by arrangement between the testator and his lawyer, had been posted by the lawyer to the testator and put into (and later taken out of) a safety deposit box in a bank; and *Allan v. Morrison* [1900] A.C. 604 in which the will was kept by the testator in an iron safe in his dining room, to which he held the keys.

45. I have not been referred to a case, such as this might be said to be, where the suggestion is that the will, entrusted to a solicitor for safekeeping, was returned unsolicited and for all practical purposes without explanation. When I finally had time to settle down to consider my judgment this case I was inclined to wonder whether, if that was what happened, the presumption might arise at all. However, on reflection, I think that the circumstances are provided for by the observation of Cockburn C.J. in *Sugden v. Lord St. Leonards* (1876) 1 P.D. 154 (referred to by Kenny J. in *Coster* and quoted with approval by Baker J. in *McDermott v. Kennedy*) that the presumption will be more or less strong according to the character of the custody which the testator had over the will. Or, perhaps, looking at a case the other way around, it seems to me that it must be an important consideration in deciding whether a testator who willy nilly came into possession of his original will destroyed it *animo revocandi* that his last clear intention was to leave it with his solicitor for safekeeping and that he never later expressed any contrary intention.

Decision

46. The cornerstone of the applicant's case is that the onus is on the notice parties to show that it is more likely than not that the deceased came into possession of her original will, which, it is said, they have not. For the reasons given I am not satisfied that this is a correct proposition of law. While the presumption of revocation arises on the will being traced into the possession of the testator, the onus of proof is always on the party propounding a copy will to show that it was not destroyed by the testator with the intention of revoking it.

47. The letter of 18th January, 2018, it is said, was a serious error on the part of Lawlor Partners. I do not think that that can be gainsaid. It is said that the letter represents

evidence of such extraordinary incompetence that it is to be doubted that its contents should be accepted at face value at all. I am not prepared to go quite that far but it does appear to me that the letter has not been sufficiently explained. The copy letter was first said to be a record which shows that the original will was sent to the deceased at her home *"in or about January, 2018".* Later the copy letter was said to be a record that the will was sent to the deceased "*further to her request for her Will",* which plainly it was not. Finally it was said to be "*correspondence from this office [which] shows that the original will was posted by ordinary pre-paid post to the deceased at her home under cover of a letter dated 18th January, 2018."* I am not satisfied that it is. It is a record that someone typed a letter of that date but inasmuch as the writing and sending of such a letter would have been inconsistent with the request which apparently prompted it as well as with the protocols in the solicitor's office I would not be confident to assume or infer that it was posted. That said, I do not believe that it would be fair to the notice parties to find that it was not sent without affording them the opportunity which they seek to cross-examine Mr. Lawlor.

48. I was earlier rather critical of Mr. Lawlor's evidence as to his practices and protocols, his records, and his engagement – or perhaps I should say his failure to fully engage beyond pointing to the copy letter – with how or by whom the letter of 18th January, 2018 was or might have been posted, and in any meaningful way with the question of what searches were later carried out and by whom. I think the same may be said, although to a much lesser extent, of Robert's evidence of his search of *"Lyttleton*" after he was told that Mr. Lawlor did not have the will. Robert, as I have said, has deposed that he *"searched the house high and low"* for the will. If it might be confidently expected that Robert would have conducted a thorough search for the will on which his expectation to inherit the family home might have depended, nevertheless he did not say where he looked or where, if anywhere, he thought that his mother might have put the will if it had arrived in the post. Robert's evidence was that even before his father died he had been dealing with all administrative correspondence. He did not say what private papers his mother kept, or where, or how they were stored.

49. All the appearances are that the last will of Mary Eastwood dated 29th November, 2016 has been lost or destroyed but it seems to me that there is a contest of fact as to how and when it was either lost or destroyed. In the first place, although it was on his behalf that the affidavit of Mr. Lawlor was filed, the applicant's case is that it is not reliable. I have come to the conclusion that there is an issue to be tried as to whether what Mr. Lawlor has suggested happened to the will in fact happened: not, as the applicant contends, because it was or would have been at variance with good practice, but because the evidence is vague. Secondly, I have come to the conclusion that there is a contest of fact as to how and by whom the post arriving at "*Lyttleton"* was dealt with in January, 2018. If that factual issue is resolved in favour of the applicant and against the notice parties, the original will might not be traced into the possession of the deceased so that the presumption of revocation would not arise. However, if that factual issue were to be resolved the other way, the presumption of revocation would arise. I accept that there is considerable force in the submission that the uncontested fact that the deceased never

sought or said that she was seeking her original will must on any view of the case be of very considerable significance, but the first step is to find the facts.

50. For these reasons I have concluded that this is not an application which can be decided by reference to those aspects of the evidence that are not seriously in dispute and that it will be necessary to hear oral evidence.

51. The evidence on this application skirted around and the arguments of counsel pointedly did not address the portended challenge to the testamentary capacity of the deceased. When, at the conclusion of the argument, I asked counsel whether the possibility of such a challenge was something which I should take into account in deciding this application or put entirely from my mind, counsel were agreed that I should put it from my mind: which I did. It occurs to me, however, that it may be a matter to which counsel should direct their minds when considering how all issues between the parties as to the administration of this estate should be most efficiently and economically dealt with.

52. I will list the case for mention in two weeks' time for submissions as to what directions are required for the further consideration of the application.