

# THE HIGH COURT

## PROBATE

[2022] IEHC 604

[Record No. 2022/PO 2985]

**IN THE MATTER OF THE ESTATE OF JOHN COUGHLAN, DECEASED**

**AND**

**IN THE MATTER OF SECTION 26(2) OF THE SUCCESSION ACT, 1965**

**AND**

**IN THE MATTER OF AN APPLICATION BY THOMAS COUGHLAN AND**

**PATRICK O'MALLEY**

**JUDGMENT of Ms. Justice Butler delivered on the 3<sup>rd</sup> day of November 2022**

### **Introduction**

1. This judgment ostensibly deals with an application under s. 26(2) of the Succession Act 1965 to revoke, cancel and recall the grant of probate issued by the District Probate Registry in Limerick on 1 September 2021 in respect of a will made by the deceased on 25 September 2012 (*“the 2012 will”*). The real issue concerns the application of the doctrine of dependent relative revocation in circumstances where the deceased made a second will on 21 July 2015 (*“the 2015 will”*), formally revoking the 2012 will. That 2015 will was subsequently destroyed by the deceased in November 2015 in the mistaken belief that the revocation of the 2015 will would revive the 2012 will. The deceased held that belief because that was the legal advice given to him by his solicitor.

2. This application is made by the deceased’s executors who are common to both wills. They applied to the District Probate Registry for a grant of probate of the 2012 will on the basis of the same mistaken legal advice to the effect that it had been revived by the destruction of

the 2015 will. They now desire to administer the deceased's estate in accordance with a document that is actually his last will and testament and in accordance with law. The application is supported by H., a beneficiary under the 2015 will but not under the 2012 will.

3. The application is opposed by M., a beneficiary under both wills, but whose inheritance, under the 2015 will, is less than it would be under the 2012 will because of the addition of H. as a beneficiary. In fairness to M., who was a close friend of the deceased, his opposition is not entirely self-serving. He is also concerned that the effect of the executors' application, if successful, would result in the distribution of the deceased's estate in a manner directly contrary to the known intention of the deceased to exclude H. as a beneficiary under his will. It is not disputed by the applicants that the deceased's desire to exclude H. from his will was his principal intention when he attended his solicitor in November 2015.

4. In considering this issue, I propose to set out the relevant facts and the applicable statutory provisions before addressing the legal arguments raised by the parties.

### **Factual Background**

5. The deceased, an elderly man, who never married and had no children, died in February 2021. Whilst not a wealthy man, he left an estate valued at over €250,000. He was clearly not close to his immediate family and, over the course of the events described below, he went to the trouble of making sure that he would die testate rather than intestate and that his beneficiaries would not include members of his immediate family.

6. The deceased attended with his solicitor for the purpose of making a will which was executed in accordance with the requirements of the Succession Act 1965 on 25 September 2012. At this stage the deceased was already an elderly man and well into his 80s. That will appointed the applicants as executors and, after making a small bequest, it devised and bequeathed the residue of his estate to four named beneficiaries, including M. The deceased's

residuary estate was not simply divided between these beneficiaries, rather each was expressly gifted “*a one-quarter interest*”. The beneficiaries did not include members of the deceased’s immediate family (although two appear to have been his cousins) and all lived in the same county town as the deceased. It is reasonable to assume that all four were close friends of the deceased and people who were good to him in his declining years.

7. In 2015, the deceased wished to make changes to his will and attended again at his solicitor’s office for that purpose. The principal change made was the introduction of a fifth beneficiary, namely H., and consequently the bequeathing to each of the five beneficiaries of “*a one-fifth interest*” in his residuary estate. This will was executed by the deceased on 21 July 2015. The opening clause of this will recites that the deceased was making this as his last will and testament and continues “*...hereby revoking all former wills and other testamentary dispositions heretofore made by me*”. There is no doubt but that the legal – and intended - effect of the execution of the 2015 will was to revoke the 2012 will.

8. Shortly after making the 2015 will, on 16 November 2015 the deceased returned to his solicitor. It seems that the deceased had fallen out with H. and wished to remove her as a beneficiary under his will. The reasons for this falling out are irrelevant. Freedom of testation means that, subject to statutory exceptions provided for in the Succession Act, a testator can choose to whom he wishes to leave his estate and is not obliged to justify that choice. As it happens the deceased’s reasons are briefly recorded in a file memo prepared by his solicitor on that day. Although the memo does not expressly record the deceased saying that he wished to remove H. as a beneficiary from his will, when the entire of the document is read, it is clear that this was his intention. The second part of the memo records the fact that the deceased had fallen out with H. and gives a very general reason for that falling out. The memo then continues:-

*“I then reviewed my file and noted the previous will he had made in 2012 had the intended four beneficiaries named. In effect it was therefore only necessary for him to tear up the will in 2015. He read through the will of September 25<sup>th</sup> 2012 and he confirmed that was correct and they were his intentions. He then proceeded to tear up the will of July 21<sup>st</sup>, 2015.*

*He asked me for two copies of his will of September 2012 which I gave him.”*

**9.** The solicitor, who has sworn a number of affidavits in this matter, expressly avers that when the deceased attended her in November 2015 he no longer wished H. to be a beneficiary and that his intention was that only the beneficiaries named in the 2012 will should have a share in his estate. Consequently, she advised him to destroy the 2015 will which he did by tearing it up in her presence. She then continues:-

*“My understanding at the time, and my advice to him as he attended then in my office, was that this action of destruction of the 2015 will as being his last will and testament had the combined effect of revoking it and of confirming/reviving the 2012 will.”*

**10.** Notwithstanding these events, subsequent to the death of the deceased the solicitor furnished the executors with a copy of the 2015 will on the basis that it was his last will and testament. Some five months later, she realised that the deceased had destroyed the 2015 will as a result of which she informed the executors that the 2015 will had been revoked and that the estate should be administered on the basis of the 2012 will. An application for grant of probate of the 2012 will was prepared by her and filed on behalf of the executors in the District Probate Registry on 23 June 2021.

**11.** However, in the intervening period, the solicitor had written to all of the beneficiaries under the 2015 will, including H., in April of 2021. She informed each of them that they were

beneficiaries of one-fifth of the residue of the deceased's estate, although the exact value of the estate was unascertained at that time. Subsequently, in June 2021, the solicitor contacted H. again to advise her that she was not in fact a beneficiary as the 2015 will had been revoked by the deceased. Very shortly after the application for a grant of probate had been filed in the District Probate Registry, the solicitor received correspondence on 30 June 2021 from the solicitors acting on behalf of H. In that letter, the solicitor's attention was drawn to the doctrine of dependent relative revocation and the provisions of s. 87 of the Succession Act. H.'s solicitor suggested, very politely but undoubtedly correctly, that the earlier will could only be revived by the re-execution of it or by a duly executed codicil. This prompted the deceased's solicitor to seek advice from counsel.

**12.** Before that advice could be received or implemented, a grant of probate to the deceased's estate based on the 2012 will issued from the District Probate Registry on 1 September 2021. Consequently, as a result of counsel's advice, the executors were advised of a necessity to make this application to court. The application seeks two things. The first is an order under s. 26(2) revoking, cancelling and recalling the grant of probate, dated 1 September 2021. The second is an order admitting a photocopy of the 2015 will to probate, the original, of course, having been destroyed by the deceased. No particular issue was raised by any of the parties as to the admissibility of a photocopy of the 2015 will should the court be satisfied that the application of the doctrine of dependent relative revocation means that the 2015 will should be admitted to probate.

### **Relevant Legislative Provisions**

**13.** None of the parties to this application dispute the fact that the legal advice given by the solicitor to the deceased in November 2015 and on foot of which he acted, was incorrect. The error was undoubtedly a genuine one by the solicitor who continued to act on this mistaken

view of the law in filing an application for grant of probate of the 2012 will. The reason the advice was incorrect is readily apparent from a brief consideration of the relevant statutory provisions.

**14.** The formal requirements for the making of a valid will are contained in s. 78 of the Succession Act 1965 which I do not propose to set out here as its terms are well known and well understood. Put simply, to be valid a will must be in writing, signed at the end by the testator and the testator's signature witnessed by two witnesses who must also sign the document. Section 3(1) of the 1965 Act defines a will as including a codicil. Consequently, to be valid, a codicil must be executed in a similar manner to a will.

**15.** Section 85 governs the revocation of wills. Apart from the automatic revocation of a will on the subsequent marriage of the testator (unless the will was made in contemplation of such marriage, dealt with in s. 85(1)), s. 85(2) sets out the formalities required for the valid revocation of a subsisting will. It provides as follows:-

*“Subject to subsection (1), no will, or any part thereof, shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in a manner in which a will is required to be executed, or by the burning, tearing or destruction of it by the testator, or by some person in his presence and by his direction with the intention of revoking it.”*

The 2015 will contained a revocation clause as a result of which the 2012 will was revoked. The issue raised by M. in his opposition to this application is whether the destruction of the 2015 will had the legal effect of revoking it in its entirety. Two elements of this subsection are relied on by counsel for M. in making this argument. The first is the acknowledgement that a will can be partially as well as completely revoked and the second is the requirement that the testator intend to revoke the will when carrying out the burning, tearing or destruction of it. Obviously, the accidental destruction of a testamentary document, even by the testator, will not

constitute the revocation of that will or codicil. What is less clear is when the deliberate destruction of the entire of such a document will constitute the partial but not the total revocation of that will or codicil.

**16.** Section 87 then deals with what the deceased's solicitor was trying to achieve in this case, namely the revival of a previously revoked will. It provides in full:-

*“No will or any part thereof, which is in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil duly executed and showing an intention to revive it; and when any will or codicil which is partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown.”*

It is apparent from this provision that there are no circumstances in which a will which has been validly revoked will be automatically revived.

**17.** For a will to be revived, it must be re-executed in accordance with s. 78 or a codicil must be executed, again in accordance with s. 78, which clearly demonstrates an intention to revive the will in question. In essence, the same formalities are necessary in order to revive a will as are necessary to make a will in the first place. The solicitor's advice to the deceased that the revocation of the 2015 will would automatically revive the 2012 will was fundamentally incorrect. In order to revive the 2012 will, that will should have been re-executed or the deceased should have executed a codicil clearly stating his intention to revive it. Revocation of the 2015 will, in the absence of taking either of these steps, would *prima facie* create a situation where the deceased no longer had any valid will in existence at the time of his death and, consequently, would die intestate. It is in order to avoid this unintended intestacy that the doctrine of dependent relative revocation, if it applies in the circumstances, comes into play.

**18.** The other statutory provision relevant to this application, but not in dispute, is s. 26(2) of the 1965 Act, under which the High Court has power to “*revoke, cancel or recall any grant of probate*”. If it is shown that the 2015 will was not validly revoked (either in whole or in part), then it remains extant and probate should be granted of that will rather than the 2012 one. On the other hand, if the 2015 will was validly revoked and accepting that its revocation did not revive the 2012 will, then the appropriate step would be for the next-of-kin of the deceased to seek a grant of administration to his intestate estate. Either way, it is clear that probate should not have been applied for nor granted in respect of the 2012 will.

### **Dependent Relative Revocation**

**19.** The doctrine of dependent relative revocation which is relied on by the executors in making this application, allows a court to hold that the *prima facie* valid revocation of a will was not, by reason of the particular circumstances, actually effective in revoking the will. The concept is in many ways counter-intuitive and its application has produced some surprising results. It is perhaps most pithily explained by Eamon Mongey (*Probate Practice in a Nutshell*, 3<sup>rd</sup> Ed., 2006) as follows:-

*“This awkward phrase simply means that where it can be established that the revocation of a will was conditional on the happening of an event which did not occur, or upon some belief which turned out to be wrong, there is no revocation.”*

**20.** The doctrine of dependant relative revocation is of considerable antiquity. One of the earlier cases cited in the more recent cases opened to me dates back to 1716 (*Onions v. Tyrer* 23 ER 1085; 1 P. Wms. 343). Although the circumstances in which the doctrine can be applied vary considerably, for the most part it operates to ensure that the revocation of a will in the mistaken belief that the disposal of the testator’s estate would be governed by another will which was or would be in place, will not be effective so as to render the testator intestate. Many



of the cases feature either the mistaken belief, as here, that an earlier will would replace the one being revoked or, alternatively, the intention to execute another will which, for some reason outside of the testator's control or understanding, is not given effect to. Clearly the simple failure of a testator to make another will in these circumstances will not suffice to have an otherwise legally valid revocation deemed ineffective. There must be some element of mistaken belief or other misunderstanding which frustrates the testator's intention in this regard. Whilst the analysis has tended to be on the conditional nature of the revocation, it is perhaps legally more exact to focus on the intention of the testator in revoking the will since that intention is central to s.85 of the 1965 Act.

**21.** The applicants relied in particular on two twentieth century Irish cases applying the doctrine, namely the judgment of Kenny J. in *In the Goods of Irvine* [1919] 2 IR 485 and that of Gannon J. in *In Re Hogan* [1980] ILRM 24. The testator in *Irvine* made a will in 1913 and then in 1914 made a subsequent will on a pre-printed form which contained a standard revocation clause. It transpired that although the 1914 document had ostensibly been executed in accordance with the statutory requirements, the testator had filled in the blanks in the pre-printed document appointing an executor and making various bequests after the printed form had been executed by both himself and the witnesses. It was agreed that these dispositions of the testator's property were not operative, but the executor sought to have so much of the 1914 will as revoked all earlier wills admitted to probate. If the revocation clause in the 1914 will had been admitted to probate in circumstances where all of the testamentary gifts in that will were inoperative, the effect would have been to create an intestacy. Kenny J. refused the application, finding as a fact that the purported revocation was merely the first act in a process whereby the testator intended to make a new will and that it was conditional on the new will being made. As no new will had been validly made, the doctrine of dependent relative revocation applied and the revocation did not take effect.

**22.** In reaching this conclusion, Kenny J. explained the doctrine as follows:-

*“If the act of revocation, whether by another will duly executed or by the destruction of the existing will, be without reference to any other act or event, the revocation may be an absolute one; but if the act be so connected with some other act or event that its efficacy is meant to be dependent on that other act or event, it will fail as a revocation. If that other act be efficacious, the revocation will operate; otherwise it will not. It is altogether a question of intention, and if, as part of the act of making a fresh will, there will be a revocation of a previous will, that revocation will be absolute provided the fresh will be made. On the other hand if the fresh will be not made, it would defeat the testator’s intention to hold the revocation to be absolute. It had no existence unless subject to a condition which is not fulfilled.”*

**23.** Although the present case involves the testator’s belief that revocation of the 2015 will would revive the earlier 2012 will rather than an intention that a new will would take the place of that revoked, the applicants argue that the situation is nonetheless analogous. Similar reliance is placed on *In Re Hogan* (above) which has closer factual parallels to this case. In *Hogan*, the testator executed a will in 1977 and a second will, containing a revocation clause, in 1979, both with the professional assistance of a solicitor. The evidence suggested that she had then deliberately burned the 1979 will. After her death, a copy of the 1977 will was found amongst her personal effects, but the 1979 will could not be located. An application was successfully made to admit a copy of the 1979 will to probate.

**24.** In addressing these issues, Gannon J. noted a significant difference between the terms and the scope of s. 85 and that of s. 87. In particular, revocation under s. 85 may take many different forms but is ultimately dependent on the intention of the testator, whereas revival under s. 87 is dependent on strict compliance with the formalities necessary to make a valid will. Gannon J. described s. 87 as “*significantly more restrictive*” in part because “*the only*

*evidence of intention must be in the document effecting the revival*". Having examined the facts in light of the evidence available, he then concluded as follows:-

*"As already mentioned no admissible evidence is available to support the revival of the 1977 will. Accordingly, although the intentions of the testatrix were threefold namely, first to revoke the 1979 Will, second to revive the 1977 Will and third not to die intestate, the second intention was incapable of being carried out in the manner chosen by the testatrix. The third intention can be given effect only if the first intention is not fulfilled."*

He accepted the argument made on behalf of the applicant that the testator's belief that the 1977 will would be revived was based on a mistaken assumption of fact and of law on her part and that *"because the revocation was conditional upon the truth of a fact which was in fact false there was no true intention to revoke the 1979 will"*. Crucially, Gannon J. did not regard it as part of the court's function to ascertain and give effect to the intentions of the testator in any more general sense. He stated:-

*"Accordingly, the function of the Court here is not to effect the intentions of the deceased as they might have appeared to be but to consider whether or not the formal acts undertaken by the deceased in purported conformity with the requirements of the Succession Act have been performed in the manner prescribed by statute."*

**25.** The testator's intention as regards revocation is nonetheless important because s. 85 makes the validity of a revocation dependent on the intention of the testator in performing an act capable of having that effect. The ultimate outcome of the case was the admission of the 1979 will to probate notwithstanding that its contents clearly no longer reflected the intentions of the testator at the time of her death. This was because, in the circumstances, she did not have the requisite intention to validly revoke the will under s.85. There was no question of admitting the 1977 will to probate despite the fact that this seems to have reflected the deceased's

intentions at the time of her death because those intentions were neither contained nor evidenced in a validly executed and extant testamentary document.

26. The decision in *In Re Hogan* has attracted some criticism not least from Prof. James Brady in *Succession Law in Ireland* (1989) where, in considering the extent to which the principle of dependent relative revocation can be said to depend on the intention of the testator, he stated at para. 4.11.6:-

*“Decisions such as that in the Goods of Hogan suggest that it has acquired an independent self-validating existence of its own, which has little to do with the intention of the testator. It is extremely unlikely that Mrs. Hogan gave any thought to the possibility of the 1977 will being invalid and, that being so, the assumption that there was a conditional element in her revocation of the 1979 will was pure fiction. Insofar as the intention of the testatrix could be ascertained, she did not wish the 1979 will to dispose of her property on death. The other certain intention that could be attributed to her was that she did not wish to die intestate, and the court clearly attached more weight to that consideration.”*

27. Fortunately, the concern expressed by Prof. Brady that the application of the doctrine depends on ascribing a fictitious conditional intention to a testator regarding matters which he is unlikely to have considered at all, does not arise in this case. The evidence in this case, most particularly the solicitor’s memorandum, establishes that the deceased took the action he did precisely because he had been told, and presumably believed, that if he destroyed the 2015 will, the legal effect would be to revive the 2012 will. In other words, he destroyed the 2015 will intending to revoke it because he believed that in doing so he was reviving the 2012 will and, to that extent, his intention was conditional on the revival of the 2012 will.

### **Arguments of the Parties**

**28.** Based on these principles, the applicants argue that the deceased did not intend to revoke the 2015 will *simpliciter* but only intended to do so in the belief that doing so would revive the 2012 will. The effectiveness of this act of revocation was conditional on a legal assumption which, unknown to the testator, was false. Thus, as the testator lacked the intention necessary to revoke the 2015 will, the doctrine of dependant relative revocation should be applied and the 2015 will should be admitted to probate in copy form. Although the testator no longer wished H. to inherit a share in his estate and the fact that treating the revocation of the 2015 will as ineffectual will result in her inheriting the share he did not wish her to have, this is largely irrelevant as the court is looking at the validity of the steps taken under the provisions of the Succession Act and not seeking to give effect generally to the intentions of the testator. This is obviously the least attractive element of the applicants' argument. Giving effect to the 2015 will allows H. to inherit a gift that by November 2015 the deceased clearly no longer wished her to have.

**29.** Counsel on behalf of M. made a powerful argument against the proposition that the 2015 will, in its entirety, should be admitted to probate. He did not argue against the applicability of the doctrine of dependent relative revocation *per se*, but shifted the analysis one step further back to focus on the intention of the deceased when he attended his solicitor in November 2015 rather than his intention at the point where he destroyed the 2015 will. At that stage, it is argued, he did not wish to revoke his will, he simply wished to alter it by the exclusion of the gift to H. As counsel put it, the deceased wished to effect a partial revocation of the 2015 will to this extent only. Counsel characterises the intention to revoke the entire of the 2015 will as being that of the solicitor but not of the deceased.

**30.** Looking at the statutory provisions, counsel argued that, in expressly envisaging partial revocation, s. 85(2) admits of the possibility that a will, which is deliberately and completely

destroyed by a testator, may not actually be revoked in its entirety. Section 85(2) certainly envisages that a will may be revoked in whole or in part and it does not thereafter distinguish between total and partial revocation by reference to the manner in which that revocation is carried out. Thus, it is theoretically correct to say that the total destruction of a will might affect only a partial revocation of its contents. Nonetheless, it is difficult to envisage circumstances – save perhaps those contended for here – where a total destruction of a will would result in only partial revocation. In the case of doubt or uncertainty, counsel urges the court to resolve the matter in accordance with the deceased's intention and contends that, in this case, there is a contemporaneous written record of the deceased's precise intention contained in the solicitor's memorandum.

**Analysis:**

**31.** In looking at these arguments, I think it is necessary to maintain the distinction drawn by Gannon J. in *In Re Hogan* between the testator's intention as regards revocation and the testator's more general testamentary intentions. The court must examine the evidence to see whether the deceased's action in destroying his 2015 will was accompanied by the intention necessary to revoke it. The court cannot, however, reach a conclusion on whether the testator intended to revoke his will by analysing whether that revocation would give effect to what are contended to be his general testamentary intentions, even where there is strong evidence of those intentions. This is because the scheme of the Succession Act is dependent on the testamentary intentions of a testator being ascertained only from properly executed and valid wills and codicils and thereafter the law makes provision for the distribution of a deceased's estate in the absence of such a document.

**32.** It is well established that a testator's testamentary intentions are to be deduced from his will and not from the surrounding circumstances nor any statements he may have made.

Extrinsic evidence is only admissible to show the intention of the testator where it is necessary to assist in the construction of or explain any contradiction in a will (see s. 90 and *Rowe v. Law* [1978] IR 55). Obviously, as revocation can be achieved through methods which do not involve the making of a written record, there is far greater latitude for the court to accept extrinsic evidence in order to establish a testator's intention – and indeed of the testator's actions in the case of destruction of a will or the directing of a third party to destroy it - for the purposes of s. 85. Nonetheless it remains important that evidence admitted for that purpose should not then be used in a manner which would be contrary to s. 90.

**33.** Although the solicitor's memorandum does not expressly state that it was the testator's intention to remove H. from his will, the solicitor in her affidavit has accepted that this was in fact the case. That being so, there were a number of routes available through which this objective could have been achieved. The testator could have been advised to execute an entirely new will in which no gift would be left to H. This would not have been an onerous task since the 2012 will which reflected the testator's intentions was available as a precedent. He could have been advised to execute a codicil to his 2015 will removing the gift to H. and redistributing that portion of his estate between the other beneficiaries. Alternatively, he could have revoked the 2015 will and formally revived the 2012 will either through its re-execution or through the execution of a formal codicil to this effect. Unfortunately, the one route that was not open to the deceased was that which his solicitor advised him to adopt, namely the revocation by destruction of the 2015 will in the belief that the 2012 will would be automatically revived.

**34.** There is merit in counsel for M.'s argument to the extent that the deceased, when he initially attended at his solicitor's office in November 2015, did not specifically intend to revoke his 2015 will. His intentions were limited to the removal of H. as a beneficiary. However, whilst in his solicitor's office, he received advice from her to the effect that this objective could be achieved by the revocation, in its entirety, of his 2015 will because, she

believed, that would have the legal effect of reviving his 2012 will which was in terms acceptable to the testator. Thus, it seems to me that the only reasonable inference to be drawn is that, at the time when the testator destroyed his 2015 will, he did so not with the limited intention of removing H. as a beneficiary but with the intention of revoking the entire will in the belief that that would then revive the 2012 will. Although not stated in terms, I think this is clear from the solicitor's memorandum and, indeed, is expressly stated by her at para. 4 of her affidavit.

**35.** I do not think that this intention to revoke the 2015 will is one which can be exclusively ascribed to the solicitor nor is the court being asked to impute the solicitor's intention to be deceased. Rather, the evidence suggests that the deceased, having been advised by his solicitor that the destruction and revocation of the 2015 will would revive the 2012 will, carried out that destruction with the intention that the 2015 will in its entirety would be revoked. Partial revocation of the 2015 will would not have achieved the outcome which the solicitor advised the deceased would be achieved through the revocation of that will in its entirety. Consequently, although I found counsel's argument on this point to be persuasive, I ultimately do not believe it to be correct.

**36.** My conclusions in this regard are fortified by a further difficulty which, in fairness, was raised and addressed by counsel for M. If the destruction of the 2015 will were to be treated as only effective so as to revoke the gift to H., what then is to be done with the one-fifth share of the residue expressly conferred on H. as a gift under the 2015 will? Because the residue under the 2015 will is divided between the intended beneficiaries so that each inherits a defined one-fifth interest, the removal of H. would not have the effect of simply altering the one-fifth interest gifted to each of the other four beneficiaries into a one-quarter share. An issue immediately arises as to whether H.'s share would fall into intestacy or, alternatively, into the residue of the deceased's estate.



**37.** The actions of the deceased in attending at his solicitor's office three times over the course of three years would strongly suggest that he did not intend to die intestate as regards any part of his estate. However, in circumstances where the 2015 will appoints residuary legatees and devisees and disposes of the deceased's residual estate, I do not think that a partial revocation so as to exclude the gift to H. would necessarily create a partial intestacy. Therefore, in all of the circumstances I don't think that the partial revocation of the 2015 will would create either an insuperable difficulty or a partial intestacy. Nonetheless thinking through this issue demonstrates the difficulties surrounding the notion that a partial revocation could be achieved by the total destruction of a will.

**38.** On this issue, I think I ultimately have to agree with the closing submission made on behalf of the applicants which is that the testator's initial intention to remove H. from his will had, by the time he destroyed the 2015 will, changed to an intention to revoke the entire of the 2015 will because he believed, albeit mistakenly, that this would revive the earlier will. In all of the circumstances, I think that a construction of these events which accepted that the deceased carried out a total destruction of his will but intended only a partial revocation of it does not accord with the evidence that is available to the court.

**39.** I do accept the argument made on behalf of M., that this outcome is unsatisfactory in many ways, not least because H. will now obtain a gift under the deceased's 2015 will which is clearly contrary to the deceased's intentions. However, the function of the court is not to ascertain the deceased's testamentary intentions in a general sense. Those intentions can only be ascertained from and given effect to in accordance with a valid testamentary disposition in the form prescribed by the Succession Act. Insofar as the gift to H. will necessarily reduce the pool of assets available to distribute to the other four beneficiaries, counsel for the applicants has quite fairly acknowledged that the implications of this can be addressed in other

proceedings and M. will have an entitlement to seek redress in respect of the financial loss which he has suffered as a result of the erroneous advice given to the testator.

### **Conclusions**

**40.** I am satisfied that the evidence before the court enables me to draw the following conclusions. Firstly, the deceased attended at his solicitor's office on three occasions between 2012 and 2015 in connection with his will and made two wills over the same period. He clearly did not intend to die intestate. The court is not concerned with the reasons for nor the state of relations between the deceased and his immediate family. Unless members of the deceased's family have a statutory right to inherit from his estate or to make an application to court in that regard, the deceased is perfectly entitled to make a will on whatever terms he wishes. The deceased, in this case, clearly wished to die testate and to divide his estate between the persons named in his will. Secondly, while the deceased's principal objective in attending at his solicitors in November 2015 was to remove the gift to H. from his will, based on the advice he was given, he destroyed his 2015 will with the intention of revoking it in the belief that this would revive the 2012 will. I am satisfied that, at the time he destroyed the 2015 will, the deceased intended to revoke that will in its entirety and not simply the gift to H. Thirdly, the legal advice which the deceased had received was incorrect as the revocation of the 2015 will did not have the legal effect of reviving the 2012 will. Fourthly, because the deceased's intention to revoke the 2015 will was conditional on his belief that doing so would revive the 2012 will, the purported revocation of the 2015 will was not legally valid.

**41.** The net effect of these conclusions is that the 2015 will remains extant and should be admitted to probate. As the original of that will was destroyed by the deceased, I will accede to the applicant's application that a photocopy of that will be admitted to probate. The photocopy is one maintained in the solicitor's office where the original will was prepared and

no issue has been raised to suggest that it is not a true and accurate copy of the original. As this is not a case of a lost will, it is unnecessary, and in any event would be impossible, for the applicants to establish that the will was in existence at a time of the deceased's death or to rebut the presumption that the deceased had destroyed it. The evidence establishes that the will was destroyed by the deceased and, therefore, not in existence at the date of his death but the application of the principle of dependent relative revocation means that that act of destruction did not effect a valid revocation of the will. Therefore, I will also make an order admitting the 2015 will to probate in terms of the photocopy that is before the court.

**42.** In order for that to occur it is also necessary for me to make an order under s.26(2) revoking, recalling and cancelling the grant of probate which issued in respect of the 2012 will from the District Probate Office in Limerick on 1 September 2021.

**43.** Finally, I will listen to any application the parties may have in relation to the costs of this application. However, it may assist the parties if I indicate my preliminary views in this regard. This is an application which had to be made because of errors in the legal advice given by the solicitor to the deceased and, initially, to the applicants. This resulted in probate being granted in respect of the 2012 will, which grant could only be cancelled by court order. Thus, this application had to be made and M., as a beneficiary under both wills, was entitled to be put on notice of the application and to appear. Although M. was ultimately not successful in the argument made regarding partial revocation, I think this was a reasonable argument for him to have made particularly since the result he sought to achieve would have accorded with the instructions that the deceased gave to his solicitor as regards the distribution of his estate. I would be reluctant to burden the deceased's estate with the costs which have been incurred. I think the applicants would have to have strong grounds to persuade me either that M. should not recover his costs or that those costs should be paid from the estate.