

OUTER HOUSE, COURT OF SESSION

[2007] CSOH 58

OPINION OF LADY DORRIAN

in the cause

ARLENE GREENAN

Pursuer;

A417/04

against

AMANDA COURTNEY AND OTHERS

Defenders:

Pursuer: Sandison; Morton Fraser

Defenders: Kinroy, Q.C., Doyle & Co

23 March 2007

Background

[1] In this action the pursuer seeks declarator that the will of the late Richard Greenan, dated 20 March 1989, was impliedly revoked in or around July 1995 by operation of the *condition si testator sine liberis decesserit* and that he died intestate.

[2] The pursuer is the widow of Richard Christopher Inglis Greenan whom she married on 31 March 1995. She brings this action as guardian of their two children, Caitlin Greenan, born 21 July 1995 and Daniel Greenan, born 7 December 1996. Richard Greenan died on 9 April 2003. He had previously been married to the first named defender, whom he married on 20 July 1984. They were divorced on 17 December 1987 but by that time had reconciled and had resumed cohabitation. The second defender, Courtney Greenan ("Courtney") was born on 21 April 1989 during this period of reconciliation. Mr Greenan and the first named defender separated at the end of 1989 or at the beginning of 1990. By the time of the proof Courtney Greenan had withdrawn from the action, being content that decree should be granted. A comparison of how the estate would be divided according to the will and on intestacy can be seen in 6/65 and 6/66 of process.

[3] The will was executed about a month before the birth of Courtney. It made no provision for children of Mr Greenan born other than to the first named defender.

Pleadings

[4] It is averred for the pursuer that the will was impliedly revoked by operation of the *condition sine testator sine liberis decesserit* following Caitlin's birth in July 1995. The defender alleges that Mr Greenan intended that the will should continue in effect and avers that, following the birth of his children with the pursuer, he was advised, by his solicitors, Messrs Snell & Co, to make a new will but declined to do so. It is further averred that in December 1996, after Daniel's birth, Mr Greenan had a telephone conversation with the defender in which he advised that he could not afford to pay maintenance but that if anything happened to him the defender was to bear in mind where the will was. It is also averred that Mr Greenan made separate provision for the pursuer by taking out a number of insurance policies and nominating these for her benefit.

The defender makes other averments about the alleged closeness of the relationship between herself and Mr Greenan right up to his death.

[5] The defender had been ordained to lead at the proof. At the outset, and to prevent the need for making repeated objections, counsel for the pursuer indicated his position that the only averment which might be relevant to create an inference that the will had not been revoked is the sentence that following the birth of his children with the pursuer he had been advised by his lawyers to make a new will but declined to do so. He maintained that the remaining averments were not relevant to create such an inference and that proof of the averment about the December 1996 telephone call was inadmissible as a verbal declaration of testamentary intent. It was agreed that the evidence should be led subject to reservation of the argument on these issues.

Evidence

[6] The defender said that she married the deceased when he was 21 and she was 18, having met the week before her 16th birthday. They had a very good and close relationship and he got on very well with her family. However, problems arose between them as a result of his attitude to money and his drinking and they separated. In evidence she was unclear about the length of the separation, suggesting it was very short. However, during it she commenced divorce proceedings. Notwithstanding that, they reconciled and began living together again, initially in the former matrimonial home. By the time Courtney was born they had moved to a house which the deceased had purchased at 6 Greenend Gardens, having bought out the defender's share of the matrimonial home on divorce. The defender had purchased a flat at 60 Falcon Avenue, which she let out. The house at Greenend Gardens was close to that of the defender's parents. Domestic problems continued after Courtney's birth and they separated finally, in late 1989 or early 1990. She moved to live with her parents.

[7] The deceased told the defender that he had made a will, because of his off-shore job, told her roughly what was in it and where it was kept.

[8] The defender said that despite the final separation the relationship remained a close and friendly one. He continued to visit during the two years when she lived with her parents and when she moved to Falcon Avenue. The closeness of the relationship, the continuation of the visits and the deceased's feelings for the pursuer survived his meeting and forming a relationship with the pursuer in 1993; the birth of the defender's child Zachary, to another man, in 1994; the deceased's marriage to the pursuer in 1995; and the birth of Caitlin. During all this there was no change in the deceased's attitude and indeed in 1994, after the birth of Zachary, he had asked the defender for a reconciliation, and in 1995 asked her to remarry him, prior to marrying the pursuer in the March of that year. There were no set times to the visits and the defender thought the deceased was not telling the pursuer about them. She continued to see the deceased until Daniel's birth in 1996 and until he moved to Falkirk in 1997, after which she did not see him again although he continued to telephone about twice a year. He had last called in February 2003, shortly before his death.

[9] The deceased had not paid maintenance for Courtney despite being asked to do so from 1994 onwards. This upset the defender but did not affect either the relationship or the visits. She simply ceased to mention it and contacted the CSA. On an occasion in about November 1996 she met the deceased and the pursuer, who were with Caitlin and a friend of theirs, Gilmore MacPherson, in Safeways in Morningside. They did not speak. Shortly after this the deceased telephoned her to say hello, simply because they had not spoken in Safeways. This was shortly before the telephone call in November 1996 in which the will was allegedly mentioned. The defender was rather confused about whether there were two or three telephone calls. First she said there was a call after the Safeway incident, but before Daniel's birth, in which the deceased simply called to say hello. There was another call to tell her of Daniel's birth in which she raised the question of maintenance for Courtney and the will was mentioned. Then she said these were two separate calls. The deceased then called again and this time she asked for maintenance. It was during that call he said he could not afford to pay but that if anything happened to him she was to remember where the will was. She did not

tell anyone about this call as she did not see any significance in it. On this account there were three separate calls within a short period of time in late December 1996. In her affidavit she referred to one call.

[10] After Mr Greenan's death she contacted solicitors about the will. The pursuer's agent claimed that the will was revoked but she disputed that, being of the view that the deceased intended the will to stand. She consulted Doyle & Co, then sought a second opinion from Messrs Stuart & Stuart before returning to Doyle & Co.

[11] In cross-examination she said that the original source of her averment that the deceased had received legal advice to make a will following the birth of his children but had declined to do so, was not a letter dated 19 November 2003 sent to her by John Colquhoun of Stuart & Stuart, but a conversation with Fergus McMillan of that firm after he had spoken to Philippa Snell. He reported that Philippa Snell told him she had asked the deceased to make a will on a number of occasions and he had refused. Mr Colquhoun also spoke to Philippa Snell and was given the same information, which he communicated in his letter of 19 November 2003. That letter was not lodged as a production, but she thought it said that the deceased had been "pressurised" to make a will. Attention was drawn to the defender's affidavit, 7/2 of process, in which she described that letter as

"a five page letter in which he explained the law to me, gave me his opinion in relation to the law and highlighted the difficulties that I might have in invoking the terms of the existing will. In the course of that letter he recorded that both he and his assistant had spoken to Philippa Snell to obtain information from which they could give me advice. In his letter to me, Mr Colquhoun used an expression which I take to mean that Philippa Snell had told him that she had discussed making a new will with Richard Greenan but that he had declined to do so".

She had read over and agreed this affidavit before signing it. The expression referred to was "he had pressurised him to make a will and he had declined". He had also written that the deceased had declined to make a will. She added that Fergus McMillan had spoken to Philippa Snell and reported that Philippa Snell had asked the deceased on a number of occasions to make a will and he had refused.

[12] Further reference was made to her affidavit for the account she gave of the incident in Safeway's, Morningside. In that she says:

"We didn't speak, I found the encounter upsetting but after that Richard Greenan telephoned me, Daniel had just been born so it was probably in December 1996 that he telephoned me and he told me that he had had a boy. At that time Richard and I had a dispute about maintenance for Courtney, I told him that I found it all upsetting and his response was that he couldn't afford to pay any maintenance, but that if anything did happen to him that I was to bear in mind where his will was registered. I knew that he had a will which was retained by Lindsays, Solicitors".

She denied creating a disturbance. Fergus McMillan's file note of this meeting with her on 13 November 2003 which records:

"He had not seen Amanda or his son for about nine years. Originally, he was exercising contact, but this stopped when Arlene came along"

did not reflect what she said.

[13] She knew by November 2003 that anything the deceased had done to continue the will was important. She knew that the alleged telephone conversation would be important and agreed that there was no mention of that in the defences. It only came out when she had an in-depth conversation with her current solicitor and counsel. Until then "I didn't say what I knew. It depends what I was asked". She first said it to Mr Doyle in 2005, the first time it appeared in the case being July 2005.

[14] There was no mention in the pleadings until December 2006 of the deceased's request for reconciliation or his proposal of remarriage as she had not seen what relevance it had to the question of his making a will.

[15] When the deceased tried to contact her in February 2003 she tried to respond but got no answer. She agreed that, as recorded in Mr McMillan's file note of 13 November, she had told her parents that she did not want to speak to the deceased. This was because the CSA were trying to get arrears of support from him.

[16] In re-examination she said she told Mr McMillan that there had been no contact for nine years "off the top of her head". She probably did say that it stopped when Arlene came long, but that is not what she meant. Again, she just said it "off the top of her head". She was still shocked about the death.

[17] Evidence was given by the pursuer's former solicitor, Philippa Snell. She had a small chamber practice and this was her first case of the *conditio*. The pursuer had become a client in February 1993 when she purchased a house, the first contact with the deceased being when the pursuer wished to re-mortgage that house and required his consent. He became a client when they bought a house in Falkirk in 1997.

[18] Having been consulted by the pursuer and made aware that the deceased had previously been married and had a child, Miss Snell wrote directly to Amanda Courtney indicating her belief that the estate was an intestacy. There then followed correspondence with Doyle & Co, from which she understood that it was agreed that the estate would be dealt with on the basis that the will was capable of being revoked by the operation of the *conditio*. She continued to ingather the estate on that basis. However a letter dated 7 November 2003 from the defender personally indicated that she was not in agreement with that position. On 13 November 2003 Ms Snell was contacted by Mr McMillan of Stuart & Stuart, acting for the defender. She said, they "discussed what had happened to date and in general how the *conditio* would operate". Mr McMillan was unfamiliar with the *conditio* and intended to speak to one of his partners, Mr Colquhoun. Mr McMillan's file note, 7/7 of process, which records "she advised her clients previously that it would be sensible to make a will. She did not hear anything from them.", did not record what she said. Mr Colquhoun's file note of a subsequent conversation with her on 17 November, recording "Mrs Snell had in fact asked them both to make wills on more than one occasion, but like most people they had never got round to doing it", was also inaccurate. She had "never said I had previously advised them to make a will". She was anxious in the call to explain why she had proceeded as she had, that she was initially ignorant of the will and had later had the agreement of the defender's solicitors.

[19] In discussing the *conditio* with Mr McMillan she might have used as an example of where one would be barred from relying on it, a situation where repeated advice to make a will had been given. However, she did not say that she had in fact given such advice in this case. Where she buys a house for two clients who are not married, she generally advises that they should make a will but does not do so where, as here, the client are married and she had no knowledge of the prior marriage. She never "pressurised" people into making a will.

[20] She recognised that two separate solicitors, four days apart, must have misinterpreted what she said and had been staggered to discover this. Had she urged the deceased to make a will, she would not have treated the estate as an intestacy. In a letter to the Law Society, 7/1 of process, (dealing with a complaint from Courtney) she wrote:

"...we would request a copy of any statement that we have made indicating that we had 'indeed pressed our client to make a will' as stated in the short history produced by Mr Courtney Greenan. Our position on this matter is that we would have suggested to Mr and Mrs Greenan at the time when they purchased their matrimonial property that it would be wise to make a will, that our procedure as a firm would never be to 'press' a client to make a will, and we certainly did not do so in the case of the late Mr Richard Greenan".

That letter should have read that she "might have" suggested that they make a will. She could not rule out suggesting it but no more than that and certainly not repeatedly. At most it would have been a passing comment.

[21] She accepted that the confirmation 7/9 of process, signed by the pursuer on her advice, was incorrect in suggesting that there was no prior will, but she was proceeding with an agreement that the will was capable of being revoked.

[22] In cross-examination she said that she was the only person who had dealt with the transaction for the Greenans. She had never made any conscious statement that Mr Greenan should make a will and he had never declined to do so. She was then taken through her correspondence file and it became apparent that there was no mention anywhere of the suggestion that a will should be made. It appears that she met the deceased three times, twice as a client. They spoke infrequently on the telephone. She was astonished when she got affidavits suggesting that the assertion on record came from a letter of Mr Colquhoun following on his discussion with her.

[23] Mr Fergus McMillan, Solicitor, was consulted by the defender in November 2003. She was seeking a second opinion, not being happy with advice she had received from Doyle & Co. He spoke to Mrs Snell, who told him she had advised the deceased to make a will but did not hear from him. She explained that the *conditio* was applicable and that the rules of intestacy would apply. He believes that his file note recorded what Mrs Snell said. It would be odd to narrate what he had unless Mrs Snell had told him that. She told him she had advised them both to make a will. He was sure she did not say that there had been a refusal to make a will.

[24] His affidavit 7/4 of process stated:

"I have been asked to comment on Ms Courtney's assertion on record that 'Mr Greenan was advised, following the birth of his children with the pursuer, by his legal advisers Snell & Co., Solicitors, to make a new will but declined to do so. That part of the first defender's pleadings was, I understand, included because of the contents of the second paragraph on the fourth page of a letter written by my partner John Colquhoun to Ms Courtney on 19 November 2003'".

[25] He could not understand why he should be commenting on the defender's pleadings or the reason for them as he had not seen the pleadings. He had seen Mr Colquhoun's letter of 19 November, but could not explain the reference to it as justifying the defender's averment. He thought the words in that affidavit were suggested to him. He could say nothing about the timing of any advice which Mrs Snell might have given. She had not mentioned that. He was quite sure he did not say to the defender that he had information that the deceased had refused or declined to make a will. If the defender said otherwise, that was incorrect.

[26] Mr McMillan's partner, John Colquhoun, also spoke to Philippa Snell, establishing that steps had initially been taken to deal with the estate as an intestacy before the will became known. She referred to the fact that she had asked the pursuer and deceased to make wills, but they had not got round to doing so. He thought he had accurately recorded the conversation. The file note would have been dictated more or less contemporaneously. He did not think his memory would be at fault nor would he put in anything which he did not think to be true. It certainly records the sense of what was discussed. She must have said that they had been asked to make wills and that that had happened more than once. Most solicitors have clients to whom they suggest a will should be made, but who for various reasons do not proceed to do so.

[27] His letter of 19 November was intended to explain the *conditio* and what the defender would require to do to counter the rebuttable presumption. He would have advised that she could only succeed if the testator had chosen not to make a new will.

[28] As to his affidavit, which was in similar terms to Mr McMillan's, his recollection is that someone had told him what was in the Record and either he or Fergus McMillan had composed the affidavit. His "understanding" of the reason for the averments can only have come from Doyle & Co. The timing of any advice Mrs Snell might have given was not part of his discussion with her. He could not recall precisely the content of his letter of 19 November, but it did not say that the deceased had declined to make a will. The

sense of his conversation with Mrs Snell was that the deceased had not got round to making a will. He had no impression that she had pressed the deceased or that he had vigorously resisted or refused.

[29] The defender's mother gave evidence as to the closeness of the relationship between the deceased and the defender, and in general terms this was much in line with the defender's evidence of the development of the relationship and so on. After the final separation the defender returned to stay with her and the deceased visited. After he moved from the locality they "didn't see that much of him", although she thought they continued to see each other. She knew that the deceased had helped to do up Falcon Avenue, sanding floors and so on. This was about 1994. As for the other examples of contact, "I was really out of the picture then". The defender told her of meetings which had taken place but she did not know how often this had happened.

[30] Asked when the contact ended she said, "Presumably when all the wee jobs were done". Later she said, "Ricky just went on to get a new life for himself and things just drifted apart". The defender and the deceased remained friends. He phoned her from time to time and they saw each other occasionally after 1994.

[31] In cross-examination she agreed that after the defender moved out the only knowledge that she had about contact was second-hand "except a couple of times I saw him or I met him when I took Courtney swimming", of which she gave examples. The defender did tell her that he had asked her to re-marry him but she did not know when this was. Mrs Courtney had met the deceased a couple of times in Falcon Avenue, once when Zachary was a few months old.

[32] The defender's father gave similar evidence as to the nature of the relationship. When the defender returned to live with her parents the deceased still visited and they always looked happy together. He visited once a week or once a fortnight. When he moved to Yeaman Place he did not come to the house very often. At Falcon Avenue, the deceased did all the decoration. This was in about 1994, the year Zachary was born. He did not see the deceased after Zachary was about five or six months old. The defender would talk about contact having taken place. He said that they all came to the Courtney's house at Christmas 1994 and the deceased had a present for Zach, as well as for Courtney. He thought that the visits stopped when the deceased moved to Falkirk. At no time had the defender stopped the deceased from seeing Courtney. He agreed, in cross-examination, that after the deceased was involved with the pursuer, face to face contact diminished.

[33] Arlene Greenan gave evidence that she first became aware of the will in about May 2003. When she met the deceased she knew he had been married before and had a son. At first he had sporadic access to Courtney, but she was not aware of access from about May or June 1993, from about Courtney's 4th birthday. She did not have any suspicions that he was seeing them and not telling her and could see no reason why this should happen. It was possible but highly improbable or impossible. As far as she was aware the issue of a will was never mentioned in the contact between Snell & Co and the deceased. It was certainly never mentioned at any meeting or conversation in which she took part. The deceased had never indicated that a will had been discussed.

[34] As to the Safeway incident, the deceased was in one aisle with Caitlin in the trolley, and the pursuer and Gilmore Macpherson were in another aisle. Hearing raised voices, they went back and found the defender shouting at the deceased.

[35] By December 1994 she and the deceased were engaged and spent Christmas together at her flat. They had bumped into the defender's mother at the Commonwealth Pool early in 1993. She was aware of no other such incident. She would find it very surprising if the deceased had called the defender in December 1996.

[36] Gilmore Macpherson also recalled the Safeway incident. He and the pursuer were in one lane, the deceased and Caitlin in another, when they heard the defender's voice talking in a loud manner.

[37] He was not aware of the deceased keeping contact with the defender after his relationship with the pursuer had started and was confident that he would have been aware of that, even had the deceased wished to keep it from the pursuer. They were the closest of friends.

Submissions in law

General

[38] On the general principles which apply, counsel were in basic agreement. Reference was made by both to the treatment of the *conditio* in the *Stair Memorial Encyclopaedia* Vol.25, paragraphs 751-754, where it is pointed out that:

"The principle applies when a testator has made a will which contains no provision for children who may subsequently be born to the testator. If children are born after the date of execution of such a will, it is presumed that the testator did not desire his will to remain in effect in the altered circumstances; unless the presumption can be rebutted, the will is revoked and the result is usually intestacy."

The principle

".....is not one of automatic revocation of a will.... Instead it is a presumption for the benefit of the after-born child and based on equitable principles."

It

"....may be rebutted by clear evidence that the testator intended his will to be effective, notwithstanding the subsequent birth of a child."

At paragraph 753 it is observed that:

"The mere fact that a long time elapses between the birth of a child and a date of the testator's death does not overcome the presumption in favour of revocation".

It is further suggested that:

"....however long a testator may have had to consider whether he wished his will to remain in effect, the court will not accept this by itself as evidence rebutting the presumed intention to revoke."

[39] Counsel for the defender submitted that the passage of time is nevertheless significant as one of the circumstances to be taken into account. Counsel for the pursuer emphasised that the presumption could only be rebutted by "clear evidence".

Relevancy

[40] The arguments on relevancy anticipated at the outset by Mr Sandison became redundant since it was accepted by Mr Kinroy (a) that the averment that the deceased had "declined" to make a will had not been established; (b) that unless the evidence of the telephone call of November 1996 were accepted there would be insufficient in the case to rebut the presumption; and (c) that the evidence relating to the nature of the relationship between the defender and the deceased was only relevant to the extent that it lent context and credibility to the defender's account of the telephone call.

Admissibility

[41] A large part of the submissions therefore turned on the admissibility or otherwise of the evidence relating to that telephone call.

Defender's Counsel

[42] Counsel for the defender referred to *Elder's Trustees v Elder* (1894) 21 R.704 where Lord Adam, at p.708, noted that in an earlier case

"...the court held that whether revocation of a will by the subsequent birth of a child was to be implied or not, was entirely a question of circumstances. That being so, it appears to me that a birth of a child affords only a *presumptio juris* that the testator does not thereafter intend the will to remain valid.

The presumption will be of varying force according to the circumstances of the case, and may, like any other presumption of law, be rebutted by evidence of contrary intention. But if there be no evidence of any contrary intention, it appears to me that the presumption must prevail."

In the same case at p.709, Lord Kinnear said that the presumption "....may be rebutted by evidence of contrary intention" noting that:

"the force of the presumption may depend upon the circumstances of each particular case. I therefore agree with Lord Adam that the true principle is this, that the subsequent birth of the child raises the presumption of revocation,- that the inference which the law requires us to draw from that single fact may be rebutted by the inference of a contrary intention, which may be deduced, if so be, from other facts and circumstances; that in the absence of evidence to the contrary the presumption must hold."

In that case a proof was not required since no party was seeking to lead evidence to rebut the presumption. However, Lord Kinnear noted that:

"....if we were asked to allow a proof of fact tending to shew that the testator did not intend to revoke the will - tending to set aside the presumption of law, - then it would be quite right and necessary that all relevant facts on the other side should be admitted to probaton also."

Counsel submitted that evidence of the type which he sought to rely on was not excluded by anything in *Elder's Trustees*. Lord Kinnear's opinion appeared to envisage that if evidence to rebut the presumption were offered, evidence to fortify it would be equally admissible. A sentence in paragraph 833 of volume 25 of the *Stair Memorial Encyclopaedia*, that in cases of revocation of a will by the birth of a subsequent child, evidence of testamentary intention was admitted "in support of the will but not against it" was to that extent incomplete. The case of *Elder* was silent on the nature of the evidence which might be admitted. Counsel submitted that it would be competent, either to fortify or rebut the presumption, to lead evidence of the testator's intention, including both written and parole declarations.

[43] Counsel made this submission cognisant of the passage in *Green's Encyclopaedia*, Vol.4, para.756 which states that:

"If the testator has indicated clearly, either in his settlement or otherwise by writing, that his omission to provide for his children was intentional, the *conditio* will not apply. Thus, if after the birth of children who were born subsequent to the date of the settlement, it is established that he treated the deed as still effectual, or made a codicil or deed in relation to his disposition of his estate in the will, the presumption will be rebutted. Not only probative deeds but memoranda or letters under the hand of the testator may be referred to in order to ascertain his intention in this matter; but it is not competent to prove, by parole, declarations of the testator's intention, either as setting up the will or as fortifying the presumption against its subsistence."

Counsel noted that the statement that parole evidence of declarations was incompetent bears to be vouched by *McKie's Tutor v McKie* (1897) 24R 526 but that case did not vouch the proposition. The source for it was in fact *Rankine v Rankine's Trustees* (1904) 6F 581 in which a distinction was made between parole evidence and writing. Lord McLaren at p.583, discussing circumstances which might displace that presumption, said

"I sympathise very strongly with the observations by Lord Rutherford-Clark in the case of *Dobie*, that such circumstances, in order that they may have decisive weight, must be evidenced in writing, but not necessarily by a formal deed, because there might be memoranda or letters under the hand of the testator showing clearly that he had considered that the will made before marriage was operative, or that he had not considered it appropriate. In the present case we have no such evidence in writing, and parole evidence has been held in previous cases to be insufficient to displace the presumption of revocation."

Counsel submitted that these comments were *obiter* and that parole evidence may be sufficient to rebut the presumption. There was no justification for a distinction between parole evidence and writing.

[44] He proceeded to the comments of Lord Rutherford-Clark in *Dobie's Trustees v Pritchard* (1887) 15R.2, at p.4, where his Lordship greatly doubted whether the will could be set up

"...by the mere surviving of the maker without executing a subsequent deed ...I am much inclined to the opinion that the revocation was absolute, and that, even had the maker survived the birth of the child for a long time, the will could receive no effect. I doubt whether survivance, however long, would justify us in holding that a wish was implied that the will should receive effect."

[45] He then referred to *Smith's Trustees v Grant* (1897) 35 S.L.R.129, where Lord Stormonth-Darling observed that:

"...the case of *Elder's Trustees* and the comments of Lord McLaren upon it in the case of *McKie* are conclusive against the competency of any proof of declarations of intention either of setting up the will or as fortifying the presumption against its subsistence."

However, *Elder's Trustees* made no observations as to the nature of the evidence which would be competent so *Smith's Trustees* proceeded on a misreading of that case. Moreover, *Smith* makes no distinction between written declarations as opposed to parole declarations. Counsel then turned to the case of *McKie's Tutor v McKie* (1897) 24 R.526 in which Lord Adam at p.528 said that the presumption

"can only be rebutted by proof of facts and circumstances shewing that the intention of the testator was that the will should stand".

Counsel submitted that parole declarations would come within the definitions of "facts and circumstances showing that the intention of the testator was that the will should stand". Lord McLaren, at the same page, said:

"The case of *Elder* is important in this connection, as it settled this point, that the court will now allow proof of declaration of the deceased as either setting up the will or as fortifying the presumption against the subsistence of the will. For in that case the Lord Ordinary had allowed a proof, but the interlocutor was recalled by the Inner House, and judgment was given upon the known and undisputed facts appearing on the Record."

[46] Counsel submitted that these comments of Lord McLaren were not a correct analysis of *Elder's Trs*, which in turn also weakened the decision in *Smith* since it specifically proceeded on the basis of these comments.

[47] In *McKie* Lord McLaren goes on to say:

"....It rather appears to me that the presumption can only be displaced by something that amounts to a tangible and clear expression of the testator's wish that his will should subsist, e.g. by his executing a codicil to it, or by his taking measures of precaution shewing that he treated his will as a subsisting documentfor example, if the testator had taken great care to preserve his will, or had made some written reference to it after the lapse of years from the birth of a child."

[48] Counsel then referred to *Milligan's Judicial Factor v Milligan* 1910 S.C.58 at p.61 in which Lord Lowe suggested that had a will been retained by the testator and later given by him to his law agent for preservation after the birth of his child, that might have been a significant circumstances in favour of the will. Counsel suggested that the comments allegedly made by the deceased to the defender would come into the same category. Finally, counsel referred to the case of *Adamson's Trustees v Adamson's Investors* 1891 18 R.1133 at 1137 where the Lord Justice Clerk considered that trust in a surviving parent to provide for the children from the inheritance was a relevant factor.

Counsel for the pursuer

[49] Counsel for the pursuer agreed that *Elder's Trustees* decided nothing one way or another on the admissibility of declarations of intent. So far as *McKie* is concerned, counsel could not say that Lord McLaren was correct in his characterisation of the case of *Elder's Trustees* at p.528. However, great weight ought to be attached to the fact that this is an opinion of Lord McLaren, relating to wills and succession. He does not express surprise at the notion that oral expressions of intent would be inadmissible. Moreover, he goes on himself to refer to tangible and clear expressions of intention and the only examples he gives are those of writing or of actions. Furthermore, his opinion in *McKie* was concurred in by Lord Kinnear, who gave the lengthy opinion in *Elder*. Oral utterances would not be constitute examples of clear and tangible expressions of intent. Such a position is entirely consistent with the general law on revocation of wills. A will can only be made in writing and can only be revoked in writing or by acting in a way which is inconsistent with the intention that the will should continue, for example, by destroying it or by making substitutions in it. It is therefore natural to say that one is looking for writing or for actions inconsistent with the will in order to rebut the presumption.

[50] No oral declaration one way or the other was admissible. Counsel then referred to *Stewart Gordon's Trustees v Stuart Gordon* 1899 1F.1005, one of the few cases in which the presumption has been successfully challenged. In that action, however, there was both action and writing because the testator, in the full knowledge of her pregnancy and in contemplation of the possibility of her death, recognised and adopted a pre-existing will as the settlement which was to regulate her succession. This was therefore an expression of intent that was both clear and tangible. Counsel relied on the passages quoted above from *Rankine v Rankine's Trustees* and drew attention to the Opinion of Lord Kinnear at p.584 where he stated:

"It is enough that it is quite settled in our law that the birth of a child operates to revoke all previously executed wills, unless something is done by the parent to set up the will."

Counsel submitted that the content of the telephone call in question could not in any circumstances be regarded as steps taken to preserve the will of the type referred to in certain cases. In itself, lapse of time tells us nothing without a reason for it since it could equally be procrastination as deliberate intention. Reference was also made to *Rankin v Rankin's Tutor* (1902) 4F 979 and *Knox's Trustees v Knox* 1907 S.C.1123.

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Defender's counsel

[51] Turning to the facts, counsel submitted that the case turned on whether the deceased intended his will of 1989 to be the final expression of his testamentary intention. One had to look at the whole circumstances relevant to that question. He relied on five specific issues, namely: (1) the telephone conversation with the first defender in December 1996; (2) the nature of the relationship between the deceased and the first defender which lent credence to the call having taken place; (3) the evidence that Pippa Snell suggested to the deceased, after the birth of his last child, that it would be wise or sensible to make a will, and that she did so on more than one occasion; (4) the fact that the deceased had made some provision for the pursuer by nominating her as the beneficiary of certain policies; and (5) the passage of time during which period the deceased neither revoked the will nor made a new one.

[52] The case critically depended on the first defender's evidence that the deceased said what she claimed he did in the telephone conversation in December 1996. If that were inadmissible the presumption could not be rebutted. Equally if she were disbelieved on that point the presumption could not be rebutted.

[53] Counsel took into account the nature of the evidence from Pippa Snell, which he acknowledged did not extend either to urging the deceased to make a will or to his declining to do so. However, the fact that he knew where the will was and referred to it in the telephone conversation, coupled with Pippa Snell's suggestion, his inactivity and the passage of time amounted to enough to rebut the presumption.

[55] The nature of the relationship after separation is important to make acceptable the evidence about the phone call, which otherwise would be difficult to accept. Counsel invited me to hold that the remark was made, that the inference was that the deceased felt guilty about not paying maintenance for Courtney, and that factor, coupled with this very strong feeling for the defender, induced him to say what he did. The timing of the remark was critical since it was after the birth of the youngest child. It should be held that it indicates that he wished the will to remain in force.

[55] He submitted that the first defender was a witness of credit, although her evidence was occasionally confused regarding dates and was confused, or indeed simply wrong, about what she understood Fergus MacMillan had told her about his conversation with Pippa Snell. However, she had no difficulty pinning the conversation regarding the will to the end of 1996, just after the birth of Daniel, and she should be accepted as credible, reliable and sincere. He invited me to accept the defender's account of what took place in Safeway's. Her evidence in general was supported by that of her parents. Her mother knew that the deceased had proposed re-marriage, evidence which came out almost by accident.

[56] There is a very sharp contradiction between the evidence of Mrs Snell and that of Fergus MacMillan and John Colquhoun. It is hard to see how both Fergus MacMillan and John Colquhoun could make the same mistake. Mrs Snell's evidence was also consistent with her own letter 7/1 of process.

Pursuer's counsel

[57] Counsel considered it significant to draw attention to the way in which the defender's case had been presented on Record, regarding the averment that the deceased had declined to make a will. This averment could not be sustained as true and counsel for the defender did not suggest that it could be. Counsel then traced the history of the averment, suggesting that the way in which it came to be on record was damaging to the defender's credibility. Mr Colquhoun's letter of 19 November could not have provided any basis for an averment that the deceased had declined to make a will, as John Colquhoun himself entertained no such view. In evidence, changing her position, the defender said it had come from something which Fergus MacMillan had said to her. However, Fergus MacMillan denied that any such conversation had taken place nor would he have had any basis for saying such a thing.

[58] However, there remained the substantive issue of whether as a matter of fact Philippa Snell ever suggested to the deceased that he should make a will. The evidence suggested that if advice were given, it was given to both the deceased and Arlene Greenan, who was clear that no such advice was given. If it was not given to her it was less likely that it was given to the deceased. Nor is there anything in the file to suggest that such advice was given. It would be difficult to conclude that such advice was given far less that it was given repeatedly.

[59] Much of the evidence about the nature of the relationship was exaggerated, and was difficult to reconcile with the known objective facts including an early separation, a subsequent separation followed by divorce and the deceased's remarriage. Numerous aspects of the evidence undermined the credibility of the defender; the dispute about the Safeway incident, the allegation that Fergus MacMillan told her that Philippa Snell had pressurised the deceased to make a will, and the fact that the defender herself had previously said that contact virtually stopped after Arlene Greenan came on the scene.

[60] So far as the telephone call is concerned, counsel's main point was that it was inadmissible. In any event, he submitted that it had not taken place. In the whole context of lack of contact and the deceased's new life, such a call was highly unlikely. Nor is it believable that the defender would not have mentioned it earlier if true.

Discussion

Admissibility

[61] I accept that once evidence is offered to rebut the presumption evidence to fortify it must equally be admissible. However I do not consider that parole evidence of the kind relied on by the defender in this case is admissible. None of the cases relied upon by the defender relates to the admission of parole evidence and where opinions are expressed about the matter generally they are against the admission of parole evidence. There is a clear expression of opinion from Lord MacLaren in *Rankin* which does not solely refer to his agreement with Lord Rutherford-Clark in *Dobie*. In *McKie* it is correct that Lord MacLaren proceeds on a view of *Elder's Trs* which is not apparent from the face of the report in that case. However, it seems to me an important consideration that in the same case he states separately that the presumption can only be displaced by something which amounts to a "tangible and clear expression of the testator's wish", going on to provide examples which are not consistent with the notion that parole evidence is sufficient. *Smith Tr's* does seem to proceed on a misreading of *Elder's Trs* but it remains consistent with *McKie*. Accordingly I conclude that the evidence as to the alleged telephone call is inadmissible.

[62] Whilst I can see that the nature and extent of other provision for after-born children may have a bearing on the issue, the provision made for the pursuer in this case does not do so.

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[63] In any event, I do not believe that the telephone conversation took place. I accept that the defender and the deceased remained on cordial terms but I do not believe the relationship continued in the way categorised by the defender. I believe that there was for a while continuing contact between the defender and the deceased and that this might have continued until some time after the deceased met the pursuer. I am of the view that contact diminished considerably after the pursuer came on the scene and from some time in about 1994 more or less ceased altogether, although I accept that it is quite possible that the deceased visited Courtney during the Christmas holiday of 1994. The bulk of the evidence suggests diminishing contact from 1993 and into early 1994. The defender's claim that there was continued contact right up until the birth of Daniel is simply not credible and is unsupported by any convincing detail. I think it is possible that at an earlier stage the deceased had asked for a reconciliation and had asked the defender to remarry him but not during the timescale described by the defender. In my view the defender has transposed these events to later dates to help support her case. Not only did the deceased marry the pursuer in March 1995, but at one point the context of the defender's evidence was that the proposal had come before the pursuer was pregnant with Caitlin who was born in July 1995.

[64] The evidence of the defender's parents as to ongoing contact was very vague. I do not think they were in any way seeking to mislead simply that their recollections are at fault and cannot be relied on after about 1992, particularly in relation to timing of events. Mrs Courtney thought contact stopped because "Ricky got a new life" which is consistent with it stopping soon after the pursuer came on the scene. At an early stage the defender herself said it stopped when the deceased met the pursuer (Fergus MacMillan's file note).

[65] As to the issue of legal advice tendered to the deceased by Philippa Snell I consider that she did tell both Fergus MacMillan and John Colquhoun that she had advised the deceased to make a will. Mr Colquhoun in particular was a careful witness and I do not for a moment think he would have written that the advice "had" been tendered if Mrs Snell had only suggested that it "might" have been. However, I also accept that Mrs

Snell now has no recollection of doing so, that it would not, in the circumstances be her usual practice and that the pursuer has no memory of any such advice. That leads me to conclude that if any mention of a will had actually been made, it must have been a passing comment and no more.

[66] I consider that the various changes in the defender's position - whether the allegation that the deceased declined to make a will after the birth of his later children came from Mr Colquhoun or Mr MacMillan, when it came from neither; how many phone calls there were in late 1996; - are damaging to her credibility. I do not accept her evidence about the Safeway incident. I find it impossible to believe that she would not have mentioned the telephone call at a much earlier stage had it really taken place and I think it highly unlikely that such a conversation would have taken place anyway.

[67] Accordingly I will sustain the pursuer's second plea-in-law, repel the defender's pleas-in-law and pronounce decree in terms of the first conclusion of the summons.