

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2011-404-7304  
[2012] NZHC 753**

IN THE MATTER OF s 14 of the Wills Act 2007  
AND IN THE MATTER OF the estate of C of Auckland, deceased

BETWEEN H  
Plaintiff

AND P  
Defendant

Hearing: 9 February 2012

Counsel: J B Murray for Plaintiff  
V M Ammundsen for Defendant

Judgment: 10 February 2012

Reasons: 24 April 2012

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**REASONS FOR JUDGMENT AND ORDERS OF POTTER J**

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In accordance with r 11.5 High Court Rules  
I direct the Registrar to endorse this judgment  
with a delivery time of 2 p.m. on 24 April 2012.

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## **Introduction**

[1] On 10 February 2012 I made the following orders:

- (a) Under s 14 of the Wills Act 2007 I declare that a will document dated 18 September 2011, a copy of which is attached as Exhibit A to the affidavit of H sworn on 16 December 2011 filed in support of this application (I having sighted the original will document), to be valid as the last will of C, late of Auckland, violin maker, deceased.
- (b) The costs of the plaintiff of and incidental to this proceeding shall be payable from the estate of the deceased as a first charge on the estate.
- (c) H, the residuary beneficiary under the will dated 18 September 2011 having consented, the costs of the defendant of and incidental to this proceeding, estimated to be in the sum of \$6,000 shall be payable from the estate of the deceased also as a first charge on the said estate pro rata.

[2] I said the reasons for my decision and the orders would follow. These are the reasons.

## **Background**

[3] The deceased committed suicide in September 2011. The deceased had previously made a will in 2007, appointing the defendant to be the sole executrix and trustee, and giving his net estate to her absolutely. This will was prepared by the deceased's solicitors, signed by the deceased in the presence of two witnesses, who also signed the will in the deceased's presence, and in the presence of each other. The relationship between the defendant and the deceased ended in or about 2008.

[4] On or about 18 September 2011, the deceased compiled and signed a document which purported to be the last will of the deceased (the document). It revoked all earlier wills made by him, appointed the plaintiff the sole executor and

trustee of the will, gave specified gifts of money to friends, and gave the deceased's residuary estate to the plaintiff. The deceased committed suicide shortly after sending the document by email to the plaintiff (among others).

[5] The plaintiff applied to have the document declared valid as the last will of the deceased, or that the document be declared a valid revocation of the 2007 will.

[6] The defendant filed an admission of the claim dated 16 December 2011, and consented to an order being made by the Court in terms of the plaintiff's statement of claim.

## **Relevant law**

### *Requirements of a valid will*

[7] For a will to be valid, s 11 of the Wills Act 2007 (the Act) requires that:

- (1) A will must be in writing.
- (2) A will must be signed and witnessed as described in subsections (3) and (4).
- (3) The will-maker must—
  - (a) sign the document; or
  - (b) direct another person to sign the document on his or her behalf in his or her presence.
- (4) At least 2 witnesses must—
  - (a) be together in the will-maker's presence when the will-maker—
    - (i) complies with subsection (3); or
    - (ii) acknowledges that—
      - (A) he or she signed the document earlier and that the signature on the document is his or her own; or
      - (B) another person directed by him or her signed the document earlier on his or her behalf in his or her presence; and

- (b) each sign the document in the will-maker's presence.

*The Court's discretion under s 14 of the Wills Act 2007*

[8] The deceased's will was not signed and witnessed as per s 11(2) of the Act. However, the High Court has a discretion under s 14 to declare a will valid despite the document not complying with s 11 of the Act:

- (1) This section applies to a document that—
  - (a) appears to be a will; and
  - (b) does not comply with section 11; and
  - (c) came into existence in or out of New Zealand.
- (2) The High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.
- (3) The Court may consider—
  - (a) the document; and
  - (b) evidence on the signing and witnessing of the document; and
  - (c) evidence on the deceased person's testamentary intentions; and
  - (d) evidence of statements made by the deceased person.

*Preconditions to exercising the discretion*

[9] Section 14(1) requires that the purported will to be a “document”, defined in s 6 as meaning “any material on which there is writing”. It is clear that the document, written on paper, meets this requirement.

[10] Section 14(1)(a) requires that the document “appears to be a will”. A “will” is defined in s 8(1) of the Act as a document that:

- (a) is made by a natural person; and
- (b) does any or all of the following:
  - (i) disposes of property to which the person is entitled when he or she dies; or

- (ii) disposes of property to which the person's personal representative becomes entitled as personal representative after the person's death; or
- (iii) appoints a testamentary guardian.

[11] The document may also change, revoke or review a will or be a codicil to an existing will.<sup>1</sup>

[12] I am satisfied that the document meets the statutory definition of a “will”. The cover sheet states that it is the will of the deceased. In it, the deceased revokes all earlier wills, appoints the sole executor and trustee of the will and then disposes of his estate. The document fulfils the functions that a will document normally would.

[13] Section 14(1)(b) limits the Court’s discretion to validating the will only if the will is invalid due to non-compliance with s 11. If it is invalid for any other reason, the Court cannot exercise its discretion. As outlined above, and as the deceased states in cl 22 of the document, the document does not comply with s 11 of the Act as it was not witnessed. This appears to be the only reason for the will’s invalidity. I am satisfied that s 14(1)(b) is met.

[14] Section 14(1)(c) requires the document to have come into existence in or outside New Zealand. It is clear from the evidence that this document was made in New Zealand.

#### *Exercise of discretion*

[15] Given that the requirements in s 14(1)(a)-(c) have been met, the Court may exercise its discretion if it is satisfied that the document expresses the deceased’s testamentary intentions. The Court may consider the document, evidence on the signing and witnessing of the document, evidence on the testamentary intention of the deceased and evidence of statements made by the deceased person.

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<sup>1</sup> Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Brookers) at WB14.03(2).

[16] I am satisfied that the will reflects the deceased's testamentary intentions. This is based on the specificity of the dispositions in the document as well as the explicit statement in cl 23 of the document that it is the deceased's wish that the High Court be satisfied that the document expresses the deceased's clear and full testamentary intentions. The deceased committed suicide immediately after writing the note, so there could have been no subsequent change of intention.

### **Outcome**

[17] For these reasons I made the orders set out above.