IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001010
[2015] NZHC 2941

UNDER	s 14 Wills Act 2007
IN THE MATTER	of the estate of the late Robert George Charles Waddingam
BETWEEN	STEVEN JAMES TURNER Plaintiff
AND	DONALD MCFADZEAN Defendant

On the papers

Date: 24 November 2015

JUDGMENT OF THOMAS J

This judgment was delivered by me on 24 November 2015 at 3.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Solicitors:

Gibbs Mills Livingstone, Auckland.

Introduction

[1] The plaintiff has applied to validate a will under s 14 of the Wills Act 2007 (the Act). The application concerns the estate of the late Robert George Charles Waddingham (the deceased), who died at Auckland on 3 June 2014.

[2] The plaintiff, Steven James Turner (Steven), is the named trustee and executor of the deceased's estate under an intended will dated 30 May 2014 (the intended Will).

[3] At the time of preparation of the intended Will, Steven and his brother, Lewis George Turner (Lewis), were the deceased's property managers pursuant to an order of the Family Court dated 16 May 2014. By order of the same date, the Family Court appointed Steven and Lewis to make a testamentary disposition in terms of the intended Will. Although that document was executed by Lewis on 30 May 2014, it was not executed by Steven before the deceased died.

Background

[4] The deceased was married to Brenda Joan Waddingham (Mrs Waddingham) for over 40 years. Mrs Waddingham and the deceased did not have children. Mrs Waddingham died unexpectedly on 9 November 2013. She had been the property manager of the deceased at the time of her death and was seeking an order that she be appointed to sign a will for the deceased (in similar terms to the intended Will). Steven, Lewis, and their siblings, Wayne Leslie Turner and Carolynn May Lamperd, are the nieces and nephews of Mrs Waddingham.

[5] The provisions of the intended Will, which reflected instructions which had originally been given by Mrs Waddingham, were:

(a) The estate was to be divided in two, and distributed as follows:

(i) To pay one half, in equal shares, to:

- Steven Turner;
- Lewis Turner;
- Wayne Turner; and
- Carolynn Lamperd.

(ii) To divide the other half into eight equal parts, to be paid:

- four parts to the Starship Foundation for its general purposes;
- two parts to Ronald McDonald House Charities for its general purposes;
- one part to the NZ Guide Dog Breeding Scheme Inc for its general purposes; and
- one part to the IHC Foundation for its general purposes.

[6] All of these parties were served with the proceedings, with the exception of the NZ Guide Dog Breeding Scheme Inc, which has never existed. In its place, the Royal New Zealand Foundation of the Blind was served. The Royal New Zealand Foundation of the Blind is the only organisation which breeds and trains guide dogs. Section 32 of the Charitable Trusts Act 1957 enables an executor to seek approval to substitute a suitable charity in the place of a non-existent charity.

[7] The beneficiaries of the intended Will (with the exception of NZ Guide Dog Breeding Scheme Inc) and the Royal New Zealand Foundation of the Blind are hereinafter referred to as "the intended Will beneficiaries".

[8] A will of the deceased's dated 1973 has been discovered. That will left the deceased's estate to his nephews and nieces (being the children of his brother, John

Seaton Waddingham, and his sister, Marie Naish McFadzean). These beneficiaries (the 1973 Will beneficiaries) are:

(i) Stephen John Waddingham

(ii) Malcolm Bruce Waddingham

(iii) Christine Anne Watton

(iv) Diane Elizabeth Haldane

(v) Paul McFadzean

(vi) Donald McFadzean

(vii) Ian McFadzean

(viii) Susan McFadzean

[9] The 1973 Will beneficiaries filed statements of defence and affidavits in opposition to the application. The IHC Foundation filed a notice of appearance.

[10] The parties have now reached a full and final settlement regarding validation of the intended Will (subject to later variation as set out in a deed of family arrangement signed by all affected parties), and resolution of all claims in relation to the deceased's estate.

Deed of family arrangement and orders sought.

[11] The intended Will beneficiaries and the 1973 Will beneficiaries have all executed a deed of family arrangement recording their settlement, which is subject to the Court making the order sought for validation of the intended Will. The parties now seek an order by consent for validation of the intended Will.

Analysis

[12] In order to satisfy the requirements of s 14(1) of the Act, it must be shown that the intended Will:

(a) appears to be a will;

(b) does not comply with s 11 of the Act in that it is not signed or properly witnessed;

(c) came into existence in New Zealand; and

(d) expresses the deceased person's testamentary intentions.

[13] The Court is expressly empowered, by s 14(3), to consider a broad range of factors when examining the question of intention, including the document; evidence of the signing and witnessing of the document; evidence of the deceased person's testamentary intentions and evidence of statements made by the deceased person.

[14] As MacKenzie J observed in *Re Estate of Campbell*:[1]

> [4] Section 14 of the Act made a quite fundamental change to the law concerning the validity of wills. Previously, a will that did not comply with the formalities required by law for the execution of a valid will was invalid. That meant that no matter how clearly the testamentary intentions of the deceased had been expressed those intentions could not be given effect if the mode of expression did not comply with the formalities that the law required. Section 14 has been very beneficial in avoiding that outcome. Its utility is demonstrated by the fact that it has been invoked in over 80 cases since 2007.

[15] Applying s 14 to the present case, I am satisfied that the intended Will:

(a) appears to be a will;

(b) does not comply with s 11 of the Act in that it is not signed or properly witnessed; and

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[1] *Re Estate of Campbell* [2014] NZHC 1632, [2014] 3 NZLR 706.

(c) came into existence in New Zealand.

[16] The evidence referred to in the following paragraphs assists in inferring the testamentary intention of the deceased.

[17] The fact that the Family Court order appointed Steven and Lewis to make the intended Will under s 55 of the Protection of Personal and Property Rights Act 1988 which relevantly provides:

> **55 Court may authorise manager to make testamentary disposition for person subject to property order**
>
> (1) Where the court has given a direction under section 54(2) that a person subject to a property order may make a testamentary disposition only by leave of the court, or the court is satisfied that such a person lacks testamentary capacity, the court may authorise the manager acting for that person to execute a will for and on behalf of that person in such terms as the court directs.
>
> (2) Before a court authorises a manager to execute a testamentary disposition under subsection (1), it shall settle the proposed terms of the testamentary disposition provisionally, and hear such persons who wish to be heard and whom the court is satisfied have a proper interest in the matter.
>
> …

[18] Furthermore, there is evidence as to what the deceased would have wanted prior to his loss of capacity.

[19] First, the second affidavit of the solicitor for Mrs Waddingham and the deceased attached a file note of a meeting she held with them in January 2010. The purpose of the meeting was to give instructions for wills for both of them. At that stage, the deceased was under the care of a doctor and had early signs of Alzheimer's disease. A letter from a specialist, Ronald Haydon said:

> It is clear that he has had a significant progression of his Alzheimer's disease. There is a considerable lack of insight into his limitations in his cognitive function. He does however, seem to have partial capacity to understand the nature of questions relating to his property and welfare and its consequences but he is very forgetful and would not remember the nature of these decisions for more than a brief period.

[20] The deceased's general practitioner then concluded that it would not be appropriate for the deceased to make "significant decisions henceforth".

[21] I accept, however, that the discussion at the meeting constitutes some evidence of what the deceased wanted, albeit he was labouring under early Alzheimer's disease at that point. The deceased might not have had testamentary capacity to execute a will but he was able, nevertheless, to express an intention about how his estate should be divided.

[22] Secondly, evidence of what Mrs Waddingham believed the deceased would have wanted. The lawyer who acted for Mrs Waddingham in her application to be the deceased's property manager and welfare guardian swore an affidavit. Annexed to her affidavit was a report by Mr Allen Gluestein, a lawyer appointed by the Family Court to represent the interests of the deceased in respect of that application. Mr Gluestein met with both Mr and Mrs Waddingham in May 2014. He said in his report:

> 11. I was advised that they had both made Wills in 1970, presumably mutual wills.
>
> 12. Mrs Waddingham advised that she had not been able to find copies of the old Wills or certainly not able to find a copy of Mr Waddingham's Will and she couldn't remember who the solicitors were who acted at the time.
>
> 13. Mrs Waddingham said she had made a new Will that leaves everything to her husband if he survives her, but if not, then half to her nephews and a niece and the other half to charities.
>
> 14. She believes that Mr Waddingham would want to make a will on similar terms, but appreciates that there is an issue about his acuity to do so at this stage."

[23] Mr Gluestein recommended that a will be made for the deceased by the manager appointed under the Protection of Personal and Property Rights Act 1988.

[24] Thirdly, Mrs Waddingham's lawyer confirmed that Mrs Waddingham had given her the same information about the earlier will and said that Mrs Waddingham told her that the effect of the 1973 Will was not what the deceased would have wanted anymore.

[25] Given those considerations, I am satisfied that the intended Will expresses the deceased's testamentary intentions and that the application under s 14 of the Act

should be granted. In saying that, I am mindful of the opposition that had been filed to the application but that the proceedings have been settled as indicated above.

[26] For these reasons, the application is granted. There is no issue between the parties as to costs.

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Thomas J