IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2011-488-677

UNDER	section 14 of the Wills Act 2007
IN THE MATTER OF	the Estate of the late SUSAN DOREEN IRVINE
BETWEEN	CRAIG MAURICE JOHNSTON AND ANDREW JAMES GOLIGHTLY IN THEIR CAPACITY AS PROPOSED EXECUTORS IN THE ESTATE OF SUSAN DOREEN IRVINE Applicants

Hearing: On the papers

Counsel: R O Parmenter for the Applicants

Judgment: 26 October 2011

JUDGMENT OF ELLIS J

This judgment was delivered by me on 26 October 2011
at 11 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Marsden Woods Inskip & Smith, PO Box 146, Whangarei 0140
Counsel: R O Parmenter, PO Box 1052, Auckland 1140

[1] Susan Doreen Irvine died on 7 June 2011 in Whangarei. She was 58 years old. She had previously executed a will on 10 August 1999. In that will everything was left to Mrs Irvine's only two children, the daughters of her first marriage, Bridget Tapper and Amy Tapper. Mrs Irvine married William Bruce Irvine in 1994 but they did not have any children together. Mr Irvine had adult children from a prior marriage.

[2] Mr Gittos, a solicitor from Whangarei, has deposed that on 1 June 2011, he attended upon Mrs Irvine and obtained instructions for the drafting of a new will. He then drafted a will in accordance with those instructions. The file note that he made of her instructions was annexed to his affidavit. It was intended that the new will be executed on 2 June 2011 but Mrs Irvine's health rapidly deteriorated and she was not well enough to sign the will before she died.

[3] Mr Gittos has deposed that the draft will reflects Mrs Irvine's testamentary intentions at the time of her death and confirms his view that on 1 June 2011 she was of clear mind and had a good understanding of the matters in which she was instructing him.

[4] The two people named as executors in the draft will, Mr Johnston and Mr Golightly now apply to this court for an application under s 14 of the Wills Act 2007 (the Act) declaring Mrs Irvine's draft will valid. That section provides:

> **14 High Court may declare will valid**
>
> (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.

[5] Mr Gittos has deposed that the only persons potentially adversely affected by an order of the Court under s 14 would be:

(a) The executors named in what would otherwise be Mrs Irvine's last will and testament (Patricia Gay Cooper of Whangarei and Fraser Thomas Ashby of Whangarei); and

(b) The two beneficiaries under that will, namely Mrs Irvine's two daughters, who are also the beneficiaries under the draft will.

[6] Signed consents by both the executors and potential beneficiaries were annexed to Mr Gittos' affidavit.

[7] In terms of the requirements of s 14, there can be little doubt that the draft will constitutes a "will" in terms of the definition in s 8 of the Act, namely a document that is made by an actual person and disposes of property to which the person is entitled when he or she dies. Nor is there any doubt that the draft will does not comply with the requirements of s 11 of the Act in that it is not signed or properly witnessed.

[8] In order to make an order declaring the will valid, the Court must be satisfied that the document expresses the deceased person's testamentary intentions and again, in light of Mr Gittos's affidavit and the circumstances in which the draft was prepared, there can be little doubt in the present case in that respect. In short, the evidence of Mr Gittos satisfies me that in terms of subsection (3), the contents of the draft will itself and the evidence about Mrs Irvine's testamentary intentions favour the exercise of the Court's discretion in favour of validity.

[9] I record, as well, that the circumstances in the present case are materially identical to those in both *Re Estate of Brown* and *Re Estate of Brundall*.[1] In both those cases declarations of validity were made.

[10] Incidentally, and for completeness, I record that leave is also granted to commence these proceedings by way of originating application. I also accept that, in light of the consents referred to in [6] above, it is appropriate in terms of r 7.45 of the High Court Rules for the application to proceed on a without notice basis. Precedent in both these respects also exists in the *Brown* and *Brundall* decisions.

Rebecca Ellis J

[1] *Re W A Brown* HC Auckland CIV2010-404-6328, 13 October 2010 and *Re Brundall* HC Auckland CIV-2011-404-3742, 6 July 2011.