IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2009-441-000369

ESTATE OF MALCOLM ROSS HICKFORD (DECEASED)

Hearing: On the papers

Counsel: MIC Redington

Judgment: 13 August 2009 at 4pm

I direct the Registrar to endorse this judgment with a delivery time of 4pm on the 13th day of August 2009.

JUDGMENT OF MACKENZIE J

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[1] This is a 'without notice' application for an order under s 14 of the Wills Act 2007 to declare a will valid.

[2] The facts, as they appear from the affidavits filed in support of the application, are that the deceased was diagnosed with terminal cancer in July 2008. Following that diagnosis he discussed his will with his partner, Ms Young, one of the present applicants. There was an earlier will, dated 26 March 1968. The deceased was then married to his former wife, from whom he was divorced in 1979. His former wife died in April 1982. In his discussions with Ms Young concerning the will, Mr Hickford indicated that he wished to make a new will and they agreed that he would see Ms Redington at Taradale Law, a local lawyer. Mr Hickford told Ms Young that he had made an appointment to see Ms Redington in September 2008. Mr Hickford also spoke to his daughter Annette (the other applicant) in late 2008 and discussed with her making a new will. He told her that he intended to

appoint Ms Young and herself as his executors. He asked her if she was okay about being appointed his executor and she agreed. Mr Hickford did see Ms Redington on 6 October 2008. He told her at that appointment that he was ill with cancer and gave her instructions to prepare a new will. Ms Redington prepared the will with some urgency in the light of those instructions and posted to him the document, now sought to be declared valid, on 9 October 2008. She did so under cover of a letter which said: "I enclose herewith the draft of your new will for your perusal. Please have a read through and contact me either with any changes you may require or to make an appointment."

[3] Mr Hickford did not come back to her, and she did not follow that up. After the visit to Ms Redington, Mr Hickford discussed the matter again with Ms Young. She was with him on 10 October or thereabouts when he received the letter and copy of the will in the mail. He passed the document to her and said: "This is what I've done. Is this alright?". She looked over the document and confirmed to him that she was happy with the contents. After that the letter and document went to the end of the dining room table and remained there until after Mr Hickford's death on 25 January 2009. Ms Young did not ask him about the will again as she presumed that he had attended to the matter. Mr Hickford also talked to Annette about the will after he had seen the lawyer. Her evidence is that he spoke about the will as if it was signed and she understood he believed he had made his new will.

[4] The application is, as I have noted, a 'without notice' application. The first question for consideration is whether that course is appropriate. There is no procedure prescribed for the making of an application under s 14. The procedure will depend upon the circumstances. The most important consideration in determining the appropriate procedure must be the need to ensure that all persons who may be affected by the making of an order have a proper opportunity to be represented in the proceedings. That must in this case include all persons who would benefit under the 1968 will, which would be operative if the declaration of validity sought were not made. There is a copy of that will in evidence before me. If that will were operative, its effect would be that the whole estate would go to Mr Hickford's three children. Each of the children has filed an affidavit supporting the present application. There is accordingly no need to require an application to be

made on notice to them. There are, apart from the children and Ms Young, no persons who will be affected by the decision as to whether the 1968 will remains operative, or whether a declaration is made declaring the 2008 draft will valid. Accordingly, I am satisfied, in terms of r 7.45 of the High Court Rules, that the application affects only the applicants and the other children, all of whom support the application, and that accordingly the interests of justice require the application to be determined without serving notice of the application.

[5] I turn then to the merits of the application. Section 14 provides as follows:

> (1) This section applies to a document that—
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> (a) appears to be a will; and
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> (b) does not comply with section 11; and
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> (c) came into existence in or out of New Zealand.
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> (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.
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> (3) The Court may consider—
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> (a) the document; and
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> (b) evidence on the signing and witnessing of the document; and
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> (c) evidence on the deceased person's testamentary intentions; and
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> (d) evidence of statements made by the deceased person.

[6] The first requirement is that there be a document that appears to be a will. The document sought to be declared valid is the draft will attached to Ms Redington's letter. That document is in the form of a will, and includes all provisions usual in a will. In form, it meets the requirements of s 8(1) of the Act that it be a document made by a natural person which disposes of the property of that person when he dies. The only respect in which the document does not appear to be a will is that it is not signed and witnessed as required by s 11(2). That non compliance means that the document falls within s 14(1)(b). Section 14(1)(c) is not in issue. For these reasons, I consider that s 14 applies to the document. That means

that this Court may make an order declaring the document valid if the Court is satisfied that the document expresses the deceased's testamentary intentions.

[7] There is a helpful discussion of the requirement that the document expresses the deceased's testamentary intentions by Professor Peart in "*Where There Is A Will, There Is A Way*", (2007) 15 Waikato Law Review 26, at 34. Professor Peart notes the difference in wording between the New Zealand statute and the statutes of some of the Australian States, where the requirement is for the Court to be satisfied that "the deceased person intended the document to constitute the person's will". Professor Peart notes that the difference in wording could be material, in that the Australian wording has been construed by some Courts to mean not only that the document must express the deceased's final intentions as to the disposition of the property referred to in the document, but also that it is that particular document that the deceased intended to be his or her will. On that approach, wills instructions and drafts of wills have been excluded. See for example *Re Application of Brown; Estate of Springfield* (1991) 23 NSWLR 535 and *Baumanis v Praulin* (1980) 25 SASR 423. Professor Peart notes that other Courts have opted for a more liberal approach, focusing on the substance of the document rather than its form: *In the Matter of the Will of Lebarto; Shields v Caratozzolo* (1991) 6 WAR 1; *Estate of Blakeley* (1983) 32 SASR 473.

[8] In this case, I do not consider that it is necessary for me to address in detail, beyond the words of the statute itself, the approach to be adopted in New Zealand. I consider that, on the facts of this case, the answer to the question of whether the Court is satisfied that the deceased intended the document to constitute his will, or to whether the Court is satisfied that the document expresses the deceased's testamentary intentions, will be the same. The evidence is that the will had been drafted by the solicitor in a form which the solicitor considered appropriate to give effect to the deceased's instructions as conveyed to her, and in a form which could be signed. That is clear from the covering letter. The evidence of Ms Young and Ms Hickford as to their subsequent discussions with the deceased satisfy me that the deceased did consider that the form of will was appropriate to reflect his intentions.

[9] The fact that the deceased did not make an appointment to sign the will might be consistent with any one of three broad possibilities:

(a) That he had changed his mind about making a will;

(b) That he overlooked or forgot about signing the will; or

(c) That he did not think that he needed to do anything further.

[10] I consider that, to meet the statutory test, the case must fall within the third possibility. Clearly, the first possibility would mean that the document did not express his testamentary intentions. In my view, the second possibility might not meet the statutory test. I consider that the third possibility would meet the test. If the deceased thought that he had made an effective will, and that the reason that the document was unsigned was a mistaken view that everything necessary had been done, the Court could be satisfied that the document did express the deceased's testamentary intentions despite the lack of a signature.

[11] I consider therefore that the question to be determined is whether I can be satisfied, on the balance of probabilities, that the third possibility is the correct one. As the Supreme Court has made clear in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, the balance of probabilities is a single standard, but as a matter of fact, Judges require stronger evidence of some allegations before the issue can be proved to their reasonable satisfaction. I consider that, because of the importance of a declaration that a will be declared valid, there must be cogent evidence that the document reflects the deceased's testamentary intentions.

[12] I am satisfied by the evidence on this point. As to the first possibility, the evidence does not suggest that the deceased had any change of mind after receiving the draft will and discussing it with Ms Young. I consider that, if that had been the case, then more likely than not he would have contacted Ms Redington, or discussed the matter with Ms Young, or both. The evidence is that he did neither. As to the second possibility, I consider it more likely than not that the deceased did not simply overlook the matter or forget it. The evidence of Ms Young and Ms Hickford is

indicative of a man who was conscientiously putting his affairs in order before his death. Their evidence satisfies me that it is unlikely that he might have failed to follow the matter up through inadvertence. There was a period of some three and a half months between receipt of the draft will and his death. As to the third possibility, both Ms Young and Ms Hickford express the view that this was the case and Ms Hickford's evidence is that he spoke of the will as if it had been finalised. I accept their evidence on this point. I find, on the balance of probabilities, that the third possibility is the correct one.

[13] I am satisfied, to the degree of cogency appropriate to the test in s 14(2), that the document does reflect the deceased's testamentary intentions. There will accordingly be an order declaring valid as the last will of Mr Hickford the document marked "A" attached to each of the affidavits of Ms Young and Ms Hickford.

"A D MacKenzie J"

Solicitors: Taradale Law, Taradale, Hawke's Bay