NZLR

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

No Special Consideration

A. No.4/76

NO.

BETWEEN CLAUDE JOSEPH LINCOLN
of Auckland, Retired

Plaintiff

A N D THE PUBLIC TRUSTEE
a corporation sole by virtue of the provisions of the Public Trust Office Act, 1957 and having its office in Wellington

Defendant

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Hearing: 18, 19 August 1976 at Wanganui

Judgment: 15 December 1976

Counsel: C.M. Nicholson for Plaintiff
J.W. Tizard for Defendant

JUDGMENT OF JEFFRIES J.

The plaintiff in this case is the nephew of Georgina Williams who died at Wanganui on the 7th day of October 1974, then aged 97 years. She left a will dated the 3rd November 1971, naming the Public Trustee as executor, and a codicil to that will dated the 24th December 1971, in which she purported to make an alteration to her will concerning the class of nephews and nieces who were to take a share of a special part of her estate, which will be mentioned hereafter. Probate of the last will and the codicil was granted in common form to the Public Trustee at Wanganui on the 24th day of December 1974. The plaintiff in his statement of claim seeks an order that the grant of probate of the codicil to the defendant be set aside on the grounds that at the time of execution the deceased lacked testamentary

capacity. There was a further alternative cause of action in the statement of claim that the defendant had influenced the deceased in the execution of the codicil. If this action succeeds the result is that probate of the will dated 3rd November 1971 stands, and the distribution of the estate will proceed in the terms of that will, unaffected by the later codicil.

The deceased was one of 6 children, and was born in the year 1876 in Hokitika. She spent her early life there and ultimately went to live in Wanganui about 1918 and remained there for the rest of her life. She married twice, first to a man named Murphy, but was divorced from him, and then married a man named Williams who predeceased her by many years. At no stage of her life did she have any children of her own. She had 4 sisters and 1 brother named Robert. Very little is known of Robert, who might have been called John. In particular it is not known whether he married or had any children, and it is thought he might have emigrated to Australia at the turn of the century. For the purposes of this estate he must be ignored. She had one sister named Margaret who had 10 children, the youngest one being the plaintiff in this case, now aged 68 years. Of the 10 children 3 were living at the date of the will, namely 3rd November 1971. Another sister Euphemia had 15 children and there were 3 living at the date of the will. Agnes had 5 children and there was 1 living at the date of the will. Finally, Charlotte had 3 children, of whom 1 was living at the date of the will. Therefore in all the deceased's 4 sisters had 33 children, and needless to say those children in turn had numerous grand nieces and nephews of the deceased. The significance of the numbers will become clear when I examine the terms of the will. At the date of the will there were only 8 nephews and nieces alive. The evidence about the testatrix's family was given by the plaintiff and I was

informed it is possible there were 10 not 8 living at that date.

Before outlining the provisions of the will it is convenient at this stage to introduce details of the manner in which the deceased's estate was considerably enhanced towards the end of her life. Scotland was the original home of the deceased's parents. Her mother being born in 1836 and married a man named Nicol in 1859. That couple emigrated to New Zealand in the last century and in this country had a family of 6 children, as outlined above. A member of the father's family emigrated from Scotland to New York, and in 1961, a descendant, Elizabeth Sansom, died there intestate. It was ultimately established that she was a first cousin of the testatrix and her nearest relative from that deceased's paternal side. I was informed that the laws of intestacy of the New York State provide that persons entitled to succeed are traced exclusively through the father, and therefore the nearest blood relative of Elizabeth Sansom on that side was entitled to her estate. I was also informed this point was reached only after litigation there. A London firm of genealogists communicated with James Lincoln, who was the older brother of the plaintiff Claude, some time probably in about 1961. I am informed that the approximate value of that part of the estate is about $50,000.

The plaintiff in his evidence said that he had lost contact with his aunt before the war and was informed about the year 1941 that she had already died. It seems about the year 1961 when the plaintiff's older brother was first contacted by the said London firm that he discovered his aunt was still alive and living in Wanganui. He then set about re-establishing relationships with his aunt which he did, probably in 1963 when she had ceased living in her own home and was at an old persons' establishment named Loma Lynda at Wanganui. The

plaintiff then, and still is, living in Auckland.

The deceased made many wills with the Public Trustee, the first one as far back as 1918. After the establishment of her inheritance from the United States the deceased was consistent in the dispositions she wanted to make concerning that part of her estate. The last will was executed on 3rd November 1971 when she was then aged 94. By that will she left the share or interest in the estate of her late cousin Elizabeth Sansom subject to certain conditions upon trust first to pay out two legacies and then to stand possessed of the balance on the following terms:-

> " 3(c) Subject to the foregoing for such of my nephews and nieces as are living at my death and if more than one in equal shares per capita PROVIDED HOWEVER AND I DECLARE that should any of my nephews and nieces predecease me leaving a child or children living at my death then and in every such case such last-mentioned child or children shall take and if more than one in equal shares the share or interest which his her or their parent would have taken under the provisions of this sub-paragraph 3(c) of this my will had such parent survived me. "

The intention of the deceased was clear that apart from two relatively small legacies she wished the inheritance from her cousin to be shared by members of the family from whence the money had originally sprung. Although at the time of execution of that will the testatrix was a very great age no attack is made upon her capacity to make the will she did. I might add that further dispositions were made in that will to other members of the family by way of legacies and a division of the residue of her estate into four parts, but that aspect need not concern us.

On the 8th November 1971, that is five days after execution of the will, the deceased suffered a cerebrovascular accident of moderate severity, and she was admitted as a patient to Belvedale Hospital, Wanganui, and remained there as such for the rest of her life, that is to 7th October 1974

when she died.

After execution of the will it was examined by the office solicitor of the District Public Trustee in Wellington and he detected what could be described as a flaw in the drafting of paragraph 3(c) quoted above. The flaw, as I understand it, is this: as that clause stands it is capable of the interpretation that only those nephews and nieces alive at the date of the will, or who have died since the will and whose children in that case are substituted were in the contemplation of the deceased. The other possible interpretation is that the deceased meant to benefit all her nephews and nieces living or dead at the date of the will, and if dead their children by substitution if any. In this judgment I very deliberately eschew making any comment on the meaning of clause 3(c) in the will because as a result of my decision it is likely that that clause will have to be examined by this Court at some future date.

Mr Francis Arnold Wallace was called in evidence and he lives in Wanganui and was formerly the district Public Trustee in that city. He retired from the position in 1973. He gave evidence that he went to Wanganui for the second time in about 1961 or 1962 but before that knew the deceased as a client of many years of the Public Trustee. He became friendly with the deceased and made a habit of calling on her as frequently as two or three times a week when she was in Loma Lynda throughout most of the 1960's, and until November 1971. He said that it was clear that the deceased intended to benefit the entire complement of nephews and nieces and, if dead, their children, if any, and not simply those nephews and nieces living at the date of the will. When the possible ambiguity in clause 3(c) was drawn to his attention by Head Office in December 1971 he had a codicil prepared making an alteration to the will in the following

terms:-

> " 1. Sub-paragraph 3(c) of my said will is hereby deleted and the following sub-paragraph 3(c) substituted therefor:-
>
> "Subject to the foregoing for such of my nephews and nieces as are living at my death and if more than one in equal shares per capita PROVIDED HOWEVER AND I DECLARE that should any nephew or niece of mine have died prior to the execution of this my will or hereafter die in my lifetime leaving a child or children living at my death then and in every such case such last-mentioned child or children shall take and if more than one in equal shares the share or interest which his her or their parent would have taken under the provisions of this sub-paragraph 3(c) of this my will had such parent been living at my death." "

Obviously the wording of the substituted clause contained in the codicil puts beyond question the interpretation of the original clause 3(c) in the will. Mr Wallace was anxious that the deceased execute the codicil because in his opinion it was correctly giving validity to her intentions. Because of the cerebrovascular accident suffered by the deceased in early November it was necessary to cover the position of her testamentary capacity in regard to the execution of the codicil. I might also add that the deceased had severely deteriorating eye-sight with advancing age and probably from about 1960 onwards she was blind, or almost completely blind. Her signature on the November 1971 will was very shaky, and had even drawn a comment from the office solicitor at the District Public Trust Office at Wanganui at the time and he questioned then in a memorandum, which was produced to me, her capacity to execute the will. It was this same solicitor who was an attesting witness to the codicil.

Apparently, the deceased recovered somewhat from the accident in early December sufficiently enough to encourage Mr Wallace that he would be able to have the correcting codicil executed. Accordingly the Public Trust Office requested Dr C.H. Hughes-Johnson, a medical practitioner in Wanganui, who had attended the deceased since 1952 to examine her on

the morning of 24 December 1971 for the purpose of establishing whether or not she had testamentary capacity. Dr Hughes-Johnson was called in evidence and he said that his examination satisfied him that she had the necessary capacity and accordingly advised the Public Trustee. Mr Wallace together with the office solicitor, Mr Trevor Gordon Sando, proceeded to the hospital probably later that morning, and obtained execution of the codicil which is the subject of this action. It is to be noted that the codicil is executed by the deceased simply placing a cross where her signature should be opposite the attestation clause. She was right handed and the cerebral accident caused right sided paralysis.

I think I need say but little on the law relating to testamentary capacity as it is now fairly well established. The onus of proof of a will and codicil under challenge lies upon the person propounding the document; in this case the Public Trustee. See Watkins v. Public Trustee [1960] N.Z.L.R. 326. The question for the Court is one of fact, and it is whether at the time of making the testamentary document the testatrix was of a sound and disposing mind understanding the implications of her actions. See In re White [1951] N.Z.L.R. 393 at p.409.

The plaintiff alleges primarily that the deceased did not have testamentary capacity when she executed the codicil. If the codicil stands then the part of the deceased's estate related to her inheritance from Elizabeth Sansom is to be divided into 33 parts. If the will stands alone then it appears that the exact wording of clause 3(c) of the will requires to be interpreted by the Court with the possibility that only 8 or 10 nephews and nieces, being those living at the date of the will, are to share in the inheritance received from Elizabeth Sansom. The onus of proof rests upon the defendant who propounds the will. The defendant called in

evidence Dr Hughes-Johnson who has been a general medical practitioner for approximately thirty years, and knew the deceased for over twenty years. He gave as his opinion that she was capable of making testamentary dispositions as at the 24th December 1971. After listening to the doctor give evidence in the witness box, and his cross-examination, I am satisfied the examination carried out on the morning of 24th December 1971 was of a casual nature. He did not make any notes of his examination and most important of all he did not ask any question of the deceased to test her mind, memory and understanding such as who were those persons who might have a claim upon her bounty, or the extent of her estate, which are two areas customarily investigated for the purpose of gauging the capacity of a testator. I think that he gathered a superficial impression of lucidity, which I am satisfied was not a true one. Dr Hughes-Johnson admitted that he had never before carried out an examination for the purposes of reporting on testamentary capacity, and did not seem aware of the extent or the nature of such an investigation. Mr Wallace and Mr Sando were both called in evidence and unfortunately neither of these two witnesses has any recollection of the circumstances prevailing at the moment of execution of the codicil by the deceased. No notes were taken by either whereby their memories could be refreshed as to the precise events, and therefore I am unable to rely on their evidence. At the highest they say it was their practice to ensure that a testator would have testamentary capacity, but as stated neither has any recollection of detail in this specific instance. A further point is that the examination by the doctor was carried out in the morning and the codicil was executed at least some hours later. When questioned about patients who have suffered cerebrovascular accidents the

doctor conceded that their condition can alter over a number of hours. He would not agree that it would change from hour to hour. The period of some hours which I find elapsed between the examination by the doctor and the execution of the codicil in these circumstances of the very great age of the deceased, together with the recent cerebral accident and her blindness, lend weight to the fact she might not have had testamentary capacity at the moment of execution even if I am wrong in the view I take of the testatrix's capability when examined by the doctor.

The plaintiff called in evidence Mrs Elizabeth Ann Adlum who is the matron of the Belvedale Private Hospital, Wanganui. She has held that post for eleven years and is a trained and registered nurse and has practised as such for fifteen years. She has now been nursing elderly people for eleven years as matron of the hospital. She also has had experience at the Wanganui General Hospital and at the Rotorua General Hospital. This witness had no doubt whatsoever that Mrs Williams from the time she was admitted to Belvedale Hospital on the 8th November did not have testamentary capacity. I give the following extracts from her evidence in chief as an indication of her view of the deceased's mental condition:-

> " What would you describe her state of health as upon admission? She was reasonably coherent slightly confused, completely paralysed down her right side, and incontinent of her bladder and bowel.
> Could she walk unassisted? No.
> Did you throughout the weeks that followed have opportunity of gauging her mental capabilities? Yes because I was with her every day many times during the day I was able to assess that in having conversations with her and was watching her actively.
> What was, or is your view of her condition in the month immediately following her admission as to her ability to understand particularly money matters? Two days after she was admitted her condition deteriorated. She became extremely disorientated and restless and she began having frequent screeching bouts which agitated herself but not only that which agitated all the rest of the patients in the hospital. "

In another part of her evidence she said the following:-

> " If evidence were given that people formed the view that on 24 December 1971 Mrs Williams had the mental capacity to understand matters relating to the alteration of her will would you agree with such a view, that she did have? No I do not agree.
>
> Court: Even if that were given by a Doctor? I still do not agree. "

I think I ought to accept the evidence of the matron of the hospital because she was in a better position to judge the capacity of the deceased than even the deceased's own medical practitioner. When a person of very advanced years suffers a cerebrovascular accident a Court must double its vigilance before pronouncing itself satisfied as to the validity of a testamentary document executed after that event. A trained and experienced nurse had no doubts after having had her under constant observation up to that time for over 6 weeks that she did not have the requisite capacity to make a proper testamentary disposition.

Viewing the entire evidence concerning this testatrix I am quite satisfied she did not have a sound mind, memory and understanding of her dispositions contained in the codicil executed on 24 December 1971. I therefore order that the grant of probate of the codicil on that date to the defendant in common form be set aside.

This action is disposed of by my decision on the first cause of action, but in case my views on the second cause of action need to be considered I state them very briefly. The essence of the allegations in the statement of claim is that the testatrix was influenced by the advice of the defendant to make provision for an extended class which were never in her contemplation. Admittedly the point at issue is somewhat technical and perhaps obscure. There has been academic comment on it and a fairly recent case. See Re Earls Settlement Trusts /1971/ 2 All E.R. 1188. I

have already noted that if the codicil falls there could follow an interpretation case on the existing clause in the will. I find that the pleading of the allegation is pusillanimous. Paragraphs 10 and 11 of the statement of claim state:

> " 10. AT the date of the alleged execution of the alleged codicil the deceased was led by the Defendant to believe that no material alteration was being made to her will, contrary to the fact.
>
> 11. THE deceased, acting upon and influenced by the advice of the Defendant, executed the alleged codicil without appreciation of the consequences of her doing so and/or did not know and approve of the contents of the codicil. "

Paragraph 10 is edging towards a quite serious allegation of a species of fraud which I categorically reject. Paragraph 11 is less objectionable from this viewpoint, but discloses a hesitancy about the facts which are the basis of the pleading. If "influence" is pleaded it must to my mind be qualified by an adjective such as "undue" so as to make it clear the influence was improper, or that the testatrix was induced to do something against her free will. The influence must be distinguished from persuasion which is not unlawful. See Hall v. Hall L.R. 1 P. & D. 481 and Sir J.P. Wilde at 482;

> " Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of a testator, will constitute undue influence, though no force is either used or threatened. "

The onus of proof of such an allegation rests on him who sets it up. See Williams on Wills 4th edn at p.32 and the authorities cited in footnote (o).

Neither the evidence called for the plaintiff nor submissions of his counsel were directed much at this second cause of action, but it was not abandoned. To my mind it was not established by the plaintiff.

The plaintiff has brought a representative action and I consider he is entitled to his costs from the estate as taxed by the Registrar together with disbursements and witnesses expenses.

Solicitors: Meredith, Connell & Co., AUCKLAND, for Plaintiff

Christie, Craigmyle, Tizard & Dickson, WANGANUI, for Defendant