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Butterworths (2)

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A 4/77

Special Consideration

BETWEEN JANICE PATRICIA SCOTT of Auckland, Married Woman

Plaintiff

A N D JOHN DOUGLAS HUTCHISON of Masterton, Solicitor, as Executor and Trustee of the Estate of HARROLD VICTOR JAMES ROBERTS late of Masterton, Retired, deceased

Defendant

Hearing : 14 July 1980

Counsel : H Fulton for plaintiff
D B Collins for first defendant
G M Loe for second defendant

Judgment: 18 July 1980

ORAL JUDGMENT OF WHITE J

I reserved my decision in this case in order to read the evidence and consider the arguments and in particular the cases cited during the argument. Having done so the impressions I formed during the hearing remain unchanged and I propose to give my judgment orally.

I am indebted to counsel for their careful arguments. Mr Collins did not address any argument to the Court but called Mr Hutchison whose evidence threw useful light on the circumstances in which the mutual wills were prepared.

The facts briefly stated are that mutual wills were made by a husband and wife, a Mr & Mrs Roberts on 21 April 1972. Mr & Mrs Roberts had married late in life after the deaths of their former spouses. The mutual wills provided that if husband or wife survived he or she would receive the whole

estate but in each case the wills went on to provide that if the husband or wife did not survive, Bruce Fergus Scott and Geoffrey James Roberts were to be appointed trustees and the estate was to be held for such of them Janice Patricia Scott and Alan Brian Roberts as tenants in common in equal shares absolutely. The wife died first and three weeks later the husband made a new will which did not follow the provisions of the mutual wills made in 1972 but left the residue to the testator's sons. A month later on 7 July 1976 the husband died. The essential allegation was that there was an agreement between the husband and wife that the wills would be irrevocable after the death of either the husband or wife. On that basis the plaintiff asks for a declaration that on the death of the husband his trustee holds the estate upon the trusts contained in his will of 21 April 1972.

Mr Fulton accepted from the outset that the mere making of mutual wills without more is not generally regarded as sufficient evidence of an agreement or arrangement not to revoke such a will. He accepted that if evidence of surrounding circumstances is relied on to establish an agreement or arrangement that evidence must be scrutinised with care by the Court. It was submitted that all relevant matters including the circumstances of the deceased persons and the terms of the dispositions were to be taken into account. He contended that while contemporary and similar wills are not enough in themselves those circumstances are matters of importance. Birmingham v Renfew (1937) CLR 666 was relied on and in particular the judgment of Dixon J as he then was. The question there, as here, was whether a husband who had altered his will should be held to have agreed when mutual wills were made that if he should survive he would leave his will unrevoked. Dixon J said, at p 681, "such an agreement can be established only by clear and satisfactory evidence. It is obvious that there is great need for caution in accepting proofs advanced in support of an agreement affecting and possibly defeating testamentary dispositions of valuable property." Mr Fulton relied also on Re Gillespie 1969 3 DLR 317, as showing the appropriate

test
/to be applied.

Mr Loe raised a preliminary point submitting that any evidence regarding statements made by Mrs Roberts was not admissible on the general ground that it was hearsay. No authority dealing with a case of this kind was cited. Mr Fulton submitted that the evidence should be admitted as part of the res gestae or, alternatively, as an exception to the hearsay rule as evidence relating to testamentary dispositions. I ruled that evidence of conversations of the kind included in the evidence of the plaintiff and other witnesses was properly given as part of the surrounding circumstances. In Birmingham and others v Renfrew and others (supra), at p 682, Dixon J referred to witnesses deposing "to a circumstantial account of discussions between the wife and one or other of the intended/beneficiaries".

Mr Loe accepted that mutual wills had been executed and that there was an agreement to do so but he submitted that there was no agreement to go further to make wills which were not revocable on the death of Mr or Mrs Roberts. He referred to In re Oldham 1925 Ch 75 which was approved by the Privy Council, Gray & others v Perpetual Trustee Co Ltd and another (1928) AC 391, affirming a decision of the High Court of Australia. Mr Loe submitted that these cases applied and he compared them with In re Green, deceased, Lindner v Green 1951 Ch D 148 In Gray's case (supra) it was held that an agreement to constitute equitable interests had not been established. And the law was stated that "the mere fact of making wills mutually is not evidence of such an agreement having been come to". Without a definite agreement there could not be a trust in equity.

Mr Loe also submitted that even if the evidence of the plaintiff were accepted it went no further than to show that mutual wills were agreed to; that the evidence did not satisfy the onus

on the plaintiff of proving any agreement that mutual wills were made which could not be revoked once either Mr or Mrs Roberts died. Mr Loe relied also on the evidence of Mr Hutchison which, he submitted, merely confirmed the making of contemporaneous wills identical in terms without any evidence that the question of making them non revocable had been considered. Mr Hutchison was confident that had the question been raised he would have remembered. On the other hand he stated that Mr and Mrs Roberts did not seek advice; that they had obviously discussed previously what they intended to do and gave their instructions accordingly. It is clear that the question of revocation was not raised when Mr Roberts instructed Mr Hutchison to draw the new will in June 1976.

It is necessary now to consider the surrounding circumstances in more detail.

Before their marriage in October 1971 Mrs Roberts had lived in Masterton at 27 Cambridge Terrace with her previous husband for 20 years. She continued to live there as a widow for a further 21 years until she married Mr Harrold Victor James Roberts. Prior to his marriage Mr Roberts had lived at Pahia where he owned a property. This was sold and from their marriage to their deaths they lived in the house at 29 Cambridge Terrace in Masterton. There was evidence that they pooled their resources, for example, each paying off approximately half of the $900 owing on a mortgage over the property. In April 1972 they made the mutual wills in the first named defendant's office coming in together to give their instructions and then again to execute the wills. Mr Hutchison was unable to recall details of the interviews but his recollection was clear that he did not find it necessary to advise at any length because they had obviously discussed what they intended to do and gave their instructions with some precision as he noted at the time.

As a result of what Mrs Roberts had said to the plaintiff she regards herself as bringing the present

proceedings as "representative" of herself and other members of her family. Mrs Roberts was her Aunt (her mother's sister) and her godmother. The evidence showed that the plaintiff had a very close association with her from childhood and throughout her life while she was bringing up her own family. Mrs Roberts had never had children of her own but had a close relationship with her relatives. I accept the plaintiff's evidence which was carefully and fairly given. It is evidence which explains the reasons for the mutual wills executed in April 1972. Mrs Roberts had often discussed her personal belongings with the plaintiff who was aware of her wishes some of which were noted, for example, on the backs of pictures. I accept Mrs Scott's evidence that she had been shown a copy of her Aunt's will sent to her to read and return with a letter pointing out that the plaintiff's husband was to be a trustee. She had returned the will and had not kept the letter. She regarded the will as giving effect to her Aunt's wishes that the plaintiff would receive half the estate for division. She had understood the other half was to go to the youngest of Mr Roberts' sons, Alan, who she had been told was not as well off as the other sons. The letter made it clear she said that Mr Roberts had made an "identical will" and that the property was to be divided between the two families "when they (the Roberts) had both died". The plaintiff said Mrs Roberts had talked to her on other occasions in similar vein.

Regarding the personal items belonging to Mrs Roberts she said in evidence that after the latter's death Mr Roberts had given her one ring and had indicated that he wished to keep other personal property at that stage. She had accepted that and later when she received a letter from Mr Roberts saying that he had altered his will and left her $1000 she had thought this meant an addition to the mutual will she had seen. She had not realised, and the letter did not suggest, that the provisions of the mutual wills had been changed leaving the residue of the estate to Mr Roberts' sons.

In my view against the background of a second marriage late in life the form of the mutual wills leading to a division of the residue of the estate equally in a way which benefited representatives of the two families is strong evidence of an agreement between Mr and Mrs Roberts regarding division of the estate of the survivor. The agreement of Mr and Mrs Roberts is further supported, in my view, by their clearly expressed intention to make mutual wills in which both families benefited pursuant to identical provisions in both wills. This was not unnatural in the circumstances having regard to the pooling of their assets, and, no doubt, their pensions, in recognition of a measure of equality of contributions to the total estate. In the circumstances, and bearing in mind "the caution in accepting proofs" I consider an implied agreement that the wills could not be revoked after the death of Mr or Mrs Roberts is clearly the reasonable inference to draw on the balance of the probabilities in the present case.

Having reached these conclusions I respectfully adopt reasoning in the judgment of Dixon J in Birmingham v Renfrew (supra).

The general principle was stated by Dixon J at p 683 :

> "It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable... The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will."

It is also important to note that in that case the wife died and bequeathed her residuary estate to

her husband if he should survive her. At p 689 Dixon J refers to the position of the survivor as absolute owner including that when the survivor dies "he is to bequeath what is left in the manner agreed upon" - in that case, and the present case, "that at his death the residue shall pass as arranged".

For these reasons I have reached the conclusion that the plaintiff is entitled to the declaration sought. If necessary I shall hear counsel as to costs or memoranda may be submitted.

Solicitors for the plaintiff :	Messrs Wilson Henry Martin & Co (Auckland)
Solicitors for the first defendant :	Messrs Chapman Tripp & Co (Wellington)
Solicitors for the second defendant :	Messrs Bell Dunphy & Co (Wellington)