

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

③ FWT X
P.No. 664/84

NZR

562

IN THE ESTATE of V FRAY
of Auckland, New
Zealand, Retired Com-
pany Director,
Deceased

Hearing: 18th May 1984

Counsel: Temm Q.C. and Miss Connell for Executors
Brown Q.C. for Caveators
Craddock Q.C. and Laxon for Catherine Anne Spencer
Chambers for Gwenyth Bedford Moore Connell

Judgment: 29.5.84

JUDGMENT OF SINCLAIR, J.

The abovenamed deceased died on the 1984 leaving a will and three codicils thereto. Under the will the deceased appointed his wife and Mr L. R. Willis, Chartered Accountant of Auckland, to be the trustees. After making provision for his wife he left certain pecuniary legacies to four named charities and after making provision for income to his wife he left the whole of his estate to four named children, being Mackie, Connell, Metclafe and Spencer who are daughters of the marriage.

By his first codicil the deceased gave certain additional powers to his trustees and went on to state that he was of Australian nationality, holding an Australian passport and that he was domiciled in that country.

The second codicil made certain further provision for his wife and made certain provision in relation to an apartment in a block known as _____ he then made further substantial provision for two of his daughters, namely Mrs Connell and Mrs Spencer, and directed that certain trust funds should be set up as set forth in that codicil.

By the third codicil he appointed a further executive trustee, namely R _____ Connell, who is a solicitor and the husband of one of the beneficiaries above referred to.

Following the death of the late Mr Fray two of the daughters, Mesdames Mackie and Metcalfe, lodged a caveat and in due course counsel attended before me pursuant to the provisions of an order nisi when I heard submissions as to whether or not I should direct that the will and codicils should be proved in solemn form or whether I should proceed to deal with the matter pursuant to the provisions of S.61 of the Administration Act 1969.

It was Mr Craddock's contention that I should direct affidavits to be filed in opposition to those filed on behalf of the caveators and to hear argument before it was decided to direct that the application for administration be made in solemn form.

At that particular time counsel for the Executors, who of course was representing Mr Connell, and counsel for the Caveators strongly submitted that having regard to all the circumstances there ought to be an order that

the will and codicils be proved in solemn form. In addition to Mr Craddock opposing that course of action Mr Chambers on behalf of Mrs Connell also supported the stand taken by Mr Craddock on behalf of Mrs Spencer. At that time there was but one affidavit filed on behalf of the Caveators and it raised for consideration the question of the mental health of the deceased and the question of undue influence over him by Mr Connell.

At that particular time counsel referred in the main to the decision of this Court in In Re Annie Nissenbaum (1939) N.Z.L.R. 94. In consequence of the representations made at that time I indicated to counsel that I wished to consider one aspect of the matter which related to Mr Connell having been responsible for the preparation of the will and the codicils when he was the husband of one of the beneficiaries and one of those who had obtained an increased benefit at the expense of Mesdames Mackie and Metcalfe in the second codicil. In consequence I issued a memorandum to counsel asking them to consider the cases of Tanner & Ors v. Public Trustee & Ors (1973) N.Z.L.R. 68; Barry v. Butlin (1838) 2 Moo. P.C.C. 480 and Tyrrell v. Painton (1894) 151.

In consequence counsel saw me again on 18th May, 1984 and at that time counsel for the Trustees and Mesdames Mackie and Metcalfe maintained their position, while counsel for Mrs Connell indicated that she now supported the stand taken by the Trustees and supported the application for the grant of the administration in solemn form. However, counsel for Mrs Spencer maintained that the Court ought still to direct the alternative procedure envisaged by S.61 of the

of the Administration Act 1969 to be followed. However, Mr Temm pointed out that to follow the course suggested by Mr Laxon would involve delay and considerable expense with the distinct probability that in any event, having regard to the fact that the will had been prepared by a solicitor who was related to one of the major beneficiaries, the Court would direct proof in solemn form.

Having regard to the situation which had been reached by the parties, and having regard to the issues involved and the fact that Tanner's case and those cases cited in that decision indicate quite clearly that the Court's suspicions will be aroused where circumstances exist similar to those which exist here, I was of the view that it was expedient, proper and necessary at this stage to order that the application for administration be made in solemn form and I so ordered. I indicated that I would reduce my reasons to writing and this is now done which is, in effect, a re-statement of what I said on the 18th May last.

I record that Mrs Fray has not made any application for administration at the moment and it appears for good reason in that she is not well enough to so apply. I record also that on 14th May, 1984 pursuant to S.7 of the Administration Act 1969 I made an order appointing Messrs Connell and Willis temporary administrators.

In respect of the present application I direct now that the proceedings for the grant of administration in solemn form must be filed within 30 days of 18th May, 1984 and that the costs of and incidental to this action shall

be costs in the cause.

P. P. W. J.

SOLICITORS

Connell & Connell, Auckland for Trustees
Glaister Ennor & Kiff, Auckland for Caveators
Towle & Cooper, Auckland for Kathrine Anne Spencer
Mahoney Samuel & Becker, Auckland for Gwentyth Bedford
Moore Connell