Law Reports

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IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

A.26/83

BETWEEN C McGINLEY

Plaintiff

A N D S WOOLLETT

First Defendant

A N D M RATHBUN

Second Defendant

A N D J(WOOLLETT
by his guardian ad litem

Third Defendant

No special Consideration

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Hearing : 8th March 1984

Counsel : J. Cadenhead and S.J. Hembrow for Plaintiff
K.A. Gough for First Defendant
T.M. Abbott for Second Defendant
D.L. Carruthers for Third Defendant

Judgment : 8th March 1984

(ORAL) JUDGMENT OF BARKER J

This is an action for a grant of probate in solemn form in the estate of D Rathbun, late of Greymouth, retired storekeeper (hereinafter called "the deceased"). He died at Greymouth on 1983. On the day before his death in the operating theatre at the Grey Hospital, just as he was about to receive the anasthetic for an operation for an aortic aneurysm, the deceased told one of the nurses that he wished to make a will. At his direction, she began a document with these words:

I d Rathburn Hereby aurthorise My Solicitor McGinely"

That is as far as that particular nurse got with writing the will; she then asked the charge nurse to take over. The charge nurse then added the words:

"to take over my estate and to carry on the D Rathburn trust with the Public Trustee."

The signature of the deceased was then put to this document. The charge nurse then added the following:

"I bequeth one thousand Dollars to my parish priest for use in the parish."

Realising apparently that a will required two witnesses, the charge nurse then attracted the attention of Mr Treanor, the surgeon who was to perform the operation; on the evidence that I have heard, it seems clear that the deceased then signed the document again in a position after the reference to the bequest to the parish priest; his signature was then witnessed by Mr Treanor and by Miss Daikee, the charge nurse. I am satisfied that they signed the document in the sight and presence of each other and in the sight and presence of the deceased who also signed the document in their sight and presence.

These proceedings were then issued by Mr McGinley; he is a solicitor who has practised for many years in Greymouth. He sought the grant of probate in solemn form of the testamentary

document and an order confirming him as executor according to the tenor of the will. There are also certain other orders sought as to the administration of the estate and as to the validity of the bequest to the parish priest.

In my view, these proceedings were properly commenced by way of an action to obtain a grant of probate in solemn form. Halsbury (4th Edition) Volume 17, Paragraph 866 indicates that where there is doubt as to the validity of the will, it is open to the executor to prove it in solemn form. Clearly the form of the document would attract questions as to its validity. Paragraph 775 of the same volume of Halsbury indicates that the Probate Court may, in considering the suit propounding the will, also for the sake of avoiding further proceedings determine ancillary questions arising out of the administration of the estate.

The evidence before me was given by the witnesses to the will; I have summarised it already. I am satisfied that the document was signed in accordance with the requirements of the Wills Act 1837 (Imp.).

The evidence of Mr McGinley shows that he knew the deceased for almost 60 years, having grown up with him in Greymouth. He had acted as his solicitor for at least the last 10 years; in March 1983, his firm had prepared a trust deed for the deceased naming the Public Trustee as trustee under the trust deed. Mr McGinley is and has been the only person of that surname practising law on the West Coast.

Without going into detail, the trust deed gives certain benefits for the deceased's wife, daughter and grandson. Mr McGinley tried to persuade the deceased to make a will on several occasions including the occasion when the deceased signed the trust deed; on all occasions, the deceased declined to accept his advice. Mr McGinley stated in evidence that he had made enquiries for a will from the only other legal firm in Greymouth, the Public Trustee and various banks; all enquiries were to no avail except that he was able to find a will made in 1938, held by another legal firm. However, this will has no validity because the deceased married after 1938.

Mr McGinley has provided details of the deceased's estate as known to him. Most of it is in readily realisable form; the net worth of the estate is of the order of $200,000.

The deceased is survived by his wife, the second defendant. They had entered into a separation agreement in 1964 which was varied as to maintenance in 1970. In 1969, she had commenced proceedings in the Supreme Court at Christchurch for divorce; this petition never went to a hearing; it was a term of the 1970 agreement that the second defendant would discontinue these divorce proceedings; I am advised from the Bar that that is in fact what happened.

The second defendant gave evidence to confirm the signature of the deceased and the fact that she and the deceased had been living apart; she also confirmed that there was no separation order in force. This is a matter of some

relevance because of the law relating to intestacy; a widow in respect of whom a separation order (as distinct from a separation agreement) is in force, has no claim under an intestacy of her husband.

Mr Cadenhead, against the above factual background, submitted first that the document was a proper will and that Mr McGinley should be admitted as its executor according to the tenor. These are two distinct matters for the Court to consider.

As to the form of the will, there is a presumption in favour of due execution; the form of the will is immaterial provided the will is signed and witnessed; it does not matter that the will does not purport to deal with the whole estate of a deceased person.

One problem is that this document contains two signatures by the testator; I think that the two authorities referred to by Mr Cadenhead (and concurred in by other counsel) overcome that problem. Re Hornby, (1946) 2 All E.R. 150 held that the test is whether on the facts the testator intended to authenticate the whole document. The Irish decision of In the Goods of Pattison, (1917) I.R. K.B. 90, held that two signatures by the testator does not invalidate a will provided that the second signature was the operative one and it was the one witnessed by the two necessary witnesses.

In Hornby's case, Wallington, J. in the Probate, Divorce and Admiralty Division, held that the combined effect

of the Wills Act 1837 and Section 1 of the Wills Amendment Act 1852 was for the Court to decide in each particular case what was the "end" of the will and whether the document, with the signature where it was, made it apparent on its face that the testator intended to give effect by his signature to the writing signed as his will. In Hornby's case, there had been a document written in green ink in the testator's handwriting on one side of a sheet of paper. On the right hand side, about a third of the way down, lines had been drawn forming an oblong space, in which there appeared the word "Signed" in the testator's handwriting in the same green ink, and, in a different coloured ink, the testator's signature. The signatures of the attesting witnesses, also in this different coloured ink, appeared at the foot of the sheet. Beyond the document itself there was no evidence of the circumstances in which it had been prepared and signed. Nevertheless, it was held that the testator intended his signature sufficiently to authenticate the whole of the document written on that side of the sheet of paper, which was then admitted to probate.

The present case is of course much stronger because there is detailed evidence of the circumstances giving rise to the preparation of the document. The Irish case of Pattison is even more in point. There, the testatrix signed her will but her signature was not then attested. She then signed it again in the presence of two witnesses. It was held that this second signature was a good acknowledgement of the earlier signature and the will should be admitted to probate.

In that case, the Court had the benefit of evidence

from at least one of the attesting witnesses and had no hesitation in finding that the document should be admitted to probate. Pattison's case is similar to the present because here the testator had signed the document once and then signed it a second time in the presence of two attesting witnesses.

Accordingly, I have no hesitation in holding that the document is a valid will; I therefore move to consider whether Mr McGinley should be appointed executor according to the tenor.

The test is a general one and was succinctly stated by Sim, J. in Re Rylatt, (1916) N.Z.L.R. 1160:

> "In order to constitute a person executor according to the tenor there must be something explicity imposing one or more of the duties of an executor - In Re Cook, (1902) N.Z.L.R. 114 - or something in the nature of a general direction to administer; In Re Way, (1901) N.Z.L.R. 345."

Other cases saying much the same thing are In Re The Goods of Lush, (1887) 30 P.D. 20 and In Re Cosgriff, (1917) N.Z.L.R. 839. In the present case, the document authorised "my solicitor McGinely to take over my estate". Also, in the second part of the document it bequeathes $1,000 to the parish priest. I think that these two references are sufficient to indicate that the testator desired Mr McGinley to be executor in the circumstances of his having acted for the deceased. Accordingly, I have no hesitation in confirming Mr McGinley as executor according to the tenor of this will.

The statement of claim sought further declarations as to the extent of the executor's duties over the property which he has to administer. I think that this prayer states things a little broadly. Clearly, if Mr McGinley is executor, then it is his duty, in accordance with the normal duties of an executor, to get in all of the estate of the deceased and to administer it according to either the directions in the will or the law relating to intestacy or both. In the present case, the only bequest made by the deceased was the bequest of $1,000 to which I shall make reference later.

As to the balance of the estate, there is the intestacy. Accordingly, Mr McGinley will be required to distribute the estate in accordance with the laws of intestacy existing as at the date of death of the deceased. I do not think that any further direction to him is called for; no doubt he will be well aware of the relevant provisions of the Administration Act 1969 at the relevant date.

In fact, I understand from counsel under intestacy, the personal chattels, including a motor vehicle, will go to the widow, together with a $50,000 legacy plus one-third of the balance; the remaining two-thirds of the balance will go to the only child of the deceased who is the first defendant. The third defendant is the only grandchild of the deceased and is not entitled to receive any benefit in intestacy, but of course is a potential claimant under the Family Protection Act 1955. He is also a beneficiary inter vivos in the trust referred to earlier.

The only other subsidiary question concerns the bequest to the parish priest. Evidence was given by Mr McGinley that the deceased was a stalwart member of the Roman Catholic parish of Greymouth and that the parish priest at the time he made his will, was the Reverend James Morris Harrington. Monsignor Harrington is still parish priest of Greymouth.

The researches of Mr Cadenhead have uncovered yet another Irish case, Bradshaw v. Jackman, (1887), 21 I.R. 12 which held that a bequest to a named superior of a religious institution was a bequest to that person, not to the office-holder; therefore, the bequest is a personal one to Monsignor Harrington, who of course would be required to use the bequest "for use in the parish". Mr Gough I think is correct to submit that this is not strictly a charitable bequest because "for use in the parish" may well cover uses which are not strictly charitable in law.

I therefore formally pronounce probate in solemn form of the document dated 31st August 1983 which has been produced in evidence. I declare that Mr Cyril Redmond McGinley of Greymouth, solicitor, is executor according to the tenor of that document.

I think my judgment will indicate sufficient guidance for the executor over the various ancillary matters that have been canvassed before me. All counsel have considered the authorities and are in agreement with the result that has been arrived at by me.

I also direct, in accordance with normal practice in probate cases, that the costs of all parties on a solicitor-and-client basis be paid out of the estate. Costs are to be approved by Mr McGinley.

K.D. Barker J.

SOLICITORS:

De Goldi & Cadenhead, Christchurch, for Plaintiff.

K.A. Gough, Christchurch, for 1st Defendant.

Harper, Pascoe & Co., Christchurch, for 2nd Defendant.

Carruthers & Weatherall, Greymouth, for 3rd Defendant.