

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

6/12
③ FWT

P.346/84
P.215/84

B/Worths
X

IN THE ESTATE OF A MACDONALD
late of New Plymouth
Retired Timber Worker
Deceased

1482

BETWEEN J MACDONALD
of New Plymouth,
Widow
Plaintiff

A N D J MITCHELL of
Taumarunui, Farmer and
M MITCHELL his
wife as Trustees and
Executors in the Estate
of A
Macdonald
Defendants

Judgment: 3 DEC 1984

JUDGMENT OF GALLEN J.

The late A Macdonald died at New Plymouth on 1984. He left a Will dated 8 May 1979. On 20 June 1984, Miss V.C. Sim a solicitor in New Plymouth, lodged a caveat on behalf of the abovenamed plaintiff in the New Plymouth Registry, in the following terms:-

"LET NOTHING be done in the Will of A MACDONALD, late of New Plymouth in New Zealand, deceased without notice to Messrs St Leger Reeves Middleton Young & Co., Solicitors for J MACDONALD of New Plymouth, Widow of the deceased having interest."

On 23 August 1984, the executors named in a Will dated 8 May 1979, applied by motion to the High Court at New Plymouth for probate of that Will. The fact that the caveat had been lodged seems to have been overlooked and on 29 August 1984, Mr Registrar L'Estrange at Wellington admitted the Will to probate. On 23 November 1984, counsel for the plaintiff learned for the first time that probate had been granted. He then checked with the Registry of the High Court at New Plymouth and ascertained that the caveat had been lodged under probate No.215/84. He also confirmed that probate had been granted on 29 August 1984 under No.346/84. On the same day, he got in touch by telephone with the solicitors acting in the estate who informed him that they were about to distribute the estate. Counsel for the plaintiff indicated that notice would be given under the provisions of the Family Protection Act 1955. The plaintiff now moves ex parte for an order that the order made on 29 August 1984 granting probate, be rescinded and for a further order that an interim injunction issue restraining the defendants from distributing the estate of the deceased.

Counsel submits by memorandum that in the circumstances, it would be appropriate for an order rescinding the probate to be made under the provisions of Rule 426C of the Code of Civil Procedure. That Rule deals with orders fraudulently or improperly obtained. I do not think that it applies to this situation. The action of the executors in seeking probate could not be described as fraudulent or

improper and in my view the Rule in terms applies to a situation where the conduct of the applicant is questionable in manner contemplated by the Rule. Rule 531T prescribes the procedure for obtaining recall of probate. The procedure prescribed by that Rule in the circumstances of the kind now under consideration, is by way of action. In Re Wilkinson 1923 G.L.R. 266, Chapman J. considered a situation where Letters of Administration had been by mistake granted to an infant, all concerned believing that he was of full age. The learned Judge considered that in those circumstances it would be a ponderous absurdity to have to proceed by way of action and he invoked the provisions of Rule 531Z of the Code of Civil Procedure which provided that in matters not specially provided for, the appropriate Rules in England could be invoked. Using this provision, he considered that it was appropriate to deal with the matter by way of motion. Rule 531Z was revoked by the Supreme Court Amendment Rules 1944 and this course is not therefore open to me.

In my view, the plaintiff will need to proceed by way of action. In any event in circumstances such as these, I should have been reluctant to have granted an order rescinding the order in question, ex parte.

The plaintiff also seeks an interim injunction preventing distribution until the matters in issue have been resolved. Having regard to the circumstances, I think such an order is appropriate and an injunction will issue restraining the abovenamed defendants from distributing the estate of the abovenamed deceased until further order of the Court. Leave is reserved to any party to apply in respect of any of the matters referred to in the motion.

R. J. Ballantyne

Solicitors for Plaintiff:

Messrs St. Leger Reeves,
Middleton, Young and Company
New Plymouth

Solicitors for Defendants:

Messrs Menefy, Tapp and Company
Taumarunui
