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NZLR

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A. No. 94/82

872

IN THE MATTER of the Declaratory Judgments Act 1908

A N D

IN THE MATTER of the Will of M ROSSITER late of Christchurch, Retired, deceased

A N D

IN THE MATTER of an application by V GORRIE of Stewarts Gully, Married Woman, as executrix of the Will of the abovenamed M ROSSITER deceased for orders interpreting the said Will

BETWEEN V GORRIE of Stewarts Gully, Married Woman

Plaintiff

A N D M ROSSITER of Christchurch, and E ROSSITER of Melbourne, Australia, Infants

Defendants

Hearing: 24 May 1984

Counsel: T. Sissons for Plaintiff
C.A. McVeigh for M.T. Rossiter
P.J. Rutledge for M.S.J. Rossiter
B.S. McLaughlin for E.C.A.J. Rossiter

Judgment: 28/6/84

JUDGMENT OF QUILLIAM J

This is an originating summons for interpretation of the will of M Rossiter who died at Christchurch on 1981 aged years.

The deceased was married twice and was the father of three children. By his first marriage he had a son, M Rossiter, who is now years of age. After his separation from his first wife the deceased had a second son, M Rossiter (T) by a woman to whom he was never married. That son is now : years of age. Following his divorce he remarried and there was a third son, E Rossiter (E) by that marriage. The second marriage also ended in divorce. Thereafter both the younger sons lived with the deceased until his death.

On 23 April 1981 the deceased made his last will and this was duly admitted to probate. It was a holograph will and some of its terms suggest that it was, in part, copied from an earlier will drawn by the Public Trust Office.

By cl 1 of his last will the deceased revoked former wills and appointed "my brothers and sisters of New Zealand" and "also my nephews and relations by marriage" as executors and trustees. In the result probate was granted to one sister. By cl 2 he appointed trustees and guardians of his two younger sons and by cl 3 he gave directions as to his remains after death. Clause 4 is the principal subject of the present proceedings and it is as follows:

> " 4. I give and bequeath the sum of ten thousand Dollars ($10-000 to my son the said E Rossiter should he survive if one son is deceased then the remaining son and his familly will bequeath the whole of my estate both real and personal of whatever nature and where-soever be situated not hereinbefore otherwise disposed of unto my trustees upon trust to pay thereout my just debts funeral and testamentary expences and all death duty payable in respect of my estate and to stand possessed of the Residue for my son the said M Rossiter or E Rossiter whichever might be the surviving son of my two boys at the age of 25 years continuing on page two of this my original will both children must permantly reside in

Papanui if either of my sons marry, their children must attend the Primary school in Papanui, also attend [illegible] Church of England Papanui, both are familly ties, I appoint all my trustees with full power and control, also with sole rights as to disposeing of my property which could be of no further use, including all contents, it is my wish that both sons remain in my home situated at [illegible] Avenue Papanui Christchurch 5 under the care of my Trustrees. "

There then follows a residuary clause in these terms:

" I give and bequeath the whole of my estate both real and personal of whatever nature and wheresoever situate not hereinbefore otherwise disposed of unto my trustees and guardians upon trust to pay thereout of my just debts funeral and testamentary expences and all death duty payable in respect of my estate and to stand possessed of the residue for my sons the said M[illegible] Rossiter and E[illegible], Rossiter should they survive me my trustrees and guardians must install some person in my home to look after my sons. "

The questions asked in the originating summons are:

" 1. TO what interest in the estate of the deceased is E[illegible] ROSSITER an infant son of the deceased entitled pursuant to the terms of the deceased's Will?

2. TO what interest in the estate of the deceased is M[illegible] ROSSITER an infant son of the deceased entitled pursuant to the terms of the said Will?

3. WHAT is the true interpretation and meaning of the residuary clauses in the said Will. "

It is necessary, first, to set out the general principles of law upon which the interpretation of a will

is to be approached. A convenient and helpful statement of a number of the general principles is to be found in the judgment of Tompkins J in Re Lourie [1968] NZLR 541 at p 546:

> " I think I may, from the above cases, summarise the principles applicable to construing this will as follows:
>
> (1) If the language of the will is unambiguous and discloses no obvious mistake or omission, the Court must construe it as it stands.
>
> (2) If on the face of the will there is an ambiguity or an obvious mistake or omission or other difficulty, the Court may consider extrinsic evidence of the circumstances in which the will was made in order to assist it in ascertaining the intention of the testatrix.
>
> (3) Extrinsic evidence is not permissible to show that words were omitted by mistake in the drafting or engrossment of a will.
>
> (4) If the intention of the testatrix can be determined with reasonable certainty or by necessary implication from the language of the will, read in the light of the circumstances in which it was made, the Court should give effect to that intention.
>
> (5) If the Court finds that there was an obvious omission in the will and can determine by necessary implication what was omitted, it may supply the words omitted in order to give effect to the intention of the testatrix. "

Certain further principles may be stated. The first is that the proper way to construe a will is "to construe the whole of the document and not to place prima facie meanings on particular words, but to place a final and definitive meaning upon the words arrived at by an examination of the document as a whole": (Re Hipwell [1945] 2 All ER 476 at p 477). A second is that there is a presumption against intestacy but this should not be carried too far particularly in the case of a home-made will: (In re Kallil [1957] NZLR 10 at p 25). Bearing these principles

in mind it is necessary now to look at the will in order to see whether it can be construed so as to identify and give effect to the intention of the deceased.

There appear to be two possible ways to read cl 4. One is by assuming there to be a full stop after the words "should he survive" and the other is by accepting there should be no such full stop. Once this is recognised then it seems to me clear how the clause must be interpreted.

On the basis of the former assumption the clause, although still inelegantly expressed, can at once be seen to be capable of a sensible construction. It would provide, first, and with complete clarity, that there was to be a bequest of $10,000 to E should he survive, and by "survive" there can be little doubt the deceased meant survive the deceased himself. There then follows the alternative in the event of E not surviving the deceased. An initial difficulty arises over the use of the word "bequeath", but this can only have been a mistake for "receive" or a similar word. With that amendment the alternative to Eugene surviving is that the whole estate, including the $10,000, is to go to whichever son is the survivor of the two, and that is to include the family of that survivor. However, this part of the clause was not, in my view, intended to have any effect at all in the event of both sons surviving the deceased.

If cl 4 cannot be read in that way then I consider it cannot be read so as to make any sense at all. The initial bequest of $10,000 is clear upon any basis, but the difficulty would then arise if one considers the possibility of trying to graft on to that bequest the alternatives of each son being the survivor. Should it be E then he would receive the whole estate anyway and the bequest of $10,000 would have been meaningless. Should it be Terry then he would receive the whole estate and again the bequest of $10,000 would have been meaningless. But it is that bequest which is the dominant feature of cl 4 and the deceased cannot have intended that it was to have no meaning

or effect at all. Accordingly, to read the clause without first giving full effect to the bequest is simply to make a nonsense of it. By the simple device of inserting a full stop the clause can at once be given a meaning.

The only question is whether that device is one available to the Court. I have no doubt that it is. As I have already indicated, there is authority for supplying words omitted where there is an obvious omission and it can be determined by necessary implication what was omitted. A fortiori I am satisfied that the Court may insert a punctuation mark where it is plain that one has been omitted. That is the case here, and I find that the proper course is to insert the full stop after the words "should he survive" and then to read the clause by giving effect to the first sentence and by treating the second sentence as having been conditional upon an event which did not occur. Clause 4 therefore, in the result, achieved no more than to make a bequest to E[illegible] of $10,000.

The residuary clause, which presents no problems of interpretation, then applies according to its terms in order to require a division of the balance of the estate between the two sons.

The questions asked in the originating summons are answered as follows:

1. A bequest of $10,000 and one-half of the residue.

2. One-half of the residue.

3. There is only one residuary clause in the will. It provides for the two named sons to share equally any residue should they survive the deceased.

The costs will be reserved.

Solicitors: Meares Williams, CHRISTCHURCH, for Plaintiff

Spiller, Rutledge & Langham, CHRISTCHURCH, for M.S.J. Rossiter

Harold Smith & Dallison, CHRISTCHURCH, for E.C.A.J. Rossiter