N.Z.L.R

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY 18/12

P No. 200/92

2495 MEDIUM PRIORITY

IN THE ESTATE of S
of Palmerston North,
Company Director,
deceased

Name of Deceased not to be published

Counsel: J T Ingerson in support

Judgment: 14 December 1992

JUDGMENT OF GREIG J

This is an application by the sole executor for probate of the will of the abovenamed deceased dated 22 March 1990. There is no difficulty or issue arising out of that application but in addition the executor has applied for an order for exclusion from probate of certain parts of the will and a further order that the original will and the affidavit of the applicant in support of exclusion order should not be open to public search without leave of the Court. The Registrar had some doubt as to his jurisdiction and authority to make either of those orders and so with the consent of counsel for the applicant the matter was referred to a Judge for decision.

The deceased died on or about March 1991 at Palmerston North. His wife predeceased him but he was survived by a daughter and a son, each of whom have children.

The scheme of the will, in broad terms, provides out of his real estate one-third of the realised value not exceeding $100,000 to the son and after a number of bequests, legacies and other specific provisions the residue of the estate to the daughter. I stress that that is a broad view of the scheme

of the will. It is not intended to declare the full meaning and effect of it because there may be some questions of interpretation and construction.

The will is, it seems, a home made will. It is typed on some 25 foolscap pages and was witnessed not by a solicitor or a law clerk but by two civilians. The will contains a number of clauses, particularly of a machinery provision which, I assume, have been copied out of a will or will document prepared by solicitors. The principal dispositive provisions in the will are largely in lay language. The whole is prepared and set out in a narrative form. There are long passages of statement and opinion dealing sometimes generally, sometimes particularly, with aspects of the family history. These are, to some extent, expressed as explanatory of the dispositions made by the testator and especially the reasons for the provisions made for and in respect of his son and his son's children. In those the testator expresses his disappointment and disapproval of certain aspects of his son's life and conduct and describes a distancing of the family relations as between the father and the son and his family. In the course of those narrative passages there are strong and detailed criticisms of the son and his wife which are in some respects defamatory and are clearly offensive. The offence is not just that suffered by the subject of the criticism but in a public document may create offence and injury to others, not excluding the testator and the memory of him.

The passages and words complained of, and which are sought to be excluded from the probate, are all part of the expression of the testator's reasons for his dispositions. They must be relevant to an understanding of his intentions and the belief or opinions which moved him. None of them, however, affect the disposition of the estate or relate to an understanding or to the proper construction of those dispositions. They are all, therefore, extraneous to the real purpose and effect of the will as the disposition of the estate but would have relevance if it was necessary to have regard to the deceased's reasons for making or not making any particular provision under the will. Any exclusion of any part of the will from the probate, that is to say the will as proved, will not expunge the words from the will itself. That will remain as the testamentary declaration by the deceased. It will thus remain available without alteration for any evidential or other use in any proceedings which might arise in or about the estate.

Although such an application as this is infrequent it is not without precedent. *Halsbury's Laws of England* (4th ed, vol 17, para 850) under the heading "Exclusion of Words from Probate" contains the following passage:

> " Offensive, scandalous, libellous, blasphemous or undesirable passages having no testamentary relevance may also be omitted from the probate and from any copy of the will subsequently ordered, but this is a power to be exercised with great moderation, for a testator has the right to explain why he has disposed of his property in a certain way although he has no right to libel anybody in his will by using words which have no direct bearing on the devolution of his property. The court has refused to expunge or strike out the offending words from the original will. "

To like effect in *Tristram and Coote's Probate Practice* (27th ed, p 74) the law is expressed in similar terms. In *The Goods of Honywood* (1871) LR 2 P & D 251 Lord Penzance, having accepted that there was a power to make an omission from the probate copy of the will, said that it was a power to be exercised with great moderation and not to be done on light grounds. In 1914 in *In the Estate of White* [1914] P 153 Bargrave Deane J said that there were only four reported cases on the point, including the ones last mentioned, and expressed his view that:

> " ... a will ought not to be made the medium of slanderous statements, and that where in a testamentary document words were inserted which in no sense had any testamentary value or effect and could serve no useful purpose if left in, they should be omitted from the document itself; .... "

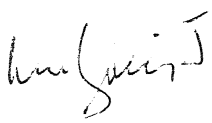
The Judge went on to make the distinction between omission of the words from the will and omission from probate and noted that no copy would go out from the Probate Registry except a copy of the probate which would not contain the objectionable words.

In more recent times Bucknill J in *In the Estate of Hall, deceased* [1943] 2 All ER 159 said, at p 160:

> " It seems to me that, *prima facie*, the probate ought to issue in the words of the will itself. I think that a testator not only has the right to dispose of his property, but he has the right also to give reasons why he has disposed of it in a certain way. On the other hand, he is not entitled to use his will as a means of libelling and unjustly injuring somebody against whom he has a spite; or, even if he has no spite, he has no right, I think, to libel anybody in his will by using words which have no direct bearing on the devolution of his property. "

I have carefully examined the words and passages which are identified in para 6 of the applicant's supplementary affidavit sworn on 11 March 1992. It is obvious that to quote or examine these passages in any detail in the course of this judgment would defeat the whole purpose of the application and negate the effect of the order to be made. Suffice it to say that I am satisfied that each of those passages and the words contained in them are unnecessary to the disposition of the testator's estate or to the elucidation of the proper construction and meaning of the will. They are all objectionable, defamatory, and will cause offence and injury needlessly to members of the family. It is proper that these words should be omitted from the probate and I make an order accordingly.

Under R 66 (7) the Judge has a discretion to prevent the inspection, searching or copying of any document. The first order made necessarily requires a further order so that it has full effect otherwise there could be searching and copying of the documents, the will remaining on the file and without any expungement. There will therefore be an order as sought that the original will and the supplementary affidavit of the applicant shall not be inspected without leave of a Judge.



Solicitors: Kensington Swan, WELLINGTON, for Applicant