

N.Z.L.R

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

2/6

P No. 604/94

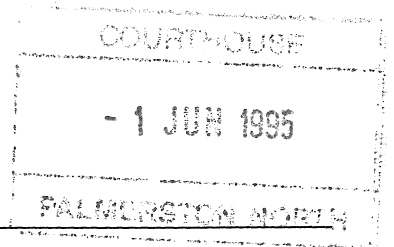


IN THE ESTATE

of INGER DEIGHTON formerly of
Paraparaumu, but late of Palmerston
North, Widow, deceased

602

MINUTE OF GREIG J



Solicitors:

This matter arises out of the application for probate in the estate of Inger Deighton made by AMP Perpetual Trustee Company N.Z. Limited. Mr Registrar Seton, who dealt with the application, made a number of requisitions on the application among which was one requiring the applicant to record in the application, and thus in the probate, the previous full name of the company being the name of the executor as expressed in the will, the subject matter of the application for probate. The requisition was disputed but in the end was conceded to enable probate to be granted but without resiling in principle from the view taken by the applicant. Probate was then granted.

The matter has been referred to me purportedly by way of an application for review of the Registrar's decision pursuant to R 651 (3). That application is, in terms, made by the Registrar. That provision does not seem to me to be apt. It seems unlikely, in any event, that a Registrar should be able to or be authorised to apply for review of his own decision. It may be said, moreover, that the matter is now academic, the probate having been granted. However it appears clear that both the company and the Registrar consent to the matter being referred to a judge, whether on an informal or formal basis and in light of that I have accepted the matter and give this minute accordingly.

The will of the deceased dated 11 August 1982 appointed the Perpetual Trustees Estate and Agency Company of New Zealand Limited as executor and trustee of the will. The company in that name had been incorporated under the Companies Act 1882 on 16 April 1884. It was given power, by virtue of the Perpetual Trustees Estate and Agency Company Act 1884, to act as executor and trustee. It was a trustee company within the meaning of the Trustee Companies Act 1967. That company later became a subsidiary of the Australian Mutual Provident Society. As a result it was desirous of changing its name to the name AMP Perpetual Trustee Company N.Z. Limited. In order to achieve that, and some further powers and authorities, the AMP Perpetual Trustee Company Act 1988 was passed. It is a private Act. The long title of that Act reads as follows:

" An Act—

- (a) To provide for a change of name by The Perpetual Trustees, Estate, and Agency Company of New Zealand (Limited); and
- (b) To authorise the Company to transact business with the Australian Mutual Provident Society and with other subsidiaries of that society; and

- (c) To consolidate the provisions of the Perpetual Trustees, Estate, and Agency Company Act, 1884 and its amendments. "

Under s 2, the interpretation section, the term "The Company" was defined to mean -

" The Perpetual Trustees, Estate, and Agency Company of New Zealand (Limited) incorporated in New Zealand under the Companies Act, 1882, which, on and after the 1st day of April 1988, will be called AMP Perpetual Trustee Company N.Z. Limited".

Section 4 (1) enacted and effected the changed name of the company. Section 5 (d), omitting the irrelevant words, is as follows:

- " On and after the 1st day of April 1988, the Company shall be and continue to be the same body corporate as the body corporate existing before that date and called The Perpetual Trustees, Estate, and Agency Company of New Zealand (Limited). In particular, and without limiting the generality of the foregoing,— ...
- (d) Every reference in any Act, will, trust deed, document, sign, poster, notice, or other place to 'The Perpetual Trustees, Estate, and Agency Company of New Zealand (Limited)' or to 'The Perpetual Trustees, Estate, and Agency Company of New Zealand Limited', or to 'The Perpetual Trustees Company Limited', whether before or after that date, shall be deemed to be a reference to 'AMP Perpetual Trustee Company N.Z. Limited'. "

By s 6 of the Act the Company was empowered to be and act as an executor to apply for and obtain probate and to do all other acts and things that an executor might do as a private individual when appointed executor.

The original application sought probate to "AMP Perpetual Trustee Company N.Z. Limited of Wellington, trustee company, the executor appointed by the will under its former name." The former name was not expressed. In the affidavit to lead grant of probate, sworn by the Wellington Trust Manager of the company on 25 October 1994, having deposed to his position and authorisation to make the affidavit, in para 2 of his affidavit said this:

- " 2. The Company is authorised to act as executor pursuant to the provisions of section 6 of the AMP Perpetual Trustee Company Act 1988. By that Act, the name of the Company was changed from its former name, The Perpetual Trustees Estate and Agency Company of New Zealand Limited. "

Paragraph 7 of the affidavit, following para 7 of Form 51, said:

- " 7. The Company is the executor named in the will under its former name. "

The form of the Registrar's requisition as minuted on the file, as relevant to this particular point was:

- " Applicant applies in current company name, immediately followed by previous full name, then place and description. "

That minute was responded to by Mr G E Leather, the solicitor for the applicant and the principal legal adviser for the applicant. He referred to the fact that the form of application and form of affidavit to lead to grant of probate had been in use for some years and had been accepted in other Registries and reference was made to eleven specific Registries and Registrars who, it was said, had accepted those forms. Reference was also made to the provisions of s 5 of the Act which was specifically referred to in the affidavit, as I have noted. It was his contention, therefore, that the reference in the will to the former name was, by force of the Act, deemed to be a reference to the company in its new name and therefore no further reference or requirement was needed.

The Registrar's minute in reply to that was:

- " This application is the first one I have seen in years from around the country that has not properly referred to the previous name in the application. A grant is based on the application which must tie in with the will. The codicil must be properly described also. "

An amended application was then filed seeking a grant "to AMP Perpetual Trustee Company N.Z. Limited (the executor appointed by the will under its former name, The Perpetual Trustees Estate and Agency Company of New Zealand Limited) of

Wellington, Trustee Company," The probate was granted on that basis, the probate in due course being issued and sealed in the same form of words.

The dispute was taken up, following the grant of probate, by Mr N C Kelly, who described himself as a consultant to the AMP Perpetual Trustee Company N.Z. Limited, but is well known as a former Public Trustee of New Zealand with a very long and detailed experience there and thereafter in the administration of estates and in administration and probate practice. He repeated the submissions made by Mr Leather, referring to the practice in other Registries, and the effect of the provisions in the Act.

The applicant for probate must show that he is entitled to the grant. If he is appointed executor in the will he must show that he is that executor. If there is a discrepancy between the name in the will and the true name of the executor that must be explained in order to prove that the applicant is, indeed, the executor because that chain or linkage is fundamental and so must be recorded in the probate itself to which is annexed the will to show to all the world the connection and the proof notwithstanding the apparent discrepancy.

Textbooks accord with this view. In Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (17th ed, 1993) at p 284 there appears this passage:

" If the executor has changed his name from that given in the will, he should show that that name was formerly his. Any deed poll which changed the name should be referred to and produced; otherwise he should set out when the change of use took place, that he has abandoned the name given in the will and now uses his current name. An executrix who has married or married again gives her present description and former name and description, e.g. 'Jane White, wife of John White, formerly Jane Grey, spinster.' "

In *Tristram and Cootes Probate Practice* (27th ed, 1989) at p 119 there appears this:

" **Change of name**

If an executor has changed his name since the date of the will, he should be described in the oath as 'A.B.,

formerly and in the will called C.D.', and the oath should include evidence in support of the change of name. If the change has been evidenced by a Deed Poll, particulars of this should be given, and the Deed Poll should be produced.

Where a change of name has been effected by constant use and repute but no Deed Poll has been executed, the oath should state when the change occurred and establish that the deponent has permanently abandoned the old name and uses, and intends to continue to use, only the new name.

If an executrix has married or remarried since the date of the will, her description should be followed by the words 'formerly _____, spinster', or 'formerly _____, widow', as the case may be. "

In Dobbie's Probate and Administration Practice (4th ed, 1986) paras 294, 295 and 296 are to the same effect.

In *In re Cooper* [1899] P 193, by a draftsman's error one of the named executors was described as Thomas Cooper instead of Thomas Stevenson. It was sought to grant probate to Thomas Stevenson as one of the executors and counsel sought to have the wrong surname struck out and the right one inserted. The President, Sir Francis Jeune, refused to do that, but granted probate to "Thomas Stevenson, in the will described as Thomas _____". *In re Parsons* (1908) 27 NZLR 958 was a case where the executor was described in the will as John Johnson but it was proved that the intention was to appoint John Johnson Smyth. Edwards J granted probate to "John Johnson Smyth, of Matamata, Waikato, in the Provincial District of Auckland, grocer, called in the will 'John Johnson'."

I think the practice is clear and correct and ought to be followed. Notwithstanding that the name has been changed by Act of Parliament together with a deeming provision, that does not, in my judgment, alter the position or avoid the application of the principle that in the application, the probate and in the affidavit the discrepancy between the names should be expressly resolved.

In my judgment, therefore, the Registrar was correct in making the requisition and insisting upon compliance with it in this case.

DATED at WELLINGTON this thirtieth day of May 1995.

