IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-7115

UNDER the Wills Act 2007

IN THE ESTATE OF JUNE ROSE MANSFIELD

Hearing: Determined on the Papers

Judgment: 10 March 2009 at 9:00 am

JUDGMENT OF ASHER J

This judgment was delivered by me on 10 March 2009 at 9:00 am pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
TS McDell, Wynyard Wood, PO Box 2217, Auckland 1140

[1] This is a without notice application for correction of a Codicil of the late June Rose Mansfield dated 27 August 2008, or in the alternative for the Court to use external evidence to interpret the words "two partners for the time being of the firm Wynyard Wood, Solicitors, practising at Auckland", as appointing the firm of Wynyard Wood as executors of her estate. The application is made relying on both ss 31 and 32 of the Wills Act 2007.

Background

[2] The Codicil in question inserted as a clause in the will, in substitution for an earlier clause, the following:

> I appoint as my executors and trustees two partners for the time being of the firm of Wynyard Wood Solicitors practising at Auckland ("my trustees"). If at my death the firm of Wynyard Wood no longer exists then the appointment will relate to the firm which carries on its practice or can be identified as having succeeded to its practice.

[3] The basis for the drafting of the clause in the Codicil was a passage in *Dobbie's Probate and Administration Practice* (5th ed). In paragraph 17.12 a clause reading "I appoint two of the partners at the date of my death in the firm X to be executors and trustees of this my will", was stated to be acceptable.

[4] Wynyard Wood still exists as a firm. However, when the application for probate came before the Registrar, the Registrar questioned whether the clause was void for uncertainty. He noted that the clause was provided for in *Dobbie's Probate and Administration Practice*, but referred to the case of *Re Horgan (deceased)* [1969] 3 All ER 1570. In that case Latey J held that a clause appointing as executors any two of however many partners may be surviving at the time of the testator's death, without identifying those partners, would be void for uncertainty. The statement was obiter.

[5] In *Re Horgan* the clause was worded differently from the clause in this Codicil, and Latey J, with some hesitation, found it to be sufficiently certain. That clause appointed a named and existing law firm as executors, who could act "through any partner or partners of that firm or their successors in business at the date of my

death not exceeding two in number". Latey J was able to find that the clause could be construed as meaning that all the partners of the firm were appointed, and that the reference to the two partners was to the appointment of two partners only to prove the will and act initially, with all the partners remaining executors and trustees.

[6] That construction cannot be applied to this Codicil. It is the two partners who are referred to at the outset, rather than the firm, that are appointed. Wynyard Wood as a firm has no role. Thus, the Registrar was correct to raise the issue of uncertainty.

[7] The application seeks either correction under s 31 or a purposive interpretation under s 32, to achieve the result of Wynyard Wood's appointment as executor. It is convenient to deal with the interpretation point under s 32 first because if the applicant's interpretation is upheld, there is no need to apply the remedial powers of s 31.

The application under s 32

[8] Section 32 of the Wills Act 2007 provides:

> **32 External evidence**
>
> (1) This section applies when words used in a will make the will, or part of it,—
>
> (a) meaningless; or
>
> (b) ambiguous on its face; or
>
> (c) uncertain on its face; or
>
> (d) ambiguous in the light of the surrounding circumstances; or
>
> (e) uncertain in the light of the surrounding circumstances.
>
> (2) The High Court may use external evidence to interpret the words in the will that make the will or part meaningless, ambiguous, or uncertain.
>
> (3) External evidence includes evidence of the will-maker's testamentary intentions.
>
> (4) The Court may not use the will-maker's testamentary intentions as surrounding circumstances under subsection (1)(d) or (e).

[9] Before the enactment of s 32 it was clear that surrounding circumstances could be taken into account, from the perspective of a person sitting in the "testator's armchair": *Perrin v Morgan* [1943] AC 399, 420, *Re Beckbessinger* [1993] 2 NZLR 362. It was the circumstances at the time of the execution of the will that were considered and not later developments: *In the Goods of Blackwell* (1877) 2 PD 72, *Re Horgan (deceased)* p 1571. I interpret s 32 as relating to circumstances in existence at the time the will-maker signed the will, as the words "surrounding circumstances" indicate the circumstances that surrounded the signing and not circumstances that arose afterwards.

[10] The will is not uncertain or ambiguous on its face in terms of s 32(1)(c). The words are clear as to their meaning. Two partners of Wynyard Wood Solicitors are to be executors. The words are, however, uncertain in terms of s 32(1)(e) in the light of "the surrounding circumstances". The "surrounding circumstances" reveal that any two partners of Wynyard Wood could not, at the time of the will, have been ascertained. There is no external evidence in terms of s 32(2) as to which two partners Ms Mansfield would have wished to appoint at the time of her death. This issue cannot be resolved. Under s 32(4)(e) evidence as to Ms Mansfield's actual intentions cannot be used for the purposes of interpretation (s 32(1)(d) and (e)), but even if they could this could not resolve the uncertainty, as she in fact did not wish to appoint only two partners. As I will explain later in this judgment, she wished to appoint the firm. As a whole the problem arises simply because the wrong words were put in the will.

[11] For these reasons it is not appropriate to use s 32 as a basis for the appointment of Wynyard Wood as executor.

The application under Section 31

[12] However, Wynyard Wood has also made the without notice application for the correction of the Codicil relying on s 31 of the Wills Act 2007. Section 31, which came into force on 1 November 2007, conferred express power on the Court to correct wills.

[13] The power of the Court to correct errors had been recognised in a number of New Zealand decisions prior to the new Act: *Re Jensen* [1992] 2 NZLR 506 at 511, 512; *Gibbs v Bluck* HC AK CIV-2006-404-2054 1 August 2006 Courtney J; *Macrae v The Trustees Executors and Agency Company of New Zealand Limited* HC WN CP251/01 23 October 2002 Ronald Young J. Those earlier decisions recognised that where it was clear that an error had been made and the will-maker's true intention could be deduced with reasonable certainty from admissible material, the Court could give effect to the true intention: *Re Thompson* (1910) 29 NZLR 398, 400 and *Re Jensen* at 510.

[14] Section 31 of the Wills Act 2007 reads:

> **31 Correction**
>
> (1) This section applies when the High Court is satisfied that a will does not carry out the will-maker's intentions because it—
>
> (a) contains a clerical error; or
>
> (b) does not give effect to the will-maker's instructions.
>
> (2) The Court may make an order correcting the will to carry out the will-maker's intentions.

[15] The new section was considered by MacKenzie J in *Re Armstrong* HC WN CIV-2008-435-95 31 July 2008. He determined that where an error is noticed before probate is obtained and a correction is sought, the appropriate procedure is to apply for correction under s 31 as an interlocutory application. That is the procedure that has been followed.

[16] The wording of s 31 may reflect the law that existed at the time of its enactment, but is best interpreted on its own words. It can be noted that there is an overlap in ss 31(1)(a) and (b). A clerical error will generally not give effect to the will-maker's intentions, and thus the correction of clerical errors will generally be available on the grounds set out in both ss 31(1)(a) and 31(1)(b). However, not every failure to give effect to the will-maker's instructions will be a clerical error. Indeed, this Codicil did not contain clerical errors in the sense of an error in transcription or writing out. It was phrased deliberately and there was no specific error made in the choice of words or numbers. Rather, the application needs to be

considered under s 31(1)(b). Does the clause give effect to the will-maker's instructions?

[17] There is affidavit evidence as to the will-maker's instructions. The solicitor involved, Sarah Holmes, deposed that she visited Ms Mansfield on 26 August 2008. She was instructed by her to remove the existing executor of her will, and she was told that the law firm of Wynyard Wood should administer her estate. The handwritten note of the discussion that she has produced corroborates her evidence. Part of that note which carefully records the discussion reads, "And WW as sole executor".

[18] Ms Holmes explained in her affidavit that she used the wording referring to two partners having considered the suggested wording in *Dobbie's Probate and Administration Practice*. She acknowledged, however, that the wording did not follow exactly that in *Dobbie's Probate and Administration Practice*. Obviously her understandable goal was to limit the number of executors. However, the clause that she drafted did not reflect Ms Mansfield's intentions. Ms Mansfield's intention was that Wynyard Wood would be the executor and not just two of its partners.

[19] While there is uncertainty as to which two partners might be the partners to be appointed, an appointment of the firm of Wynyard Wood as executor removes that uncertainty. Wynyard Wood is an existing firm and the appointment effectively makes all its existing partners the executors of the will. This is what Ms Mansfield wanted. Thus the application proposes an order correcting the will, which will carry out the will-maker's intentions in terms of s 31(2).

[20] I conclude that the requirement for correction set out in s 31(1)(b) has been made out. The Codicil as drafted does not give effect to Ms Mansfield's instruction, which was to appoint the law firm of Wynyard Wood as a whole and not just two partners of that firm. It follows, therefore, that the Court should make an order correcting the will under s 31(2) to meet that instruction and intention.

[21] The application suggests broadly that the Codicil be corrected to appoint the firm of Wynyard Wood as the executors and trustees of the estate. I consider that in

the circumstances it is safest to apply the detailed wording approved in *Re Horgan* at 1572 and 1573, and suggested in *Dobbie's* at 17.12, appointing the partners of the law firm at the date of her death. However, I do not consider it necessary to correct the Codicil to include the full wording set out in *Re Horgan* and *Dobbie's* which reads:

> I appoint the partners at the date of my death in the firm of ….. of …. Or the firm which at that date has succeeded to and carries on its practice to be the executors and trustees of this my Will (and I express the wish that two and only two of them shall prove my Will and act initially in its trusts).

This is because Ms Mansfield has died and the firm of Wynyard Wood still exists, and has a limited number of partners who can collectively execute the will. The will-maker's intention was only to appoint Wynyard Wood, which has only a limited number of partners, and it is not therefore necessary to go further and refer to a specific number of the partners to act initially.

Result

[22] The Codicil dated 27 August 2008 is corrected to read:

> I appoint the partners at the date of my death in the firm of Wynyard Wood, Solicitors of Auckland, to be the executors and trustees of this my will.

[23] The application for probate is to be returned to the Registrar for consideration.

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Asher J