IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2009-454-000154

IN THE ESTATE OF	NGA TUNGAANE BROWN of Waiouru, New Zealand, Administration Assistant (deceased)

Hearing: On the papers

Counsel: P G Logan for Applicant

Judgment: 22 July 2009

JUDGMENT OF MACKENZIE J

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[1] This is an interlocutory application without notice for an order under s 31 of the Wills Act 2007, correcting the will of the deceased.

[2] The deceased, who was an Administration Assistant for the New Zealand Defence Force at Waiouru, died on or about 3 November 2008, and probate of her will, dated 27 August 2008, was granted on 20 April 2009.

[3] An error in her will has become apparent. Clause 2 of the will reads as follows:

> IF my husband ERUERA HAMUERA BROWN survives me by thirty (30) days I appoint him my executor but if he does not survive me by 30 days then the appointment of executor and the gift recorded in this clause shall not apply. Instead, but not otherwise, the following provisions of this will shall take effect.

[4] That clause is clearly incomplete. It refers to a gift recorded in the clause, but no such gift is made. This application seeks the correction of the will by the substitution of the following clause:

> *IF* my *husband* ERUERA HAMUERA BROWN *survives me by thirty (30) days* ***then I give the whole of my estate to him*** *and appoint him as my executor but if he does not survive me by 30 days then the appointment of executor and the gift recorded in this paragraph shall not apply. Instead but not otherwise, the following provisions of this will shall taken effect.*

[5] There is evidence in supporting affidavits from Mr Brown and from the solicitor who drafted the will and from the secretary who typed the will. That evidence, which includes a will check list prepared by the deceased, makes it clear that the testatrix's intention was that, subject to survivorship for the 30 day period, her husband should be appointed executor and there should be a gift to him of the whole of her estate. That evidence makes it quite clear that, by a clerical error, the words which I have highlighted in the replacement clause were omitted from the will which was signed.

[6] The evidence is such that the Court is clearly satisfied that the will does not carry out the will maker's intentions because it contains a clerical error and the jurisdiction to make an order correcting the will under s 31 accordingly arises.

[7] The will as drafted gives rise to an intestacy as to the whole estate. Clause 2 presently contains no disposition of the testatrix's property. The substitute provision in cl 4, which does dispose of the estate, does not apply, by reason of the last sentence of cl 2.

[8] This application has been made without notice. I must consider whether the circumstances are such that this application can properly be dealt with without notice under r 7.46 of the High Court Rules or whether I should require that the application be made on notice to those who would otherwise succeed on an intestacy.

[9] Neither paragraph (b) or (c) of r 7.46(3) can apply, since the effect of making the correction will be to alter the disposition of the estate which would apply if the error were not corrected. Nor does paragraph (d) apply. To require the applicant to proceed on notice would involve additional expense, but that would not of itself be sufficient to engage paragraph (a). The question then is whether the interests of justice require the application to be determined without notice under paragraph (e).

[10] In many (if not most) cases where the jurisdiction to correct a will is invoked, in circumstances where the correction will have a material effect on the dispositions in the will, it will be appropriate to require that the application to correct be made upon notice to all those who may be adversely affected by the correction. However, the new power confined by the Wills Act 2007 to correct a will is clearly intended to assist in enabling effect to be given to the wishes of a testator, and to provide a convenient procedure for this to be done. I do not consider that it is in the interests of justice, or in accordance with the intention of Parliament, that unnecessary procedural requirements be imposed.

[11] The mistake here is such an obvious one, and the intention of the testatrix is so clear, that I do not consider that it is necessary to give the persons who would succeed on an intestacy an opportunity to argue what would be, on my assessment, an unarguable proposition: that the will should not be corrected, and that the clear intention of the testatrix should be frustrated. For these reasons I am satisfied that the interests of justice require the application to be determined without notice, under r 7.46(3)(e).

[12] There will be an order correcting the will by deleting cl 2 and substituting cl 2 in the form set out above.

"A D MacKenzie J"

Solicitors: Avison Reid Lawyers, Lower Hutt