

**IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY**

CIV 2009-442-370

UNDER the Wills Act 2007

IN THE MATTER OF the Estate of the late JUDITH LOUISE
CAMPBELL (Deceased)

Hearing: (on the papers)

Counsel: W Davis for Named Executor

Judgment: 2 December 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 2 December 2009 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Cuba Family Law, PO Box 11 248, Wellington

[1] The named executor of a Will executed on behalf of the late Judith Campbell, applies to review a decision of Madam Registrar Bowles, declining to make a grant of probate of the Will because the attestation clause was inadequate. The Registrar declined to grant probate on the grounds that the Will did not comply with s 11(4)(b) of the Wills Act 2007 (the Act).

[2] The late Ms Campbell died on 4 July 2009. She suffered from Down's Syndrome, an intellectual disability and epilepsy, living in sheltered accommodation in Nelson for many years.

[3] Ms Campbell's mother died in 2003. As one of five surviving children, Ms Campbell received an inheritance of \$172,889.15.

[4] On 14 September 2004, the Family Court at Nelson made orders under the Protection of Personal and Property Rights Act 1988 (the 1988 Act), in respect of Ms Campbell's affairs. Her sister, Janice, was appointed as welfare guardian and manager of her property, under ss 12 and 31 of the 1988 Act.

[5] The property order (made under s 55(2) of the 1988 Act) authorised counsel for Ms Janice Campbell to prepare a Will for her sister. On 7 March 2006, Judge Whitehead approved a draft Will for execution.

[6] On 10 April 2006, the Will was signed by Ms Janice Campbell (as property manager) in the presence of two witnesses. Both witnesses attested execution of the Will in the presence of Ms Janice Campbell. The attestation clause reads:

Signed by JANICE ROBERTA CAMPBELL for and on behalf of JUDITH LOUISE CAMPBELL and attested by us in the presence of JANICE ROBERTA CAMPBELL and of each other.

[7] The Registrar considered that the Will did not comply with formalities required by s 11(4)(b) of the Act. That provision states:

11 Requirements for validity of wills

...

(4) At least 2 witnesses must—

...

(b) each state on the document, in the will-maker's presence, that the witness was present when the will-maker complied with subsection (3); and

....

[8] While s 14 of the Act provides a jurisdiction to validate a Will that does not comply with s 11, s 40(2)(k) of the Act makes it clear that the validation procedure is not available for a Will made before 1 November 2007. Therefore, generally, if there were no compliance with s 11 and the Will was made before 1 November 2007, there is no power for the Court to declare the Will valid: eg *Re Lincoln (Deceased)* (High Court, Auckland, CIV 2009-404-3402, 17 July 2009, Asher J).

[9] However, Ms Davis, for the named executor, submits that s 55 of the 1988 Act takes precedence over s 11 of the Act, meaning that the Will is saved, even if there were non-compliance with s 11. Section 55(4) and (5) provides:

55 Court may authorise manager to make testamentary disposition for person subject to property order

...

(4) Any testamentary disposition executed by a manager under this section shall be—

(a) Signed in the manager's name for and on behalf of the person for whom it is made, in the presence of 2 or more witnesses present at the same time; and

(b) Attested and subscribed by those witnesses in the presence of the manager; and

(c) Sealed with the seal of the Court.

(5) *The following provisions apply to a testamentary disposition authorised and executed under this section:*

(a) *it is valid despite—*

(i) *section 11 of the Wills Act 2007; and*

(ii) sections 9 and 10 of the Wills Act 1837 of the United Kingdom Parliament; and

(b) it has the same effect for all purposes as it would have had if the person subject to the property order—

(i) had had testamentary capacity; and

(ii) had executed the testamentary disposition in the manner required by the applicable section.

.... (my emphasis)

[10] Section 55(5)(a)(i) of the 1988 Act makes it clear that a testamentary disposition authorised and executed under s 55 trumps s 11 of the Act. The attestation clause complies with the formalities set out in s 55(4) of the 1988 Act.

[11] In those circumstances, it is unnecessary for me to consider whether the form of attestation complies with or offends against s 11 of the Act. Probate should be granted.

[12] The application to review the Registrar's decision is granted. The Will executed under the 1988 Act is admitted to probate.

P R Heath J

Delivered at 4.00pm on 2 December 2009