

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

CIV 2009-404-6324

UNDER the Wills Act 2007

IN THE MATTER OF the Estate of the late JESSIE AMELIA
LAUER (Deceased)

Hearing: (on the papers)

Counsel: A P Allen for Named Executors

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:
Webb Morice, PO Box 316, Pukekohe

[1] On 22 October 2009, Mr Registrar Parker declined an application for probate of the estate of the late Ms Lauer on the grounds that the attestation clause contained in her Will did not comply with s 11 of the Wills Act 2007 (the Act). The named executors apply to review that decision.

[2] The late Ms Lauer died at Pukekohe on 20 September 2009, leaving a Will dated 30 January 2001. The attestation clause read:

SIGNED by the Testatrix the said JESSIE AMELIA LAUER and attested by us in her presence.

[3] Section 11(2) of the Act requires attestation by two witnesses. Section 11(4) provides:

11 Requirements for validity of wills

...

(4) At least 2 witnesses must—

(a) be together in the will-maker's presence when the will-maker complies with subsection (3); and

(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

(c) each sign the document in the will-maker's presence.

....

[4] The legislation expressly provides that witnesses must state, when signing the Will, that they were together present when the will-maker executed the document. As Mr Allen, for the named executors, accepts, a reference to the presence of the two witnesses when the will-maker signed the Will was omitted from the attestation clause.

[5] In respect of Wills executed on or after 1 November 2007, there is jurisdiction to validate the Will, under s 14. However, because Ms Lauer's Will was made before that date, jurisdiction does not exist. Unhappily, a lacuna has emerged

as a result of the inapplicability of the validation provisions of s 14 to Wills executed before the Act came into force.

[6] Mr Allen submits that the Court can infer, from the words used in the attestation clause, that the witnesses were present when the Will was signed. Counsel also advises that an affidavit can be made available from the two witnesses, confirming their presence when the deceased signed the Will.

[7] Regrettably, I do not consider that the words used are sufficient to give rise to that inference. Unlike *Re Lincoln (Deceased)* (High Court, Auckland, CIV 2009-404-3402, 17 July 2009, Asher J), there is no specific reference to presence of the two witnesses at the time the Will was signed. The attestation clause to Ms Lauer's Will confirms that the witnesses executed the Will in the presence of the will-maker, but not that they were both present when she signed the Will. Because s 14 does not apply, I agree with the Registrar that there was no jurisdiction for him to grant probate.

[8] The availability of an affidavit confirming the true position will enable an application for probate in solemn form to be made, to overcome the difficulties: see, generally, *McGechan on Procedure* at para HR 27.6.01.

[9] The application to review the Registrar's decision is dismissed.

P R Heath J

Delivered at 4.00pm on 2 December 2009