IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-006379

IN THE MATTER OF	the Estate of Walter Alexander Fleming late of Auckland, Retired, Deceased
BETWEEN	SUSAN WELLS AND COLIN BOYES MEAD Plaintiffs
AND	DANIEL TREVOR WELLS First Defendant
AND	MATA ESTA FORBES Second Defendant

Hearing: 30 November 2009

Appearances: R L Stevenson for Plaintiffs
E Jobbins for First Defendant
D J Spencer for Second Defendant
I C Bassett for Children

Judgment: 8 December 2009 at 3:30 pm

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 8 December 2009 at 3:30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date……

Solicitors: *Gaze Burt Lawyers, P O Box 91345 Victoria Street W, Auckland 1142*
Fax: (09) 309-3114 – R Stevenson
Spencer Legal, P O Box 8080 Symonds Street, Auckland 1150
Fax: (09) 917-4132 – D J Spencer
E Jobbins, P O Box 22356, Otahuhu 1640
Fax: (09) 276-1384

Counsel: *I Bassett, P O Box 105315, Auckland 1143*
Fax: (09) 377-0082

Introduction

[1] The plaintiffs are the executors of the will of Walter Alexander Fleming who died in 2002. They seek probate in solemn form of Mr Fleming's will or, alternatively, probate in solemn form of the will together with a codicil in the form of a handwritten document executed on the same day. The validity of the will is not contested but the validity of the handwritten document is in issue.

[2] Mr Fleming never married and had no children of his own. However, his long-time partner, Mrs Forbes, had a son and four grandsons. The grandsons, Daniel Trevor Wells, Dylan Leslie Jenkins, Jordan Trevor Forbes and Stuart Alexander Forbes are currently aged between 13 and 22 years. Although Mr Fleming appears to have had an amicable relationship with all the boys, he was seemingly closest to the oldest, Daniel Wells.

[3] Mr Fleming owned several properties but the issues that arise in this case relate to only two of them, 29 and 31 Ngä-Koti Street in Urenui. Under the terms of the will Mrs Forbes took a life interest in both properties. On her death Daniel Wells would inherit 29 Ngä-Koti Street and such of the other three grandsons that were surviving and had attained the age of 25 years (and if more than one in equal shares) would inherit 31 Ngä-Koti Street. The effect of the handwritten document, however, would see both properties go to Daniel Wells alone. It is not immediately clear whether Mrs Forbes would retain her life interest.

[4] The executors, Daniel Wells and Mrs Forbes, propound for the will together with the handwritten document as a codicil. Mr Bassett, who is court-appointed counsel for the younger three grandsons, asserts that the handwritten document is not a valid testamentary instrument and that probate should only be granted in respect of the will.

Relevant principles

[5] It is common ground that both the will and the handwritten document were executed on 10 February 2002 in accordance with the requirements of s 9 Wills Act

1837 (UK) which was the relevant statute at the time of Mr Fleming's death.[1] Under s 20 Wills Act 1837 a will could only be revoked (either wholly or in part) by another duly executed will or codicil.

[6] An intention to revoke the previous will (whether wholly or in part) is essential to the validity of the subsequent will or codicil. The fact that the testator has read or had read over to him or her the contents of the document and was of competent mind at the time of execution is a serious circumstance to take into account in determining whether such intention existed. But those facts are not conclusive and it is a matter for the Court to consider all of the circumstances in determining the testator's intention.[2] Of particular relevance to this case is the view expressed by McMullin J in *Guardian Trust Co Limited v Darroch*:[3]

> …where the will, contrary to the general revocation clauses is a "homemade" will or a holograph one, a Court may more easily find that a testator did not express an intention to revoke than where the revocation clause appears in a will the whole of which has been prepared for a particular testator. The matter can be taken no further than that, and the question in each case must be, did the testator intend to revoke the prior testamentary disposition?

The will and the handwritten document

[7] The property at 29 Ngä-Koti Street comprises a single title with a residential home on it. The property at 31 Ngä-Koti Street comprises two titles, referred to in evidence as Lot 25 and Lot 48. Lot 48 has its street frontage on to Ngä-Koti Street and has a garage on it. Lot 25 fronts on to Whaka Paki Street but it is a steep bush-covered gully and appears to have little independent value other than as part of 31 Ngä-Koti Street.

[8] Mr Mead, the second-named plaintiff, is the solicitor who prepared the will. He deposed as to Mr Fleming's instructions regarding 29 and 31 Ngä-Koti Street:

> Mr Fleming instructed me that he wished to provide that if Mrs Forbes survived him she should have a life interest in his house at 29 Ngä-Koti Street, Urenui, together with the two sections and that on her death the house

[1] The Wills Act 2007 now applies to the wills of people who die on or after 1 November 2007.
[2] *Tanner & Ors v Public Trust* [1973] NZLR 68 at 74; *Guardian Trust Co Limited v Darroch* [1973] 2 NZLR 143 at 146-147
[3] Ibid

> at 29 Ngä-Koti Street as described in Certificate of Title TN145/258 should pass to her grandson Daniel Trevor Forbes and that the two sections as described in Certificate of Title TNB3/51 should on his death be held by his trustees until the youngest of Mrs Forbes remaining three grandchildren Dylan Jenkins, Jordan Forbes and Stuart Alexander Forbes should attain the age of 25 years and then be transferred to the survivor and if more than one in equal shares.

[9] Mr Mead prepared the will in accordance with these instructions and forwarded it to Mr Fleming in late January 2002 together with a diagram that showed the layout of the properties. When Mr Fleming received the draft will and the diagram he asked his neighbours, Mr and Mrs Bellamy, to witness his signature. Immediately after executing the will he asked them to witness his signature on the handwritten document, which stated:

> To whom it may concern
>
> I should like Daniel to have 29 and 31. As I have indicated on the map as things may have changed somewhat since our last meeting. Apart from that things seem to be all in order thank you.
>
> W A Fleming 10.2.2002

[10] Mr Mead received the executed will and the handwritten document back from Mr Fleming in mid-February 2002 and spoke to him by telephone. They discussed Mr Mead preparing a fresh will to incorporate the changes referred to in the handwritten document but Mr Fleming died before that was done. Mr Mead deposed that:

> Mr Fleming in that telephone conversation on the 15th day of February 2002 reinforced his intentions as set out in his handwritten memorandum to the effect that in addition to the property at 29 Ngä-Koti Street which Daniel would take after Ms Forbes' life interest he would also after expiration of Ms Forbes' life interest take the adjoining section known as 31 Ngä-Koti Street which he had originally provided should be held by the trustees until the youngest of Daniel's half-brothers, Dylan Jenkins, Jordan Forbes and Stuart Alexander Forbes attained the age of 25 years and then be transferred to the survivor and if more than one in equal shares…I asked Mr Fleming to call and confirm his instructions, as I understood them, intending to amend and complete a will at that time.

[11] During his telephone discussion with Mr Fleming, Mr Mead made handwritten notes on the diagram that had been returned to him. These were a note in relation to 31 Ngä-Koti Street "to codicil Daniel" and in relation to 29 Ngä-Koti Street "in will Daniel".

[12] Also shown on the diagram is a double-ended arrow across 29 Ngä-Koti Street and Lot 48 of 31 Ngä-Koti Street with the words "to Daniel" endorsed on Lot 48 of 31 Ngä-Koti Street and "Daniel" on 29 Ngä-Koti Street. Another double-ended arrow is shown over Lot 25 of 31 Ngä-Koti Street and another property shown as Lot 47/No 33, which Mr Fleming also owned. There is no specific evidence as to who placed those notations on the plan but I infer that it was Mr Fleming. Mr and Mrs Bellamy only refer to the notations in blue pen having been added after they saw the diagram and Mr Mead has confirmed that those notations were the ones that he added. By elimination, that leaves only Mr Fleming as, more likely than not, having placed the double-ended arrows on the diagram.

What is the status of the handwritten document?

[13] Mr Bassett, for the three youngest grandsons, submitted that the circumstances of the handwritten document are such that one could not safely infer that Mr Fleming intended to partially revoke the will he had only executed minutes beforehand. He submitted that neither the wording of the document nor the extrinsic evidence supported such a conclusion.

[14] Mr Bassett submitted that the opening words were ambiguously addressed ("to whom it may concern") compared with the opening words of the executed will ("this is the last will and testament of me…"). Further, although executed in accordance with the statutory requirements, it nevertheless had some unusual features. It did not have an attestation clause, with affidavit evidence being relied on to establish attestation by the witnesses. It did not contain a revocation clause purporting to revoke the previous will in whole or in part. It did not refer to the will but only to the diagram which was unrelated to the will.

[15] Mr Bassett put particular emphasis on the language that Mr Fleming used, describing it as language of mere future possible preference rather than the indication of a fixed, final and deliberate expression of intention regarding the disposal of his property. Finally, the wording made it unclear as to whether Mrs Forbes' life interest in 31 Ngä-Koti Street was intended to be affected or whether it was only the residuary beneficiaries intended to be affected.

[16] Whilst there may be some significance in the fact that Mr Fleming went to the trouble of arranging attestation of the document at the same time as the will there is no real indication of an intention to partially revoke the will he had just signed. Although the words "to whom it may concern" and "I should like Daniel to have 29 and 31" are not necessarily inconsistent with an intention to alter the provisions of the previous will, nor are they inconsistent with an intention to change the will at some future time to give effect to the proposal that Daniel have 29 and 31. Further, the wording has a rather conditional flavour because of the statement that "things may have changed". This creates an element of uncertainty, conveying the possibility that a change to the will was contingent on confirmation that "things" had changed. The overall tenor of the document is one of instruction to a solicitor as to a future course rather than a deliberate revoking of the previous will.

[17] Before reaching that conclusion, however, I need to consider the relevant extrinsic evidence. The first piece of such evidence is the diagram, which specifically referred to the handwritten document. Mr Bassett submitted, correctly, that the diagram was not executed in accordance with s 9 Wills Act 1837 and therefore could not be shown to be a testamentary instrument. However, he acknowledged that it could be incorporated into the handwritten document by incorporation if that document were determined to be a testamentary instrument.

[18] A separate document may be incorporated into a will or codicil and included in a grant of probate if the document existed at the date of the will or codicil, was referred to as one that already existed and was described in the will or codicil in a way that it could be identified.[4] If the handwritten document were a valid codicil, I would consider that these prerequisites were met in the case of the diagram. The handwritten document refers to "as I have indicated on the map" thereby indicating the existence of a map and the fact that Mr Fleming had made some endorsement on it. Mr and Mrs Bellamy jointly swore an affidavit in which they confirm that Mr Fleming showed them the diagram in connection with the handwritten agreement. I therefore proceed on the basis that the diagram is incorporated into the handwritten document.

---

[4] See *Dobbie's Probate & Administration Practice* 2008 5th ed paragraph 6.1.1-6.2.3

[19] However, even taking the diagram together with the handwritten document, it is still not clear that Mr Fleming intended to revoke part of his earlier will as opposed to simply preparing instructions for his solicitor. In their affidavit Mr and Mrs Bellamy described witnessing Mr Fleming's will and the handwritten document:

> Immediately after he signed his Will Mr Fleming signed a second handwritten document again in our presence and in the presence of each other and we signed the same document as witnesses…
>
> At the time we witnessed the Will and the second document Mr Fleming produced to us a plan showing the disposition of properties which he owned at Urenui for the purpose of explaining the reason for the second document which amended the provisions of the will first signed which will we has [sic] witnessed…

[20] It is unclear from this evidence whether Mr Fleming told Mr and Mrs Bellamy that the second document was intended to amend the will or whether that was what they assumed. Neither was called for cross-examination and I am unable to draw any conclusion about Mr Fleming's intentions from their evidence as it stands.

[21] Further, the diagram is inconsistent with the handwritten document; in the document Mr Fleming referred to "29 and 31" as going to Daniel but the arrows show 29 and only part of 31 (Lot 48) as going to Daniel.

[22] This leaves the evidence of Mr Mead regarding his telephone conversation with Mr Fleming about the handwritten document. Mr Mead made a file note of the telephone call at the time in which he recorded:

> Telephone attendances upon Mr W A Fleming. He has amplified his diagram to show that Lot 25 the four grandchildren should get immediately upon the cessation of Mrs Forbes' life interest. Lot 47 is held by trustees for the benefit of Trevor Forbes during this life and then to the four grandchildren equally. Lots 48 and 49 are held as to a life interest for Mrs Forbes and then to Daniel. Query: does Mrs Forbes really need a life interest in Lot 25.

[23] In his affidavit Mr Mead described the telephone conversation as follows:

> Mr Fleming in that telephone conversation on the 15th day of February 2002 reinforced his intentions as set out in his handwritten memorandum to the effect that in addition to the property at 29 Ngä-Koti Street which Daniel would take after Mrs Forbes' life interest, he would also after expiration of

> Mrs Forbes' life interest take the adjoining section known as 31 Ngä-Koti Street which he had originally provided should be held by the trustees until the youngest of Daniel's half-brothers, Dylan Jenkins, Jordan Forbes and Stuart Alexander Forbes attained the age of 25 years and then be transferred to the survivor and if more than one in equal shares. A copy of my file note dictated on the 15th day of February 2002 is annexed hereto as exhibit H. I asked Mr Fleming to call and confirm his instructions, as I understood, intending to amend and complete a will at that time.
>
> In my file note I raised for the future interview a query as to the point of reserving a life interest in section 25 adjoining 31 Ngä-Koti Street to Mrs Forbes. It is my understanding that unlike section 48 it is little more than a gully and adds no additional amenity to the house at 29 Ngä-Koti Street. I intended that when Mr Fleming called at my office I would raise and clarify that matter with him.'

[24] I do not find Mr Mead's evidence or the file note of great assistance in determining Mr Fleming's intention. Mr Fleming's exact words are not recorded anywhere. Further, Mr Mead's affidavit does not reflect exactly the contents of his file note in that he refers to Mr Fleming reinforcing his intentions that Daniel would take "the adjoining section known as 31 Ngä-Koti Street" whereas his file note referred to only one of the lots comprising 31 Ngä-Koti Street going to Daniel.

[25] The telephone call concluded with Mr Mead asking Mr Fleming to call and confirm his instructions so that a fresh will could be prepared. Mr Mead's intentions do not necessarily reflect those of Mr Fleming; without a doubt, Mr Mead would have regarded the state of affairs as unsatisfactory and would have advised Mr Fleming to execute a fresh will even if Mr Fleming had intended the document to be effective to partially revoke the will. However, I am unable, on the evidence, to conclude that Mr Fleming did have that intention or whether he simply intended to provide new instructions for his solicitor to act on.

[26] For these reasons I am not satisfied that the handwritten document and diagram were made with the requisite intention of partially revoking the previous will. They are, therefore, not valid testamentary instruments. There will be an order that probate of the will dated 10 February 2002 be granted in solemn form to Susan Wells and Colin Boyes Mead.

[27] I was not addressed on the issue of costs. This is an appropriate case for costs of all parties to be met from the estate. If counsel have a different view they may address that issue by memoranda filed by 25 January 2010.

_____

P Courtney J