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IN THE HIGH COURT OF NEW ZEALAND **CIV 2009-442.298**
NELSON REGISTRY

IN THE ESTATE **of THELMA ELZABETH FRY**
Deceased

Date: 21 September 2009

MINUTE OF ALLAN J

Solicitors
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[1] This is an interlocutory application, without notice, for probate. The Registrar who considered the application has referred the file to me by reason of a concern on her part that the relevant will of which probate is sought may not comply with the provisions of s 11(4)(b) of the Wills Act 2007 (the Act)

[2] Section 11 of the Act sets out the requirements for a valid will. It provides:

> **11 Requirements for validity of wills**
>
> (1) A will must be in writing.
>
> (2) A will must be signed and witnessed as described in subsections (3) and (4).
>
> (3) The will-maker must—
>
> (a) sign the document; or
>
> (b) acknowledge that a person directed by the will-maker signed the document in the will-maker's presence.
>
> (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.

[3] Of particular importance for present purposes is s 11(4)(b) which requires that there must be at least two witnesses to the execution of the will, who must each state on the document, in the will-maker's presence, that the witness was present when the testator or testatrix executed the will.

[4] Here, the attestation clause relevantly reads:

> Signed by Thelma Elizabeth Fry in the presence and attested by us in her presence and in the presence of each other.

[5] The attesting witnesses have sworn an affidavit in which they depose that the deceased executed the will on 1 January 2006 by signing immediately beside the

attestation clause, intending thereby to effectively and finally execute her will. They also depose to the effect that the testatrix signed at the bottom of each page of the will. Further, they say that the will was signed in that way by the testatrix in their presence, and that they each signed the last page of the will as witnesses in the presence of each other and in the presence of the deceased.

[6] There is, therefore, evidence of due execution of the will. The difficulty arises because s 11(4)(b) of the Act requires that each witness *state on the document* in the will-maker's presence that the witness was present when the will was signed.

[7] There is little doubt about what was intended. Had the words "of us" appeared after the words "presence" where the word first appears in the attestation clause, then that would plainly constitute compliance with s 11(4)(b). The question is whether the attestation clause as it stands amounts to sufficient compliance.

[8] A similar case was recently considered by Asher J in *re Lincoln Estate* HC AK CIV 2009-404-3402 17 July 2009, where the attestation clause read:

> SIGNED by the Testator MERVYN LESLIE LINCOLN in the presence of and attested to by us in her presence.

[9] Asher J said that:

> 6. The question that arises is whether it can be said that the two witnesses have each stated in the document that they were in the will maker's presence when the will maker signed the will, as required by s 11(4)(b). I have no doubt that this is what is shown in the attestation. It would have been better if the word 'us' had been placed after the phrase 'in the presence of ... ', rather than only after the phrase 'attested to by ...'. Nevertheless, given the context of the attestation clause, the word 'us' qualifies both phrases, so that the statement is that the testator signed in the presence of both the witnesses. The use of the word 'and' between the two phrases 'in the presence of' and 'attested to by us' further supports the interpretation.

[10] Asher J accordingly held that the requirements of s 11(4)(b) had been complied with.

[11] The present case is different in that the word "of", which followed the word "presence" where it first appeared in the Lincoln attestation clause, is omitted from the present attestation clause.

[12] The evidence of the two witnesses to the will establishes that the will was in fact executed in accordance with the requirements of the Wills Act, so the attestation clause is plainly defective, in that it fails to set out accurately what occurred. In my opinion, this attestation clause, although differing from that in *re Lincoln Estate* nevertheless clearly manifests the intention, both of the testatrix and the attesting witnesses. As in *re Lincoln Estate* the word "us" in the attestation clause is plainly intended to refer not only to the fact of attestation by the two attesting witnesses in the presence of each other and of the testatrix, but also to their presence when the testatrix herself signed the will. There is no other logical interpretation.

[13] Accordingly, in my opinion, for the same reasons as appealed to Asher J in *re Lincoln Estate,* I conclude that the requirements of s 11(4)(b) have been complied with in respect of the will of the deceased.

[14] As Asher J did in *re Lincoln Estate* I believe it appropriate to remark upon the unsatisfactory state of the law, following the enactment of the Act. Prior to the date upon which the Act took effect, s 9 of the Wills Act 1837 (UK) governed the execution of wills in New Zealand. That section provided:

> ... And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned: (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; then such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

[15] Formerly, due execution of the will could be proved by affidavit evidence from a suitably qualified deponent, usually one or both of the attesting witnesses. Moreover, the law presumed that a will was validly executed in the absence of evidence to the contrary: *re Young (deceased)* [1969] NZLR 454.

[16] But the provisions of s 11(4)(b) of the Act now impose a procedural requirement which cannot be overcome simply by the filing of appropriate affidavits of due execution. An attestation clause that does not comply with s 11(4)(b) renders the will invalid unless the Court exercises its remedial powers under s 14 of the Act, pursuant to which this Court may declare a will valid, despite non-compliance with s 11. The difficulty is that s 40(2) of the Act expressly provides that the Court's powers under s 14 do not apply to a will executed prior to 1 November 2007. Accordingly, any invalidity arising from non-compliance with s 11 appears to be incapable of remedy.

[17] As has been noted by several commentators, the Act effectively changes the law retrospectively, in that it applies to wills executed prior to its enactment, but without conferring on the Court any power to grant relief from the consequences of invalidity.

[18] I join with Asher J in commending this apparent lacuna to the Law Commission and to the Ministry of Justice for their consideration.

C J Allan J