IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-485-002817
[2014] NZHC 2495

IN THE MATTER OF	RENA FRANCES MANSON, deceased
UNDER	The Wills Act 2007, the Law Reform (Testamentary Promises) Act 1949 and Part 18 of the High Court Rules
BETWEEN	DESMOND PHILIP LAERY and SIMON CHARLES DAVID WEIL Plaintiffs/Applicants
AND	JENNIFER KAY GROUT First Defendant/First Respondent
	SARAH KAY GROUT Second Defendant/Second Respondent
	MARJORY HAMLIN (also known as MARJORY VINET) Third Defendant/Third Respondent

Hearing: 9 October 2014

Appearances: S Clapham for Applicants
V Bruton for First Respondent

Judgment: 9 October 2014

ORAL JUDGMENT OF VENNING J
ON APPLICATION FOR DISCOVERY/ADJOURNMENT AND COSTS

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Introduction

[1] The first respondent's application seeks orders:

(a) for discovery;

(b) to adjourn a fixture scheduled for 3 and 4 November 2013; and

(c) costs.

Background

[2] I take the background to these proceedings largely from the summary of a previous decision of this Court delivered on 11 August 2014.[1]

[3] The plaintiffs/applicants (Desmond Phillip Laery and Simon David Charles Weil) are the named executors under a will executed by the deceased on 22 May 2007 (the 2007 will). Shortly before her death in October 2013, the deceased gave instructions for a new will. She died prior to executing that will.

[4] In these proceedings the plaintiffs seek a declaration, under s 14 of the Wills Act 2007 (the Act), validating a 2013 document containing instructed changes to the 2007 will together with the file note of Mr Weil (together the 2013 documents) as recording the testamentary wishes of the deceased and as the valid will of the deceased.

[5] The first respondent, the applicant to the application before the Court, Jennifer Kay Grout, opposes the application to validate the 2013 documents as the last will of the deceased. She is the primary beneficiary under the 2007 will. She has also counterclaimed seeking an interpretation of the clause in the 2007 will, rectification of the 2007 will and, in the event that the 2007 will's interpretation is not in her favour, or the 2013 documents are validated under s 14 of the Act, a claim under the Law Reform (Testamentary Promises) Act 1949.

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1 *Laery v Grout* [2014] NZHC 1881.

[6] In a minute of 30 July the Court recorded the parties had sensibly agreed that the s 14 application needs to be dealt with before the various counterclaims and other issues were resolved. On that basis that aspect of the proceedings was allocated the fixture for 3 and 4 November 2014 (two days allocated).

[7] In his decision delivered on 11 August 2014 Woolford J dealt with Ms Grout's application for an order appointing Mr William Malcolm Patterson of Auckland, Solicitor, as the temporary administrator of the deceased's estate under s 7 of the Administration Act 1969. The Judge made the order on 30 July 2014 after argument and provided reasons for his decision on 11 August 2014.

[8] As a result Mr Patterson is the temporary administrator of the deceased's estate, subject to the control of the Court and acting under its direction until he is discharged or removed under s 21 of the Administration Act 1969.

[9] Ms Grout has been pursuing discovery from the plaintiffs before completing her affidavits in reply. Issues have arisen between the parties as to the role and rights of the plaintiffs Mr Laery and Mr Weil given the appointment of Mr Patterson. Unfortunately the parties have not been able to resolve the matter with the assistance of counsel, which has led to the formal application now before the Court.

The issue

[10] There is a fundamental difference between the plaintiffs and Ms Grout as to the role and status of the plaintiffs, given the appointment of Mr Patterson as temporary administrator. Ms Grout proposes that there be tailored discovery by Mr Weil's firm, another law firm and Mr Laery in particular providing their files relating to the wills and power(s) of attorney for the deceased to Mr Patterson. It is also proposed that the deceased's medical records be made available to Mr Patterson. The intention is that Ms Grout will then be able to access those documents.

[11] The plaintiffs do not consider they are required to deliver their files to Mr Patterson. They consider they still have a role (and rights) as named executors under both the 2007 will and the 2013 documents. They propose listing the documents and claiming privilege over documents they consider they are entitled to claim privilege

over. They propose that they then go through the list and their claim to privilege with Mr Patterson to resolve issues. That is not acceptable to Ms Grout.

Other parties' positions

[12] I should at this stage indicate that I apprehend Ms Grout is supported in her application by the second respondent, her daughter. There unfortunately appears to be a dispute between counsel as to the position of the third respondent in relation to the issue of discovery.

[13] For his part, Mr Patterson has advised counsel that until the matter is resolved either by agreement or by the Court he does not consider he could become involved. He is leaving the matter of discovery to counsel or the Court to resolve.

Discussion

[14] Fundamentally the difference between the parties turns on the role of Mr Patterson and the rights or status of the plaintiffs.

[15] In her submissions for today's hearing Ms Clapham submitted that the plaintiffs derived their status as executors from the 2013 documents or the 2007 will and the deceased's estate and interest in the property vested in them on her death and remains in them.[2] The grant of probate was mere authentication of the title.[3]

[16] She also submits by reference to *Williams on Wills*[4] that since the executor derives his title from the will and all the estate and interest in the testate is property vested in them on the testator's death the plaintiffs can do any act before probate which is a mere authentication of his title.

[17] I acknowledge the statements of principle. They are obviously correct as far as they go. They do not however address the issue that has arisen in the present case, namely that even though the plaintiffs are named as executors and trustees of the 2007 will and are also referred to as such in the 2013 documents as executors and

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2 *Woolley v Clark* (1822) 5 B & Ald 744.
3 *Smith v Milles* (1786) 1 Term Rep 475 at 480.
4 *Williams on Wills* (LexisNexis, London, 2013) at 298.

trustees, there has now been an order under s 7 of the Administration Act 1969 appointing Mr Patterson as administrator. Section 7(1) provides:

> **7 Administration pending legal proceedings**
>
> (1) Where any legal proceedings touching the validity of the will of a deceased person, or for obtaining, recalling, or revoking any grant of administration, are pending, the Court may grant administration of the estate of the deceased to a temporary administrator, who shall, until he is discharged or removed under section 21 of this Act, have all the rights and powers of a general administrator, other than the right of distributing the balance of the estate remaining after payment of debts, funeral and testamentary expenses, duties, and fees, and every such temporary administrator shall be subject to the immediate control of the Court and act under its direction.

[18] Despite Ms Clapham's submissions I see no reason to read down the broad wording of s 7(1), namely that as temporary administrator, Mr Patterson, has all the rights and powers of a general administrator (other than the right of distribution).

[19] On the appointment of Mr Patterson as administrator he was entitled to administer the estate of the deceased.[5] That includes of course her real and personal property of every kind, including things in action. Mr Patterson is entitled to call for, or the Court is able to direct, that the files held by the plaintiffs on behalf of the deceased be delivered to Mr Patterson. Ms Clapham accepted that if the deceased was alive she would be entitled to call for those files. Mr Patterson, as her administrator, and as the person who may exercise all rights and powers in the estate is entitled to the files.

[20] Ms Clapham referred the Court to the proviso to s 24(1) of the Administration Act and also subs (3) in particular. Section 24(3) has no application. There is only the one administrator at present, Mr Patterson. Further, as I read the proviso to s 24(1) it does nothing more than effectively protect the persons named as executors for the acts that they have carried out until the grant of administration. In most cases the administrator will be the same person as the persons named as the executors and trustees of the will but in this case that is not the position. The proviso protects the earlier steps taken by the plaintiffs prior to the appointment of Mr Patterson as administrator.

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5 Administration Act 1969, s 24.

[21] I also note that s 23 is relevant. It confirms:

> **Executor not to act while another administrator is in office**
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> Subject to the provisions of this Act and of any other Act, where administration has been granted in respect of any part of the estate of a deceased person, and is not for the time being suspended, no person other than the administrator of that part of the estate shall have power to bring an action or otherwise act as administrator of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked.

[22] The section precludes the plaintiffs from purporting to act on behalf of the estate given that Mr Patterson is the administrator.

[23] There are significant issues between the plaintiffs and Ms Grout as is apparent from the affidavits filed in the proceeding. It is unnecessary for the Court today to rule on the merits of the stances taken by the parties on the substantive issues. The Court is only required to deal with the interlocutory applications before it.

[24] I consider the position to be clear given the relevant provisions of the Administration Act. But quite apart from that, there is also the case of *Hall v Guardian Trust and Executors Company of New Zealand Ltd*.[6] In that case Callan J confirmed that the Guardian Trust company could not claim privilege against the plaintiff beneficiaries for documents that came into its possession as executors.[7] On any view of it Ms Grout is a beneficiary under both the 2007 will, and, although in a much more limited way, the 2013 will documents. On the authority of *Hall v Guardian Trust* the plaintiffs would not be able to resist her application for discovery of the documents held by them relevant to the will files under which she is a beneficiary. They would not be able to maintain a claim to privilege to resist production of those documents even if they still had a role as executors, which for the above reasons I do not consider they have at present.

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6 *Hall v Guardian Trust and Executors Company of New Zealand Ltd* [1939] NZLR 993.
7 At 997.

[25] Ms Clapham also submitted Mr Patterson was not a party to the substantive proceeding and for that reason also had no status or role to make decisions about the discovery process.

[26] However, as noted the deceased's estate vests in Mr Patterson. The estate extends to the rights to call for documents, including files that the deceased would have been able to call for. While Mr Patterson is not named as a party to the current proceedings he has a proper interest in the proceedings as the administrator of the deceased's estate. Woolford J was obviously alert to that and directed that copies of the documents in the proceedings be served on Mr Patterson.

[27] It would be open to Mr Patterson if he wished to appear through counsel and make submissions at the substantive hearing. Given that he has been served with the documents in the proceedings he is effectively in the same position as other parties who have been served and would be entitled to be heard if he considered it appropriate.

[28] For the reasons set out in Ms Bruton's submissions[8] it would generally not be appropriate for a person named as executor and trustee (or in this case the administrator) to advance submissions on the 2014 documents either way. That is best left for the competing beneficiaries, given that they are in this case sui juris and able to advance their own positions. However, for the present application I do not need to take that matter any further.

[29] I am satisfied that, given Mr Patterson's role and status as temporary administrator, and given the way the file has developed to date the will and power of attorney files held by the plaintiffs ought to be delivered to Mr Patterson. There is no need for the documents to be listed and claims of privilege to be made by the plaintiffs. They do not have any role in making decisions as to privilege in this proceeding. It will be more cost effective if the files in their entirety are delivered to Mr Patterson as the tailored discovery orders seek.

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8 *Cockle v Roydhouse* (2003) 23 FRNZ 433; *Re Schroeder's Will Trust* [2004] 1 NZLR 695; *Shovelaar v Lane* [2011] EWCA 807; *Evans v Evans* [1985] 3 All ER.

[30] Any decision on privilege will then, as Woolford J anticipated, be dealt with in accordance with s 66 of the Evidence Act 2006 and in particular s 66, subss (2), (3) and (4).

Result/orders

[31] Given that the application under s 14 of the Act is to be dealt with first there is no need at present for the order sought at 1.1(d) of the application. I make orders in accordance with paras 1.1(a), (b), (c) and (e) of the application. In relation to the will and power of attorney files for the deceased that is to be for the files from and including 2007 up to the present.

[32] It will then be for Mr Patterson to consider the files and to determine whether, having regard to s 66 of the Evidence Act and the material on those files it is proper or necessary to claim privilege in relation to any particular documents on those files.

[33] I direct that Mr Patterson make any such application regarding privilege within 14 days of delivery of the files to him or within such further extended period as he may seek by memorandum. I do so because I have not heard from Mr Patterson as to how long he might need to make that decision. If necessary the Court will then rule on the issue of any privilege claimed by Mr Patterson that is contested by the parties.

[34] It follows from the above that the fixture scheduled for 3 and 4 November will, regrettably, have to be vacated.

[35] I understood Ms Clapham to accept that would be the inevitable outcome of orders for discovery. I vacate that fixture. The case will be allocated an alternative fixture in the first quarter of 2015. The fixture will be allocated at a further case management conference. Bearing in mind the above timetable I direct that the Registrar arrange a case management conference during the week of 10 November to be convened by telephone either before me or Woolford J.

Costs

[36] That leaves the issue of costs. I indicate that the applicant Ms Grout is entitled to the costs of this application, however, I reserve the issue of costs both as to quantum and as to incidence, whether they are to be borne by the estate or by the opposing plaintiffs personally, to follow the outcome of the s 14 hearing.

[37] At Ms Bruton's request I confirm that all issues of the costs incurred to date are held over for further submissions following the outcome of the fixture or otherwise as the Court may direct.

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Venning J