

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

**CIV-2014-485-002817
[2014] NZHC 1881**

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 PHILLIP LAERY & SIMON
 CHARLES DAVID WEIL
 Applicants

AND JENNIFER KAY GROUT
 First Respondent

 SARAH KAY GROUT
 Second Respondent

 MARJORY HAMLIN (also known as
 Marjory Vinet)
 Third Respondent

Hearing: 30 July 2014

Appearances: S Clapham for Plaintiffs
 V Bruton for First Respondent
 S Jefferson QC for Second Respondent
 D Watson for Third Respondent

Judgment: 30 July 2014

Reasons: 11 August 2014

**JUDGMENT OF WOOLFORD J
[Re Appointment of Temporary Administrator]**

*This judgment was delivered by me on Monday, 11 August 2014 at 12.00 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Introduction

[1] This is an application by the first respondent to appoint a temporary administrator for the estate of the late Rena Frances Manson (the deceased). The plaintiffs (Desmond Phillip Leary 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. 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 (the 2013 document) as the valid will of the deceased.

[2] The first respondent (Jennifer Kay Grout) opposes the application. She is the primary beneficiary under the 2007 will and her view is that the 2007 will is the valid will of the deceased. She has also counter-claimed, seeking an interpretation of a clause in the 2007 will, rectification of the 2007 will, and, in the event that the 2013 document is validated under s 14 of the Act, a claim under the Law Reform (Testamentary Promises) Act 1949.

Temporary Administrator

[3] The first respondent now makes an 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, subject to the immediate control of the Court and acting under its direction until he is discharged or removed under s 21.

[4] The grounds on which the order is sought is that there are now legal proceedings touching the validity of the will of the deceased and it is therefore necessary for an independent temporary administrator to be appointed. Mr Patterson is an expert in estate administration and consents to his appointment. The first respondent submits that the plaintiffs should not be appointed as temporary administrators as they are not independent and have various conflicts of interest, including the fact that Mr Laery's wife and children are named as beneficiaries in the estate.

[5] The plaintiffs oppose the application for an order appointing Mr Patterson as temporary administrator. They have filed a cross-application for a grant of administration of Ms Manson's estate to themselves, as temporary administrators. The plaintiffs seek appointment on the basis that they are the long-term financial and legal advisors to the deceased and are familiar with her estate. Accordingly, if granted temporary administration they could speedily and inexpensively attend to getting in the estate assets and disposing of them as required in order to pay the estate's debts. They also submit that the appointment of Mr Patterson will add further and unnecessary costs to the estate.

[6] Mr Jefferson QC, on behalf of the second respondent, supports the application by the first respondent for the appointment of Mr Patterson as a temporary administrator. Ms Watson, on behalf of the third respondent, took a neutral stance and indicated that she would not take an active role, having filed a notice of appearance for ancillary purposes although in earlier correspondence she had supported the appointment of the plaintiffs as temporary administrators.

[7] After hearing from counsel on 30 July 2014 at the end of the duty Judge list, I gave judgment granting the first respondent's application for the appointment of Mr Patterson as a temporary administrator and dismissing the plaintiffs' application for the appointment of themselves as temporary administrators. I indicated that my reasons would follow. These are my reasons.

The law

[8] Section 7 of the Administration Act 1969 provides the Court with a broad discretion to appoint a temporary administrator. It states:

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.

- (2) The Court may, out of the estate of the deceased, grant to a temporary administrator appointed under this section such reasonable remuneration as the Court thinks fit.

[9] There is very little case law on the principles to be applied in terms of s 7. The cases cited are all fact specific.¹

First respondent's submissions

[10] The first respondent has sworn a substantial affidavit. On the basis of the factual matters set out in the affidavit, counsel for the first respondent submits that:

- (a) the plaintiffs are hostile towards her;
- (b) Mr Laery has acted in the face of a conflict of interest with regard to the powers of attorney purportedly given to Mr Laery and his wife, which were revoked by the deceased by notice dated 10 September 2013, a month or so before her death;
- (c) Mr Laery's wife and their children are purported beneficiaries of the document sought to be validated as a will in these proceedings;
- (d) the 2007 will was drawn by Mr Weil. It is unclear and requires interpretation, ratification or correction;
- (e) Mr Weil may be the subject of a negligence claim by the first respondent in relation to the 2007 will; and/or
- (f) the plaintiffs failed to act in accordance with the deceased's instructions and have breached their duties to her by:

¹ *Re Griffin* [1925] P38; *King v MacDonald* (2002) 16 PRNZ 180 (HC); *Creser v Creser* HC Wellington CIV-2003-485-893, 2 September 2003.

- (i) not considering or acting upon her instructions set out in a letter dated 10 September 2013 that she did not want her home sold and in which she revoked the powers of attorney; or
- (ii) Ignoring correspondence from the first respondent dated 10 September 2013 stating that the deceased did not want her home sold and that other investments were available to pay rest home fees and advising the plaintiffs that the deceased had revoked the powers of attorney.

Plaintiffs' submissions

[11] Mr Laery and Mr Weil have also sworn affidavits in which they reply to each of the allegations made by the first respondent. Counsel for the plaintiff submits that there are three main reasons why they should be appointed temporary administrators of the deceased's estate:

- (a) The plaintiffs' appointment is the most cost effective and efficient course. They have a high degree of familiarity with the deceased's affairs. Mr Laery has provided accounting and tax advice to the deceased since April 1996 and has assisted with the management and administration of her financial affairs. He was appointed the deceased's attorney in relation to her property by an enduring power of attorney dated 9 June 2006. Mr Weil was the deceased's solicitor for approximately the last 14 years of her life.
- (b) There is no evidence that the plaintiffs would not act responsibly and both are appropriately qualified. Mr Laery is a chartered accountant whose has been in practice since 1997 and Mr Weil is a solicitor experienced in estate administration, being a partner at Morrison Kent. Both have taken their professional obligations as the deceased's accountant and solicitor seriously and in consultation with each other.
- (c) There is no scope for any presumed bias to become an issue because the powers of temporary administrators do not extend to distributing

the balance of the estate remaining after payment of debts, funeral and testamentary expenses, duties and fees.

[12] Mr Weil states that when he received advice from the first respondent a month or so before her death, that she had revoked the powers of attorney to Mr Laery and his wife, Mr Weil was concerned that his role as solicitor had apparently been terminated. He accordingly attended on the deceased accompanied by the nurse manager from the home in which the deceased resided. He confirmed that the deceased wished Mr Weil to be her solicitor and that Mr Laery was to continue to have a power of attorney for her property. Finally, counsel submits that even if there was evidence of bias (which the plaintiffs strongly deny), there is no way that such bias could impact on the distribution of the estate because temporary administrators do not have the power to distribute the estate. Their powers are quite limited in that regard.

Discussion

[13] Although counsel for the plaintiffs submitted that the appointment of the plaintiffs as temporary administrators was the most cost efficient course, I was attracted by Mr Jefferson's submission that, even without considering the merits of the objections by the first respondent, where there is controversy there is cost.

[14] As an example, the plaintiffs and the first respondent have been unable to agree on the scope of discovery to be provided by the plaintiffs in the substantive proceedings. Counsel for the first respondent sought informal discovery in part to minimise costs. Mr Weil's firm responded on the basis that matters should take their normal course, and that the scope of discovery should be considered in the First Case Management Conference and, inferentially, that formal orders would be required from the Court.

[15] If Mr Patterson is appointed temporary administrator, privilege in the files of Mr Weil's firm will vest in him, pursuant to s 66 of the Evidence Act 2006. As an independent administrator, Mr Patterson will then be in a position to reassess whether or not there are grounds for resisting an informal discovery process.

[16] As to the costs involved in realising the assets of the estate and paying its debts, I do not envisage that there would be significant cost savings if the plaintiffs were appointed temporary administrators. Mr Weil annexes a statement of the estate assets and liabilities as at 30 June 2014, prepared by Mr Leary, as an exhibit to his affidavit sworn on 10 July 2014. No further investigations as to the estate's assets and liabilities would appear to be necessary. The plaintiffs' costs from the date of death charged to the estate already total \$31,692.35.

[17] I am of the view that the costs involved in realising the assets of the estate and paying its debts will therefore be similar, whoever is appointed temporary administrator. However, there is, in my view, real potential for further costs to be incurred if the first respondent objects to actions undertaken by the plaintiffs as temporary administrators, given the level of distrust felt by the first respondent towards the plaintiffs.

[18] Apart from the issue of costs, I am of the view that the appearance of independence is equally important. In their original application for an order validating the 2013 document as the valid will of the deceased, the plaintiffs did not make any mention of a letter addressed from Mr Weil to the solicitors acting for the first respondent, dated 11 September 2013, in which Mr Weil referred to an authority to uplift in favour of the first respondent's firm from the deceased. Mr Weil stated in that letter:

We are concerned as to the legitimacy of the authority given a number of factors including

- (1) Conflict of interest;
- (2) Undue influence and/or duress;
- (3) Capacity;
- (4) Absence of independent legal advice.

In the circumstances, neither the purported revocation of power of attorney nor the purported authority to uplift can be recognised as being valid. We also give notice that any replacement enduring powers of attorney that may purportedly have been granted are also not recognised as valid and any action by the purported attorney thereunder would be ultra vires.

[19] The application to validate the 2013 document presumes that the deceased had the capacity to make a valid will, notwithstanding Mr Weil's advice a month earlier that he was concerned as to the legitimacy of the authority given to the solicitors acting for the first respondent, on the basis of, amongst other things, the capacity of the deceased to do so. Notwithstanding Mr Weil's subsequent affidavit in reply to that of the first respondent in which he stated that he was satisfied that the deceased had sufficient capacity to instruct him to make changes to the 2007 will a month later and just the day before she died, it would have been preferable for the full circumstances to be disclosed when the proceedings were first filed.

[20] The first respondent also records in her affidavit, sworn 8 July 2014, that she was told by the deceased a month or so before her death that Mr Laery wanted the money and that Mr Laery's wife was never on her side and that Mr Weil only did what they told him. Whatever the truth of the matter, once such allegations are made, it is important that all family members and beneficiaries see and understand that the estate is being administered independently and impartially. I emphasise that in making that comment, I do not purport to make any determination as to the factual allegations of any party.

[21] It is also important to note that it is not just the first respondent who would be disadvantaged if the 2013 document is validated as the will of the deceased. According to Mr Weil, the deceased gave him instructions to change a number of bequests, including deleting a bequest to her friend, Catherine Keirnan, in the sum of \$10,000 and changing a bequest to the Meadowbank Community Centre from \$10,000 to \$2,000. The bequests to Mr Leary's wife and their children were apparently to remain. In those circumstances, the appearance of independence is vital for the confidence of family members and beneficiaries in the process of administration of the deceased's estate, even if it is initially just realising the assets of the estate and paying its debts.

[22] It was for these reasons that I made the following orders:

- (a) Appointing William Malcolm Patterson, of Auckland, solicitor, as the temporary administrator of the deceased's estate, subject to the

immediate control of the Court and acting under its direction until he is discharged or removed under s 21 of the Administration Act 1969.

- (b) That the temporary administrator, William Malcolm Patterson is to have all the rights and powers of a general administrator, other than the right of distributing the balance of the deceased's estate remaining after payment of debts, funerals and testamentary expenses, duties and fees;
- (c) Authorising payment to the temporary administrator, William Malcolm Patterson, in accordance with his usual charge out rate.
- (d) Directing the temporary administrator, William Malcolm Patterson, be served with all documents in the proceedings.

Woolford J