IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2533
[2019] NZHC 3477

UNDER	Sections 5 and 53 of the Administration Act 1969 and Part 27 of the High Court Rules 2016
IN THE MATTER	Of the estate of STEPHANIE JOAN MANLEY
BETWEEN	JOHN PHILIP MANLEY AND SUSAN JOAN CHURCH Plaintiffs
AND	JOHN PHILIP MANLEY, SUSAN JOAN CHURCH, PAUL ANTHONY MANLEY, ANNE THERESE MANLEY-LUMSDEN, MARIA LOUISE MANLEY, TERRY PHILIP CHURCH, WAYNE ROBERT CHURCH, JAMES TYLER AND STEPHANIE ROSE MANLEY Defendants

Hearing: On the papers

Counsel: D Mitchell for Plaintiffs

Judgment: 20 December 2019

JUDGMENT OF WHATA J

This judgment was delivered by me on 20 December 2019 at 2.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Manu Rogers, Solicitors, Kaikohe

Introduction

[1] John Manley and Susan Church seek a declaration that the Will of the deceased Stephanie Joan Manley ("Mrs Manley") dated 15 May 2017 ("the May 2017 Will") be declared invalid and that the Will of Mrs Manley dated 3 April 2007 ("the April 2007 Will") be granted probate.

Background

[2] Mr Mitchell has helpfully set out the background, which I largely adopt.

[3] Mrs Manley died on 18 September 2018 aged 93 years. The plaintiffs, John Philip Manley and Susan Joan Church are the executors of the estate of Mrs Manley pursuant to the April 2007 Will. The defendants are the beneficiaries named in the April 2007 Will.

[4] However, on 15 May 2017, Mrs Manley executed the May 2017 Will. The May 2017 Will was virtually the same as the April 2007 Will except it added a direction that the share to be distributed to her grandchildren James Tyler Manley ("James") and Stephanie Rose Manley ("Rosie") was to be deposited into their parents' bank account to be held on trust until such age as James' and Rosie's parents considered they had reached maturity to use their distribution prudently.

[5] When the plaintiffs applied for probate of the May 2017 Will, the High Court registry refused to grant probate on the grounds it appeared that Mrs Manley may not have had testamentary capacity at the time the May 2017 Will was executed. This was due to the death certificate recording Mrs Manley suffered from dementia. The plaintiffs were, however, unable to obtain an affidavit from a medical practitioner to confirm that Mrs Manley had testamentary capacity when she executed the May 2017 Will and therefore the plaintiffs decided to seek probate of the April 2007 Will instead.

[6] The plaintiffs obtained the consent of the defendants, being all the beneficiaries named in the May 2017 Will and the April 2007 Will, to confirm they did not oppose the plaintiffs seeking a declaration that the May 2017 Will be declared invalid and the April 2007 Will be granted probate.

[7] The plaintiffs then filed an application seeking the 2017 Will be declared invalid and the April 2007 Will be granted probate, but the High Court registry informed the plaintiffs that that application could not proceed in the form filed as a statement of claim was also required to be filed. The application was supported by affidavits of the plaintiffs.

The threshold test

[8] Mr Mitchell also helpfully laid out the threshold test for testamentary capacity. As noted in *Banks v Goodfellow*:[1]

> As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects his bounty, and the manner in which it is to be distributed between them.

[9] Furthermore, if there is some evidence raising a lack of capacity as a tenable issue, the onus of satisfying the Court that the Will maker did have capacity rests on those who seek probate and that onus must be discharged on the balance of probabilities.[2] In order to establish capacity, when in issue, those seeking probate must demonstrate the maker of the Will had sufficient understanding of three things:

(a) That he or she was making a will and the effect of doing so ("the nature of the act and its effects");

(b) The extent of the property being disposed of, and

(c) The moral claims to which he or she ought to give effect when making the testamentary dispositions.

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1 *Banks v Goodfellow* (1870) LR 5 QB 549, at 567, citing *Harrison v Rowan* (1820) 3 Wash C C 580 at 585.

2 *Bishop v O'Dea* (1999) 18 FRNZ 492 at [2]-[3].

Assessment

[10] On 21 December 2016, Mrs Manley's cognition status was assessed as declining and her short-term memory was particularly impaired. Further, it was stated that her memory would continue to decline. At the time, Mrs Manley was 92 years of age. A medical assessment on 12 January 2017 indicated ongoing mild cognitive impairment, though she was still able to indicate her wants and needs. A further assessment on 12 April 2017 also identified reduced cognition, but that she was not a management problem.

[11] It was about this time that the plaintiffs identified that it may be preferable for there to be specific provision for her grandchildren, James and Rosie. At this time the plaintiffs thought she understood what was proposed. The 2017 Will was then executed. The only difference from the 2007 Will was that James and Rosie's distribution were to be deposited into nominated bank accounts.

[12] Mrs Manley's house was sold in June and she moved into a Metlifecare apartment. Over the next 15 months, Mrs Manley's condition deteriorated, and she passed away on 11 September 2018. Her death certificate recorded Mrs Manley as having *Advanced Dementia Years*.

[13] While not a clear case, given that all affected beneficiaries approve, I am prepared to find that there is sufficient doubt about Mrs Manley's competency at the time she executed the May 2017 Will that it should be declared invalid. The effect of this is that the executors should be granted probate in respect of the April 2007 Will, there being no issue as to testamentary capacity or otherwise in respect of that Will. Furthermore, the differences between the Wills are so small that this matter can be determined without notice.

[14] Accordingly, I make the following orders:

(a) The hearing of the application be heard without notice;

(b) The May 2017 Will be declared invalid and that therefore all earlier testamentary dispositions contained in the May 2017 Will be revoked;

(c) A grant of probate for the April 2007 Will be granted to the plaintiffs; and

(d) Costs in respect of these proceedings to be awarded against the estate of Mrs Manley.

[15] I wish to commend counsel and the executors for the thorough and clear presentation of the application. Costs on the application are to be paid out of the estate.