Wills Act 2007 – Changes and Current Issues

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Introduction/Background

The new Wills Act 2007 (the "Act") came into force on 1 November 2007. It replaced the old 1837 Wills Act which was a United Kingdom statute and which had been amended numerous times between 1852 and 2005.

Two of the most significant changes are:

1. **Section 14** of the Act which empowers the Court to declare a document that is not a valid will under the requirements of the Act to be a valid will if it is satisfied that the document expresses the deceased's testamentary intentions.

2. **Section 31** of the Act which enables the Court to correct a will if it is satisfied that the will does not carry out the deceased's intentions because it:

    a. contains clerical error; or

    b. does not give effect to the deceased's instructions.

The changes follow similar legislation in the UK and Australia which has enabled the Courts to validate or correct documents that do not meet the specific requirements for a will but express the deceased's wishes. The background to these changes is a long-standing concern that the wishes of will-makers were thwarted by the strict requirements of the Wills Act 1837.

Section 14 – declaration of a document to be a valid will

The High Court now has the ability to declare an informal document a valid will under section 14 of the Wills Act 2007. However this only applies to documents that came into existence after 1 November 2007.

14 High Court may declare will valid

(1) This section applies to a document that—

(a) appears to be a will; and

(b) does not comply with section 11; and

(c) came into existence in or out of New Zealand.

(2) The High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.

(3) The court may consider—

(a) the document; and

(b) evidence on the signing and witnessing of the document; and

(c) evidence on the deceased person's testamentary intentions; and

(d) evidence of statements made by the deceased person.

The Law

Section 14 applies to documents that:

(a) appear to be a will.

This would cover for example documents that state “The last will of XXXX”, and which dispose of property of the deceased when he or she dies or appoint a testamentary guardian (see section 8(1)(b)).

(b) do not comply with section 11.

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.

(c) came into existence in or out of New Zealand.

In practice section 14 has been used by the Court to declare documents such as unsigned wills, wills that have been signed but witnessed incorrectly and draft wills as valid wills if satisfied that the document expresses the deceased person’s testamentary intentions.

The Court may consider the document itself, evidence of the signing and witnessing of the document, the deceased person’s testamentary intentions and the deceased’s statements.

Section 14 Applications

There is no prescribed procedure for applications under section 14 of the Act. The procedure will depend on the circumstances of each case.

In *re: Zhu (Deceased)* HC New Plymouth CIV-2010-443-21 (17 May 2010) Justice Mackenzie made the following comments in relation to the procedure for section 14 applications:

> “[3] In determining the procedure appropriate for a particular case, the overriding concern, in my view, must be to adopt a procedure which will ensure that all persons who may be potentially affected by the granting of relief are given proper notice of the proceedings, and a proper opportunity to be heard. A further important principle to be taken into account is that the new powers conferred by the Act to validate and correct wills are clearly intended by Parliament to be remedial. The procedures to be adopted ought to reflect that remedial principle. Undue expense and formality in the procedures should not be imposed. The procedures should, consistent with the overriding

principle that all parties who may be affected must be given notice, be such that applications are dealt with promptly, inexpensively and efficiently.

[4] In appropriate cases, there will be a need to institute proceedings in such a way that parties who may oppose the grant of relief, or who may be affected but unable to consent, can be appropriately represented. Proceedings by way of an originating application, or for probate in solemn form, may in such cases be necessary. In other cases an interlocutory application in the course of probate proceedings may be more appropriate, as providing an efficient and less expensive method of ensuring that the issues are properly put before the Court. Where all those who could be affected consent, and there are no other factors which would make such a course inappropriate, the interests of justice may require that the application be dealt with on a "without notice" basis, in terms of r 7.46(3)(e) of the High Court Rules."

In terms of the relevant standard or burden of proof required to "satisfy" the Court that the document express the deceased's testamentary intentions the Judge made the following comments at paragraph [7]:

> "The test whether the Court is "satisfied" does not import any particular standard or burden of proof. The task of the Court is to evaluate the relevant circumstances and reach a conclusion. I expressed some views on the proper approach in this context in *re: Hickford*. Because of the importance of a declaration that a will be declared valid there must be cogent evidence to support any finding which is relied upon in determining that the Court is satisfied on the section 14(2) test".

And at paragraph [14]:

> "I consider on the balance of probabilities assessed on that basis that the absence of the requisite formalities of witnessing is explained by the fact that the will was clearly prepared without the assistance of a lawyer .... It is in my view more likely than not that the deceased was unaware of the requirement for the execution of a valid will."

In that case a document in a Chinese language (for which an interpretation was provided) which had been signed by the will-maker but not witnessed was declared valid under section 14.

Applications can be made either on notice or without notice. Applications made without notice will necessitate inquiries being made of all people who would stand to benefit under any previous valid will or on intestacy. In cases where all affected people consent to the application written consents should be obtained and attached to the applicant's affidavit.

Affidavits should be obtained from anyone who can provide relevant evidence as to the deceased's intentions and the circumstances surrounding the existence of the document.
Evidence as to why the document was not signed or witnessed correctly will be crucial to the application.

If all requisite consents are provided and comprehensive affidavits filed, it is possible for orders to be made on the papers.

Case Law

In addition to *re: Zhu* discussed above, there have been a number of cases involving section 14 since the Act came into force on 1 November 2007.

Re: MacNeil (Deceased) (2009) 10 NZCPR 770 (HC) involved a woman who committed suicide leaving a suicide note that was found beside her body. The first page of the note was headed "this is my last will and testament" and dated 20 January 2008. The note was in the deceased's handwriting and signed by her. Application was made to have the suicide note declared a valid will.

All three requirements of section 14(1) were satisfied. First the note appeared to be a will as it was headed "this is my last will and testament" and disposed of the deceased's property. Secondly the will did not comply with section 11 as though it was signed it was not witnessed. The document came into existence in Adelaide where the deceased committed suicide; therefore the third requirement of section 14 was satisfied.

Section 14(2) requires the Court to be satisfied that the document expresses the deceased's testamentary intentions. The document gave an express direction in relation to the deceased's money and referred to funeral and cremation instructions which made it clear that the dispositions were to take place following death.

After considering the evidence the Court held that the suicide note was a valid will under section 14 of the Act.

Re: Hickford (Deceased) HC Napier CIV 2009-441-000369 (13 August 2009), involved a draft unsigned will that was declared a valid will. The deceased was diagnosed with cancer in 2008 and wanted to update his will. He had a previous will from 1968 but since then he had divorced his wife in 1979; she died in 1982. The deceased had discussions with his partner and his daughter about his intentions to appoint them executors of the estate. The deceased made an appointment with his lawyer and had a draft will prepared which he showed to his partner and further discussed with his daughter. The will was not signed and the deceased died about three and a half months later.

In this case the document clearly met the requirements of section 14(1) on the facts set out above. The Court then had to decide whether the document expressed the deceased's testamentary intentions. The stumbling block was why the deceased never signed the will. The Justice Mackenzie came up with three alternative possibilities:

(a) the deceased had changed his mind;

(b) the deceased had overlooked or forgot to sign the will; or

(c) the deceased did not think he had to do anything further.

Justice Mackenzie stated that to meet the statutory test the case must fall into the third possibility. The first would mean the document did not express testamentary intentions; the second might not meet the test. In relation to the third he reasoned that "if the deceased thought he had made an effective will and the reason the document was unsigned was a mistaken view that everything necessary had been done, the Court could be satisfied that the document did express the deceased's testamentary intentions despite the lack of a signature".

Justice Mackenzie was satisfied that the deceased had thought he had nothing further to do to finalise the will and therefore it expressed his testamentary intentions. He declared the will to be valid.

Re: Rejouis (Deceased) HC Nelson CIV-2010-442-156 (21 June 2010) involved an application to declare a "schedule of intentions" as a valid will. The deceased left three testamentary documents:

(a) a will signed on 3 March 2003 but not witnessed appropriately;

(b) the 2003 will was subsequently amended by hand and referred to a schedule of intentions dated 24 September 2003; the amendment was signed but not witnessed; the schedule was signed but not witnessed.

(c) a new schedule of intentions was signed by the deceased on 20 October 2008 following the birth of the deceased's second and third daughters; it was not witnessed.

The deceased's widow applied under section 14 and the deceased's sole surviving daughter (aged 2), through counsel, consented to the application.

Justice Mallon noted that the 2008 schedule of intentions met the definition of a will under section 8(1) of the Wills Act 2007 but did not meet the witnessing requirements in section 11(4). The Judge was satisfied that the 2008 Schedule of Intentions expressed the deceased's testamentary intentions and was consistent with the other testamentary documents. She was satisfied also that the deceased had finalised his intentions and intended the 2008 schedule of intentions to be the final and completed record of his updated intentions. An order was made under section 14 declaring the 2008 schedule of intentions to be a valid will.

To date the High Court has taken a liberal approach to the exercise of its discretion under section 14 and it is difficult to disagree with the decisions in the four cases discussed above. Difficulties will arise where applications are opposed or where there is doubt about the deceased's testamentary intentions. It seems likely that High Court judges will take a cautious approach in these cases. While cogent evidence will be needed, it is apparent from *re: Zhu* that the applicable standard of proof is the balance of probabilities and the absence of legal advice may in some cases assist the prospects of a successful application.

It appears that what is important is the deceased's intentions at the time of signing or preparing the relevant document which is being put forward under section 14 rather than any subsequent intentions. A document that is prepared or signed shortly before the date of death may have better prospects of being accepted than a document which pre-dates the death by some margin because fresh and clear evidence of intention may be available. If there is a significant time difference between the date of the document and the date of death and if it cannot be established (as in the Hickford case) that the deceased did not think he or she had to do anything further, it may be harder to get an order under section 14.

Section 31 - correction of wills

Section 31 enacted the power that the Courts had been developing to correct wills which do not carry out the deceased's instructions.[1] The power to correct can only be utilised where there is a clerical error or a failure to give effect to the deceased's instructions.

31 Correction

(1) This section applies when the High Court is satisfied that a will does not carry out the will-maker's intentions because it—

  (a) contains a clerical error; or

  (b) does not give effect to the will-maker's instructions.

(2) The Court may make an order correcting the will to carry out the will-maker's intentions.

[1] In *Re Jensen* [1992]2 NZLR 506 the Court

The Law

The questions the Court must consider in deciding whether to correct a will pursuant to section 31 are:

a. Whether the will carries out the deceased's intentions?

b. If the will does not carry out those intentions, whether that is due to:

   i. a clerical error; or

   ii. a failure of the drafter to implement the deceased's instructions?

The error could simply be a clerical error. For example:

- A wrong bank account number being recorded, even though that is the number advised by the deceased.

Or the error, may not be a clerical error but a failure to draft a will which implements the deceased's instructions:

- Use of a standard clause, for example a clause appointing executors, which although specifically used by the drafter, fails to implement the deceased's instructions.

The error could be due to both a clerical error and a failure to implement the deceased's instructions. For example:

- Omitting a child of the deceased as a named residual beneficiary when the deceased's instructions were to divide the residue among all of his or her children.
- Referring to the wrong will when drafting a codicil.

Limitations to Section 31

Section 31 only applies to wills signed after 1 November 2007.

The power of correction is not a general power to correct. There will be situations where:

- The difficulties in implementing the will are due to a subsequent change in circumstances. For example, the sale of an asset. [2]
- The error is not in the will but some other document. For example, a property owned as joint tenants, which is treated in the will as if owned by the deceased as tenants in common with the co-owner, can not be corrected.

Procedure

If the error is identified before the will is probated, an interlocutory application should be made as part of the probate proceedings. If granted, the probate issued will then be in respect of the corrected will. Alternatively an application is made first under section 31. Once an order is made, it is sealed and the sealed order will then form part of the document lodged with the probate application.

In *re: Armstrong (Deceased)* HC Wellington CIV 2008-435-095 (31 July 2010) Justice Mackenzie directed that when the will contains an error careful consideration should be given as to whether the application for probate is made in common form or in solemn form. It may be best to proceed in solemn form if the applicant knows there is dispute over the form of the will. The Court may direct

[2] Parliament specifically decided not to follow the legislative provisions of the Australian Capital Territory legislation which allows the Courts to correct a will where the deceased's intentions are thwarted by a change in circumstances.

that the application, filed in common form, proceed in solemn form under rule 27.6(2)(b). An application in solemn form will proceed on notice to all affected persons as parties to the proceedings.

If the error is identified after probate has been granted, then the application for correction under section 31 can be a new and separate application under rule 18.1(a)(ix) or rule 19.5. Again this application can be without notice or on notice.

If the application is made without notice then including in the affidavits supporting the application written consents from the affected beneficiaries will assist the Court in making the orders.[3]

Affidavits should be obtained from all people who can attest to the will-maker's intentions and how the error arose. Generally an affidavit from the will-drafter will be filed. Any notes taken at the time instructions were given or the time of signing will assist the Court and should be annexed to the will-drafter's affidavit. The Court has placed considerable weight on scribbled hieroglyphics in deciding how to correct a will.[4]

Case Law

In *re: Armstrong (Deceased)* a codicil was prepared amending a 1996 will when in fact the deceased had executed a 2002 will.

Application was made to the Court to:

a. Insert the correct date of the 2002 will (in place of the reference to the 1996 will) in the codicil; and

b. To alter the paragraph references to be to the appropriate paragraphs of the 2002 will.

Justice MacKenzie approved the application to correct. The deceased's intentions may either have been to revoke her 2002 will and re-institute her 1996 will or simply to correct her last will. Justice MacKenzie held the essence of the deceased's instructions were to change her executors in her current will. There was therefore both a clerical error and a failure to implement the deceased's instructions.

In *re: Mansfield (Deceased)* HC Auckland CIV 2008-404-7115 (10 March 2009) considered the confusion and imprecision of a clause appointing as executor and trustee a partner of a law firm. The clause provided:

> "I appoint as my executors and trustees two partners for the time being of the firm of Wynyard Wood Solicitors practising at Auckland ("my trustees"). If at my death the firm of Wynyard Wood no longer exists then the appointment will relate to the firm which carries on its practice or can be identified as having succeeded to its practice."

The application for probate was rejected by the Registrar.

It was noted that *Dobbie's Probate and Administration Practice*[5] suggests using the wording:

> "I appoint two of the partners at the date of my death in the firm X to be the executors and trustees of this my will."

The Court considered an application to interpret the will using external evidence under section 32 and an application to correct the will under section 31.

Justice Asher rejected the application to interpret under section 32 saying that the problem is because there are the "wrong words" in the will. However, it should be noted that in *re: Trehey (Deceased)*

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[3] *Re: Armstrong (Deceased)*
[4] *Re: Trehey (Deceased)* HC Napier CIV 2009-441-899 (16 February 2010)
[5] Earles, Douglas, Kelly & Kelly, *Dobbie's Probate and Administration Practice* 5th ed, LexisNexis Butterworths, 2008, para 17.12.

HC Napier CIV 2009-441-899 (16 February 2010) (see further discussion below) Justice Woodhouse commented that, although not argued, he may, on the facts of that case, have been persuaded that there is an implied delegation to the partners of the law firm to appoint a partner.

Justice Asher accepted Counsel's submissions under section 31 and made an order to correct the will to read:

> I appoint the partners at the date of my death in the firm of Wynyard Wood, Solicitors of Auckland, to be the executors and trustees of this my will.

Justice Asher did not correct the will to specify the number of partners who were to apply or act as the affidavit evidence as to the deceased's instructions pointed only to the intention to appoint the law firm Wynyard Wood.

Re: Trehey (Deceased) considered a very similar provision to that before the Court in *re: Mansfield*. In this case, the clause in question provided:

> "I appoint MICHAEL PETER MOODY of Westshore in Napier, retired together with one of the partners at the date of my death in the firm of Carlile Dowling presently of Raffles Street, Napier or such other firm which at my death has succeeded to and carries on its practice as my Executors and Trustees (in this Will called "my Executors")."

The difficulty with the clause is that it does not identify a mechanism for appointing the partner of Carlile Dowling who will assume the role of executor. The application for probate made by Mr Moody and Ms Pidd, a partner of Carlile Dowling at the time of Mrs Trehey's death, was therefore rejected by the Registrar on the grounds of uncertainty.

An application for correction was approved by the Court and the clause was amended to read:

> "I appoint MICHAEL PETER MOODY of Westshore in Napier, retired, together with the partners at the date of my death in the firm of Carlile Dowling presently of Raffles Street, Napier, as my Executors and Trustees (in this Will called "my Executors") (and I express the wish that one and only one of such partners of Carlile Dolwing shall prove my Will and act initially in its trusts)."

Ms Pidd who had taken instructions from Mrs Trehey filed an affidavit exhibiting her notes indicating that Mrs Trehey's specific instructions had been to appoint only one partner of Carlile Dowling. Therefore, unlike *Re: Mansfield (Deceased)*, the Court was willing to correct the will with an expression of wishes as to the number of partners appointed.

The Court approved the grant of probate to Mr Moody and Ms Pidd, but reserved leave for the other partners to apply. The clause as amended appoints all the partners of Carlile Dowling as executors and therefore there is no uncertainty. The wish expressed in parenthesis is simply that, a wish, and further partners (being partners of the firm at the date the deceased died) may apply in the future.

Re: Trehey indicates that if the mechanism for appointing the executors is clear, the clause will be effective. Therefore, a clause along the following lines may overcome this problem:

> I appoint a partner from the law firm, XXXX (or such other law firm that, at my death, has succeeded to and carried on its practice) as may be appointed by the managing partner for the time being of XXXX (or its successor) to be executor and trustee of this my will.

Problems could also arise if a firm appointed pursuant to a will, later incorporated as a company. This situation has arisen in the United Kingdom. There the Courts have adopted a liberal interpretation and taken the reference to the law partnership to be to the equity owners of the limited liability partnership constituting the 'firm' at the date of the will-maker's death[6]. A similar approach may be followed here in New Zealand pursuant to section 32 of the Act or common law rules of interpretation.

[6] *Dobbie's*, para 17.13.

Difficulties with pre 2007 wills

Sections 14 and 31 only apply to wills signed after 1 November 2007. Of course, there are still, and will continue to be for some time, applications before the Court with respect to wills signed before 1 November 2007.

Justice Heath recently commented in *re: Lauer (Deceased)* HC Auckland CIV 2009-404-6324 (2 December 2009):

> "Unhappily, a lacuna has emerged as a result of the inapplicability of the validation provisions of s 14 to Wills executed before the Act came into force."

This problem arises because section 9 of the Wills Act 1837 (UK) as amended by the Wills Act Amendment Act 1852 was "interpreted expansively to give effect to a testamentary intention if the intention was clear, notwithstanding failure to comply with strict formalities"[7]. This section has now been repealed. But the corresponding 'intent of the will-maker' sections in the 2007 Act, being section 14 (and also 31 and 32) do not apply to wills made before 1 November 2007.

In *re: Lauer* the Court was considering an incomplete attestation clause which did not clearly state that the will was signed by the will-maker with the witnesses 'in the presence of each other'. Justice Heath regretted that he could not accept the document as a testamentary document under section 14. Justice Heath directed that an affidavit from one of the witnesses be obtained to enable an application for probate in solemn form. But this might not always be possible. What if both witnesses have died or are unable to be located?

There was a proposed amendment to section 11 of the Act in the Statutes Amendment Bill (the "Bill") considered by Parliament this year.

The Bill amended section 11 to provide that:

- a will-maker need not actually sign his or her will in the presence of witnesses, but may acknowledge in the presence of witnesses that he or she signed the will earlier and that the signature on the will is his or her own;
- a witness need not include a statement of his or her attestation, but statements of this kind made by at least 2 witnesses are evidence of the will's valid execution.

These amendments to section 11 were, in part, to ensure that it is consistent with the interpretation given to the 1837 Act.

This part of the Bill was not passed. The amendment was opposed by the New Zealand Law Society on the grounds that it did not properly address the issue with pre 1 November 2007 wills. The lacuna remains.

Conclusion

The cases reviewed demonstrate that sections 14 and 31 of the Act will have wide application. There will no doubt be many more proceedings before the Court to declare an informal document a will or correct a will. What will be of great interest is how these applications proceed and are decided, when there are disadvantaged beneficiaries opposing the application. We tender our opinion that the Court will be a lot more cautious than they have been in the cases to date.

The anomaly in the current situation is that pre-1 November 2007, documents are caught even more tightly in the rigid section 11 requirements than such wills were under the 1837 legislation. This requires Parliamentary review and correction. This may involve extending the application of sections 14, 31 and 32 to wills signed pre-1 November 2007 if the will-maker dies after that date. There appears no sound logic in the current position. *Re: Rejois* illustrates the point as the powers in the

[7] *Re: Wilkins (Deceased)* HC Hamilton, CIV 2009-419-725, (24 September 2009)

Act were only available as Mr Rejois had signed a 2008 updating memorandum to his 2003 documents, which were technically no different in form and testamentary intention.

In the meantime, perhaps extra care should be taken when reviewing pre-2007 wills. If an error is spotted, a new will should be signed immediately.