

Update

Wills and Succession

Service 74 — November 2020

Current developments

Epidemic Preparedness (Wills Act 2007 — Signing and Witnessing of Wills) Immediate Modification Order 2020

This order modifies requirements, set out in s 11 of the Wills Act 2007, for signing and witnessing of wills, effective 17 April 2020.

This is a temporary order which will end when the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

This order is discussed at [4.6.1].

New legislation

Trusts Act 2019 (2019 No 38)

The Trusts Act 2019 comes into force from 31 January 2021. This Act replaces the repealed Trustee Act 1956.

Legislative amendments

Education and Training Act 2020 (2020 No 38)

This Act amended the following Act, effective 1 August 2020:

- s 73(2)(jb) and (jc) of the Estate and Gift Duties Act 1968

Public Service Act 2020 (2020 No 40)

This Act amended the following Acts, effective 7 August 2020:

- s 73(2)(jd)(i) of the Estate and Gift Duties Act 1968
- s 242(1) of the Te Ture Whenua Maori Act 1993

Urban Development Act 2020 (2020 No 42)

This Act amended the following Acts, effective 7 August 2020:

- s 4 of the Te Ture Whenua Maori Act 1993

Commentary

Chapter 2 — Nature of a will — mutual wills

The distinction between a mutual will and a mere honorary agreement may be evidenced by the presence or absence of an agreement between the parties that addresses the non-revocability of a mutual will: *Cleary v Cockroft* [2020] NZHC 1452. See [2.16].

Chapter 3 — Testamentary capacity — grant of probate

A concern about testamentary capacity does not, by itself, prevent probate from being granted in solemn form: *Public Trust v Lourie* [2020] NZHC 1691. See [3.1].

Chapter 3 — Testamentary capacity — deterioration of body

The question of testamentary capacity may not necessarily stem from dementia or some other disease of the mind, but may be impaired by the deterioration of the body: *Grbavac v Vujcich* [2020] NZHC 1953. See [3.9.2].

Chapter 4 — Formal requirements — validation of wills by High Court — preliminary notes — s 14, Wills Act 2007

In *Holman v Oakley* [2020] NZHC 2103 the document consisted of notes made by the deceased with possible alternative (and inconsistent) dispositions of her property. They were held to be at most preliminary notes. Secondly the Court was not satisfied that the document expressed the deceased's testamentary intentions. Thus the document could not be validated by s 14. See [4.7.3].

Chapter 4 — Formal requirements — validation of wills by High Court — s 14 of the Wills Act 2007 — unsigned document

A document was validated in *Re Kinghorn* [2020] NZHC 2043 (document not signed). See [4.7.3].

Chapter 4 — Formal requirements — validation of wills by High Court — s 14, Wills Act 2007 — draft document

A document was validated in *Re Price* [2020] NZHC 202 (draft document validated). See [4.7.3].

Chapter 4 — Formal requirements — validation of wills by High Court — s 14, Wills Act 2007 — letter attached to will

In *Public Trust v Oxner* [2020] NZHC 2383 a letter to the Public Trustee stapled to a will was validated. See [4.7.3].

Chapter 6 — Construction of wills — false particularisation — s 32, Wills Act 2007

The false particularisation in *Robinson v Robinson* [2020] NZHC 1878 concerned a rental property being disposed through a family trust, which itself did not exist. See [6.11].

Chapter 6 — Construction of wills — postponed class gift — vested interest

The Court of Appeal made it clear in *McLean v Public Trust* [2019] NZCA 449 that a residuary beneficiary, even though their possession is postponed until after the death of the life tenant, still has a vested interest for the duration of the life tenancy. See [6.24].

Chapter 7 — Gifts by will — equitable doctrine of satisfaction

Under the equitable doctrine of satisfaction, there is a presumption that advances made to children after provision for their legacy are in satisfaction of the legacy: *Re Vulger* [2019] NZHC 1408. See [7.38].

Chapter 10 — Probate and letters of administration — validation of wills by High Court — s 14, Wills Act 2007 — testamentary capacity

In an application under s 14 of the Wills Act 2007 the Court must also be satisfied, if the matter is put in issue, that the deceased had testamentary capacity: *Marshall v*

Singleton [2020] NZCA 450. See [10.7] and [10.41].

Chapter 10 — Probate and letters of administration — caveats — s 61, Administration Act 1969

The threshold for satisfying the Court that there are grounds for a full inquiry is low and if the caveator's evidence is disputed the Court will normally order the application for administration to proceed in solemn form: *Turk v Turk* [2020] NZHC 1495. See [10.11].

Chapter 10 — Probate and letters of administration — discretion to pass over executor — s 6(2)(a), Administration Act 1969

In *Re Berghan* [2020] NZHC 1399 the Court referred to both the consent of the beneficiaries and tikanga Māori in making a grant in favour of a child who had been adopted out but had remained in contact with her Māori biological father. See [10.26].

Chapter 10 — Probate and letters of administration — application for probate in solemn form — proof of will

If there is doubt as to which of two testamentary or apparently testamentary documents is valid both must be placed before the Court and the Court provided with all the necessary evidence: *Public Trust v Dollimore* [2019] NZHC 607, [2019] 2 NZLR 901. See [10.41].

Chapter 10 — Probate and letters of administration — application for probate in solemn form — formal proof

In *Endean v Endean* [2020] NZHC 2575 the parties had reached agreement and sought to proceed by way of formal proof, the Court emphasised that notwithstanding consent the Court must be satisfied as to the validity of the will being propounded. See [10.41].

Chapter 10 — Probate and letters of administration — discharge or removal of executors — s 21, Administration Act 1969

The principles which apply to discharge or removal of executors are set out in *Kellerman v Kellerman-Thornton* [2020] NZHC 2297. See [10.47].

Chapter 11 — Personal representatives — duties of executors — disclosure of information to beneficiaries

For comments on beneficiaries' rights to information from executors see *Kellerman v Kellerman-Thornton* [2020] NZHC 2297. See [11.17].

Chapter 11 — Personal representatives — duties of executors — duty to keep accounts — s 44, Administration Act 1969

Section 44 of the Administration Act 1969 places a duty on personal representatives to keep clear and accurate accounts, and to be ready to render such accounts when called upon to do so: *Kellerman v Kellerman-Thornton* [2020] NZHC 2297. See [11.33].

Chapter 11 — Personal representatives — remuneration of executors

The right of a personal representative to be paid out of pocket expenses is subject to the requirement that those expenses are reasonable in the circumstances of the relevant estate: *Kellerman v Kellerman-Thornton* [2020] NZHC 2297. See [11.41].

Chapter 13 — Duties of administrators in respect of proceedings — evidence of deceased's reasons for making will — s 11A, Family Protection Act 1955

A failure by an administrator to fully comply with its obligations under s 11A of the Family Protection Act 1955 may result in the Court denying it some of its costs: *Kinney*

v Pardington [2019] NZHC 2196. See [10.47].

Chapter 15 — Estate planning — residential care means testing — transfer of assets to family trust

In *Chief Executive of the Ministry of Social Development v Broadbent* [2019] NZCA 201, [2019] 3 NZLR 376 the appellant unsuccessfully appealed against a decision of the High Court (*Broadbent v Chief Executive of the Ministry of Social Development* [2017] NZHC 1499, [2017] NZAR 1127) which found the appellant could not, under the Social Security Act 1964, take into account income the respondent could have earned from assets she no longer owned because she had transferred them to family trusts. See [15.3].

Chapter 15 — Estate planning — appointment of trustees — rights in trust assets

The Privy Council in *Webb v Webb* [2020] UKPC 22 has delivered a decision that clarifies the issues that arose in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230. The Privy Council analysed the powers Mr Webb reserved to himself under the trust deed and concluded that in all the circumstances of that case gave him rights in the trust assets which were indistinguishable from ownership. See [15.12] and [15.13.3].