

Update

Wills and Succession

Service 73 — August 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.

Legislative amendments

High Court (COVID-19 Preparedness) Amendment Rules 2020 (LI 2020/59)

These rules revoke r 5.6 (Signature to be original) of the High Court Rules 2016, effective 9 April 2020.

Commentary

Chapter 2 — Nature of a will — mutual wills

In *Cleary v Cockroft* [2020] NZHC 1452, a case concerning spouses who made identical wills, the High Court emphasised that a distinction must be drawn between mutual wills and wills that merely mirror one another on the basis of “an honorary agreement” or “mutual expectation or desire”. See [2.16].

Chapter 3 — Testamentary capacity — costs

The issue of costs in testamentary capacity cases was considered in *Eastgate v Walker-Prentice* [2020] NZHC 1042. See [3.1].

Chapter 3 — Testamentary capacity — onus of proof

As to testamentary capacity, it must be noted that the opinion of a doctor, while persuasive, is not definitive since capacity is a question of law. In *Public Trust v Atwool* [2020] NZHC 1228, the High Court preferred the evidence of a Public Trust Officer with 13 years’ experience. See [3.2].

Chapter 3 — Testamentary capacity — incapacity

Incapacity may also become apparent as a result of a combination of factors such as a medical event and subsequent injury: *Re Estate of Cox (dec’d)* [2020] NZHC 1310. See [3.3].

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

In *Re Hunt* [2019] NZHC 2394 the will had been revoked by the subsequent marriage of the will-maker. A new draft was 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 documents

Recent cases where unsigned documents were validated include *Re White* [2019] NZHC 3180, *Re Baird* [2020] NZHC 279 and *Williams v Habershon* [2020] NZHC 420. See [4.7.3].

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

In *Re Cox* [2020] NZHC 1310, the annotated will and a later draft document could not be saved by s 14 as there was a lack of testamentary capacity. See [4.7.3].

Chapter 4 — Formal requirements — validation of wills by High Court — s 14 of the Wills Act 2007 — property manager — Protection of Personal and Property Rights 1988

In *Re Haanen* [2020] NZHC 1411, the document had been signed by two witnesses and by a property manager for the deceased. The property manager was authorised to sign but the Family Court had to approve the proposed will prior to execution by the manager. This had not happened. The document was 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 — codicil

In *Re Stuart* [2020] NZHC 529 there was a valid will followed by a document that did not name an executor and failed to provide for a distribution of personal effects. This document was validated as a codicil to the existing valid will. See [4.7.3] and [5.1].

Chapter 4 — Formal requirements — validation of wills by High Court — s 14 of the Wills Act 2007 — security for costs

Marshall v Singleton [2020] NZCA 105 concerned an application for dispensation from the requirement to pay for security for costs in a s 14 case. The Court of Appeal held that the appellant had failed to demonstrate that the case fell within the category where security for costs should be properly dispensed with. See [4.7.4].

Chapter 6 — Construction of wills — powers to correct — s 31 of the Wills Act 2007

In *Re Estate of Kamo* [2020] NZHC 474 s 31 of the Wills Act 2007 was used to correct a clerical error. See [6.2].

Chapter 7 — Gifts by will — residuary gifts — residuary legatees

In *AC v CJ* [2020] NZLCRO 36, a review before the Legal Complaints Review Office, it was found that residuary legatees do not have sufficient interest under s 160 of the Lawyers and Conveyancers Act 2006 to demand an invoice from a lawyer acting in administration of an estate since residuary legatees possess neither legal or equitable interest until the residue has become ascertained (or has crystallised). See [7.7].

Chapter 7 — Gifts by will — per capita and per stirpes

When a will-maker leaves a gift to be shared among a group of persons, the distribution may be made per capita (by heads) or per stirpes (by families): *Edge v Bourke* [2020]

NZHC 1185. See [7.15].

Chapter 7 — Gifts by will — conditional gifts — licence to occupy rent free — failure to pay rates

In *Public Trust v Turner* [2017] NZHC 2979, (2017) 19 NZCPR 304, the will-maker left their partner a right to occupy a property rent-free for ten years on condition they would pay rates, and then half the property would pass to them jointly alongside others. The High Court held that the legatee had failed to fulfill the condition to pay rates. At the time of writing, this matter is ongoing: *Turner v Public Trust* [2020] NZHC 92. See [7.23].

Chapter 10 — Probate and letters of administration — caveats — s 60 of the Administration Act 1969

Entitlement to lodge a caveat is construed broadly: *Re Estate of Miah* [2019] NZHC 1278, [2019] NZAR 1293. See [10.11].

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

In *Hall v Radich-Chaytor* [2020] NZHC 409 there was agreement that a professional trustee should be appointed but dispute as to which one. See [10.26].

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

The principles in *Farquhar v Nunns* [2013] NZHC 1670 concerning removal of administrators were applied in *Gampell v Gampell* [2019] NZHC 2058, *McKellow v Domney* [2020] NZHC 1118 (application dismissed) and *Finlay v Jensen* [2020] NZHC 1211. See [10.47].

Chapter 10 — Probate and letters of administration — discharge or removal of executor — s 21 of the Administration Act 1969 — vacant possession of estate property

In *Smith v Povey* [2020] NZHC 805 the court made an order requiring the removed administrator to give vacant possession of the estate property she was occupying. See [10.47].

Chapter 11 — Liabilities of personal representatives — relief from liability

As to the liability of an administrator who unsuccessfully defends a claim see *Pratley v Courteney* [2018] NZCA 436, [2018] NZAR 1787. See [11.26] and [11.34].

