

Update

Wills and Succession

Service 76 — August 2021

Law Commission Review

The Law Commission is undertaking a review of succession law in New Zealand. In April 2021 it published *Law Commission Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021). See [1.3].

Index

The index has been updated in this service.

Case commentary

Chapter 2 — Nature of a will — death of prospective beneficiary — gifts in satisfaction of moral obligation

If a prospective beneficiary predeceases the will-maker, any gift that is left to them lapses and devolves as if on an intestacy: *Chen v Wu* [2020] NZHC 3302. See [2.2] and [7.2].

Chapter 3 — Testamentary capacity — onus of proof

Mere suppositions based on the existence of a disease will not suffice unless objective evidence that can be tied to the relevant point in time in order to raise capacity as a tenable issue: *Re Cousins (dec'd); Davidson* [2021] NZHC 213. See [3.2].

Chapter 4 — Formal requirements — electronic document — draft doc

In *Re Phillips (dec'd); Cox v Dobson* [2020] NZHC 2644, while holding that an electronic document could constitute a will, the Court declined to validate a.doc file as a will under s 14 of the Wills Act 2007 on the basis that it was an incomplete draft. See [4.1].

Chapter 4 — Formal requirements — mirror will — s 14, Wills Act 2007 (High Court may declare will valid)

Re Nelson [2021] NZHC 1431 a mirror will was validated under s 14. See [4.7.1].

Chapter 4 — Formal requirements — incomplete residue clause

In *Re Bruss* [2021] NZHC 191 a signed document contained an incomplete residue clause which the Court held could be dealt with under the laws of intestacy. See [4.7.3].

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

Successful recent cases of validation of wills under s 14 include:

- *Beets v Beets* [2021] NZHC 115

- *Re Bush (dec'd)* [2021] NZHC 733
- *Re Horne* [2021] NZHC 83
- *Re Johnstone (dec'd); Sim* [2021] NZHC 82
- *Re Moore and Humble* [2020] NZHC 2977
- *Re Nelson* [2021] NZHC 1431 (mirror wills)
- *Re Phillips (dec'd)* [2021] NZHC 1175
- *Re Rae (dec'd)* [2021] NZHC 881
- *Re Rameka (dec'd)* [2021] NZHC 195
- *Re Ratcliffe (dec'd)* [2021] NZHC 1
- *Re Rutherford (dec'd)* [2021] NZHC 655
- *Re Ryan (dec'd)* [2021] NZHC 135
- *Re Smith* [2021] NZHC 728

See [4.7.3].

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

Unsuccessful recent cases of validation of wills under s 14 include:

- *Bullivant-King v King* [2021] NZHC 963.
- *Re Piper* [2021] NZHC 534.
- *Re Phillips (dec'd); Cox v Dobson* [2020] NZHC 2644.

See [4.7.3].

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

In *Re Piper* [2021] NZHC 534 the Court held that handwritten instructions which had been destroyed meant that there was no way of checking that the draft will accurately recorded the destroyed instructions. See [4.7.3].

Chapter 5 — Alteration of wills — change to a will declared valid under s 14 — s 15, Wills Act 2007 (Changes)

The power to validate changes to a will under s 15(d) is invoked if an alteration does not comply with s 15(a), (b) and (c) provided the Court is satisfied the document, as it has been changed, continues to be a will and continues to express the testamentary intentions of the deceased: *Re Rae* [2021] NZHC 881. See [5.1].

Chapter 5 — Revocation of wills — note on envelope — s 16, Wills Act 2007 (Revocation)

In *Re Bush* [2021] NZHC 733, the will-maker wrote a note on an envelope that contained a valid will, which stated that the will inside had “no power or authority”. While the Court was ultimately satisfied it could declare the note to be a valid revocation, it was not necessary, since another later document was validated as a will under s 14. See [5.2.5].

Chapter 6 — Construction of wills — s 31, Wills Act 2007 (Correction)

In *O’Conor Institute Trust Board v Public Trust* [2021] NZHC 200 the Court ordered correction of a will under s 31 where the name of a charitable trust in the will was corrected. See [6.2].

Chapter 6 — Construction of wills — s 32, Wills Act 2007 (External evidence)

In *Comins v Public Trust* [2021] NZHC 1172 the wills of two parents contained identical clauses that provided a \$50,000 loan to their daughter should be set-off against

her share of the residuary estate. The daughter contended that there should be no set-off because the money was a gift. Section 32(1)(d) or (e) was held to apply since ambiguity or uncertainty as to the meaning of the clause was apparent in light of the surrounding circumstances. This ambiguity, however, did not affect the clear intention that the \$50,000 was to be accounted for in the division of the residuary estate. See [6.3].

Chapter 9 — Wills and intestacy in practice — mutual wills

The making of wills at the same time on the terms (often referred to as mirror wills) will be insufficient to establish a contract or mutual understanding to be bound: *Cleary v Cockroft* [2020] NZHC 1453. See [9.5].

Chapter 9 — Wills and intestacy in practice — life interest — non-apportionment of income provision

It is standard practice in a will which creates a life interest to include a non-apportionment clause: *Reid v Castleton-Reid* [2020] NZHC 2313. See [9.46].

Chapter 16 — Māori wills — ōhākī (unwritten wills)

In *Rata — Succession to Paretuaoroa Paretekoraē and Haki Rata* [2021] Chief Judge's MB 106 (2021 CJ MB 106) the Maori Land Court traversed the legislative history of the recognition of ōhākī and noted that they had not been legally recognised since 1895. See [16.8].

Chapter 16 — Māori wills — whāngai — s 115, Te Ture Whenua Māori Act 1993 (Court may determine whāngai and descent relationships of whāngai)

The effect of s 115 allowing the court to define whāngai for succession purposes does not apply retrospectively and such does not apply for estates of deceased who died before the enactment of Te Ture Whenua Act 1993: *Rata — Succession to Paretuaoroa Paretekoraē and Haki Rata* [2021] Chief Judge's MB 106 (2021 CJ MB 106). See [16.12.03].

Chapter 16 — Māori wills — gift to trust — s 108, Te Ture Whenua Māori Act 1993 (Disposition by will)

The testator can leave Māori land interests to a private trust as long as the beneficiaries fall within the categories of persons who can be directly left the interests as set out in s 108(2). The trust deed cannot include any power for the trustees to sell the Māori land interests: *Papuni — Barbara Lois Rewha* (2020) 208 Taitokerau MB 296 (208 TTK 296). See [16.13.02].

Chapter 16 — Māori intestacy — whāngai

In *Rata — Succession to Paretuaoroa Paretekoraē and Haki Rata* [2021] Chief Judge's MB 106 (2021 CJ MB 106) the Maori Land Court traversed the history of legislative provisions relating to whāngai succeeding on intestacy. It concluded that prior to 1993 there was no jurisdiction for the court to recognise whāngai on intestacies. See [16.23].

Chapter 16 — Māori intestacy — corrections

In *Rata — Succession to Paretuaoroa Paretekoraē and Haki Rata* [2021] Chief Judge's MB 106 (2021 CJ MB 106) corrections were made to entitlements through the children of the siblings of the deceased. See [16.24].

