

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

PROBATE NO. 1279/2023

IN THE MATTER of the Administration Act 1969

AND

IN THE MATTER of the Estate of **POKOINA
TUTAI MATARA**

Deceased

AND

IN THE MATTER of an application by **WILKIE
OLAF PATUA RASMUSSEN
and JANICE TUTAI**, Executor
of Will

Applicant

On the papers:

Counsel: Ms M Tangimama for Applicant

Judgment: 24 April 2024

JUDGMENT OF DOHERTY J

[1] On 26 September 2003, Pokoina Tutai Matara (Mr Matara) signed his last will and testament (the Will). The Will made bequests of specific assets to two of his daughters, including the applicant, Janice Tenoa Tutai (Janice), with the balance of his estate to be divided between them and his other children.

[2] On 22 January 2018, Mr Matara purported to change the Will by way of Codicil (the Codicil). The Codicil changed the original specific bequests, and appointed new executors and trustees. The Codicil is “defective” as the signing of it was witnessed by only one person.

[3] The Codicil had been prepared by Matara’s solicitor, Wilkie Olaf Patua Rasmussen. Mr Rasmussen has deposed that at the time the Codicil was signed, Matara came to his office and “read and understood” the changes he was making to the Will. Mr Rasmussen had arranged for a witness, Rosita Taikakara, to come to his office, and she attended. A witness

arranged by Mr Matara did not turn up. No other witness was available. Mr Matara signed the Codicil and Ms Takakara witnessed his signature. The form of the Codicil exhibited in Court shows a place for only one witness to sign.

[4] Mr Rasmussen first deposed that:

It was an oversight on my part to only have one witness at the time of the confirmation and signatory [sic] which resulted in the defective Codicil to the Will¹.

[5] He elaborated in a later affidavit², that despite knowing two witnesses were required, he had Matara sign and Ms Taikakara witness the Codicil on the basis that Mr Rasmussen would:

Hold on to a copy of the signed Codicil until such time [as] we were able to arrange for two witnesses and we will [sic] then present the same document for Mr Matara to sign in front of two witnesses.

[6] Mr Rasmussen further deposed³ that he was present with Mr Matara and Ms Taikakara when the Codicil was signed by Mr Matara, and saw him sign it.

[7] The arrangement for the resigning of the Codicil was never made and Mr Matara died on 10 November 2021.

[8] Janice and Mr Rasmussen apply for probate of the Will and Codicil. Janice has deposed, “that the only existing estate that my father has in his name is monies held by ANZ Bank in the sum of \$18,644.40⁴. If that is the case, the specific assets bequested under the Will and Codicil must either no longer exist or have been beyond the control of Mr Matara.

[9] Janice’s siblings all consent to the application. They have filed affidavits that they understand the changes to the Will purported to be made by the Codicil, and accept that their father made the changes “in the best interests of all his children”.

¹ Affidavit, 24 October 2023.

² Affidavit, 5 December 2023.

³ Affidavit, 19 April 2024.

⁴ Affidavit, 25 August 2023.

[10] Counsel submits the application can be granted given the discretion available under Section 6(2) of the Administration Act. This provides a wide discretion to the Court to give proper effect to the wishes of a testator:

...

- (2) Where by reason of the insolvency of the estate or other special circumstances the Court thinks it necessary or expedient to do so, it may –
 - (a) Grant administration to such person or persons as it thinks expedient notwithstanding that some other person is appointed an executor or that, apart from this subsection, some other person would by law be entitled to a grant of administration;

[11] If the Codicil is of no effect, then the Will takes precedence and the executors appointed under it would be the ones entitled to the grant of administration of Mr Matara's estate.

[12] Counsel has been unable to cite any Cook Island authority on the effect of s 6(2), but has referred to the New Zealand authority of *Wheeler v Somerfield*⁵ where the New Zealand High Court examined the New Zealand equivalent of s 6(2), section 14 of the Wills Act 2007.

[13] While the facts of the two cases are entirely different, the commonality was the defectiveness of the testamentary instrument because the signature of the testator was witnessed by only one witness. The complication for the New Zealand Court in *Wheeler v Somerfield* was the effectiveness of the intended Codicil, not only because of the witnessing deficiency but by reason of proved errors of fact which may have meant the will maker was under a misapprehension as to the terms and effect of the Will and the intended Codicil. The Court ultimately determined that the primary intention of the testator was clear, and s 14 could be applied to rectify the witnessing deficiency and validate the intended Codicil.

[14] In this case I am satisfied that Mr Matara intended full well the changes he made on 22 January 2018 because:

⁵ *Wheeler v Somerfield* [2015] NZHC 1269.

- a) he had given instructions to his solicitor to change the Will;
- b) he read the Codicil and confirmed to his solicitor that he understood it, and from that it can be assumed the Codicil reflected his instructions or, his intentions at the time he signed it;
- c) he knew that the lack of a second witness attesting to his signature meant the Codicil did not comply with the letter of the law;
- d) he was intending to come back and rectify the non-compliance;
- e) notwithstanding there was no independent second witness, there was a second person who saw Mr Matara sign the Codicil, namely Mr Rasmussen; and
- f) there is the independent evidence of Mr Matara's children that the changes he made were understood by them to be in the best interests of the family.

[15] Because I accept Mr Matara's intentions in regard to his instructions to his solicitor, and because those affected by his intentions and the changes he intended to make to the Will, consent to the application and the full effect of the Codicil, I exercise my discretion to grant the application and make the appropriate orders to give effect to both the Will and Codicil.

[16] Counsel should file draft orders accordingly, and these will be granted upon the satisfaction of the Registrar as to their form.



Doherty J