

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA715/2024
[2026] NZCA 210**

IN THE ESTATE OF EDWARD WATSON, of Putāruru, Retired
Blacksmith, deceased

RE PETER WATSON AND
FRANCES ROSEMARY HALL AS
EXECUTORS OF THE ESTATE OF
EDWARD WATSON
Applicants

Court: Courtney and Thomas JJ

Counsel: C Y Simes for the Applicants

Judgment: 28 May 2026 at 11:30 am
(On the papers)

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Courtney J)

[1] Peter Watson and Frances Rosemary Hall are the executors of the estate of Edward Watson. Their application for probate was declined by the Registrar on the ground that Mr Watson, who resides in Australia, swore his affidavit in support of the application without having the original will with him. Instead, his affidavit was sworn in reliance on a copy of the will. The original will was produced by the other executor and submitted to the probate registry in the High Court at Wellington.

[2] Grau J declined Mr Watson's application for review of the Registrar's decision.¹ The Judge declined leave to appeal her decision.² Mr Watson and Ms Hall apply for leave to appeal the Judge's decision under s 56(5) of the Senior Courts Act 2016. There are no relevant parties to oppose the application and Mr Watson, who is the beneficiary, does not wish to participate in that capacity.

[3] There is a high threshold for leave to appeal an interlocutory decision of the High Court. The ultimate question is whether the interests of justice are served by granting leave.³ Specifically:⁴

- (a) the applicant must identify an arguable error of law or fact;
- (b) the alleged error should be of general or public importance warranting determination or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value; and
- (c) the circumstances must warrant incurring further delay.

[4] The applicants acknowledge that their proposed appeal is moot, as probate was ultimately granted.⁵ However, they submit that the appeal raises a legal question of general importance, on which the law is not settled, namely whether the High Court Rules 2016 require every applicant for probate to physically sight and produce the original will when swearing their affidavit in support of probate or letters of administration with will annexed, even when the original will is produced by another deponent.

[5] Mootness in itself does not deprive a court of jurisdiction to hear and determine an appeal.⁶ However, appellate courts do not generally decide appeals where the decision will have no practical effect on the rights of the parties before the court in

¹ *Re Watson* HC Wellington CIV-2024-485-613156, 4 September 2024 (Minute of Grau J) [review decision] at [5].

² *Re Watson* [2024] NZHC 2996 [leave judgment] at [10].

³ *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6].

⁴ At [6].

⁵ Mr Watson filed a supplementary affidavit producing the original will, which was returned to him for that purpose, enabling probate to be granted.

⁶ *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [16].

relation to what had been at issue between them in the lower courts.⁷ The policy of restraint in dealing with moot appeals is based on the following:⁸

- (a) the importance of the adversarial nature of the appellate process;
- (b) the need for economy in the use of the limited resources of appellate courts; and
- (c) the responsibility of the courts to show proper sensitivity to their role in the system of government; in general, advisory opinions are not appropriate.

[6] In *Baker v Hodder*, the Supreme Court observed that:⁹

It is not possible to state a “test” governing the exercise of the discretion, or to give a comprehensive statement of the circumstances in which it might properly be exercised. All that can be said is that, in light of the considerations underlying the policy of restraint, a decision to hear a moot appeal should be made only in exceptional circumstances. These might be found in the circumstances of the particular case (for example, serious procedural unfairness at the first hearing) or the broader public interest (for example, where an important legal point is raised).

The High Court decisions

[7] Under r 27.4(7) of the High Court Rules an application for a grant of probate requires “an affidavit in form PR 1 or PR 2 to prove the validity of the will that the application is about”. Clause 5 of form PR 1 requires the affidavit to state:

I/We* believe the document dated [date] and marked “[specify]” now produced and shown to me/us* is the deceased’s last will.

*Select one

⁷ At [16].

⁸ At [18], citing *Borowski v Attorney-General of Canada* [1989] 1 SCR 342 at 358–363.

⁹ *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [33].

[8] Grau J considered that this clause of form PR 1 was to be interpreted as requiring each executor to swear the affidavit while sighting the original will. She added:¹⁰

[4] ... I am advised by the Probate Office that posting a will overseas so that an executor may sight an original copy of it is a common exercise and, as is implicit in the decision of Registrar Shakes, Probate would not ordinarily grant probate where an executor has sworn an affidavit on the basis of a copy.

[5] Given that the grant of probate in New Zealand has always and continues to operate in this manner, and absent any extraordinary reasons why Mr Watson should not be required to follow the orthodox process, I decline his application for review.

[9] In refusing leave to appeal, Grau J said:¹¹

[6] As explained by [MacKenzie J] in *Re Crawford*, because the grant of probate revolves around the authenticity of the purported original will document itself, providing an affidavit sworn in reliance on a copy of the original will is not enough.¹² Inspection of an original document by an executor is important. Sighting an original enables the signatures of the testators to be examined, the condition of the will to be examined, and may alert an executor to the possibility of pages or sections of a will that may be missing ...

[7] ... the plain words of Form PR 1 in the [High Court Rules] require Mr Watson to be able to swear that “*the document ... now produced and shown to [me] is the deceased’s last will*”. A plain reading of these words, taking into account the well-established requirement an original will document be sighted by executors and provided to the Registry where possible, indicate that Mr Watson must be able to depose that a particular document is the final will of the deceased. Mr Watson would be certifying that it is those particular pieces of paper with that particular ink and text, now held by Registry, that is the final will. It is not possible for him to do so by looking at an electronic copy of a will.

[10] The Judge accepted that the current practice of sending original wills overseas by courier for executors to depose as to the authenticity of the document increases the chance of the will being lost or damaged but noted that processes exist for dealing with that eventuality.¹³ The Judge did not see any issue of public interest, noting that “the requirement that original documents be sighted and provided is well-settled and

¹⁰ Review decision, above n 1.

¹¹ Leave judgment, above n 2.

¹² *Re Crawford (deceased)* [2014] NZHC 609, [2014] 3 NZLR 38 at [11].

¹³ Leave judgment, above n 2, at [8].

applies to all those seeking probate in New Zealand” and “it is an uncontroversial and orthodox practice”.¹⁴

The application for leave to appeal

[11] The applicants’ solicitor is Ms Simes, of Kiwilaw Probate and Estates Ltd. The affidavit in support of the application was made by a legal assistant of the firm, Ms Dunstan. It is evident from her affidavit that the underlying basis for the application is a general concern by the firm about the requirement for overseas executors to have the original will with them when they swear or affirm their affidavits in support of their application for probate.

[12] The present case follows another application filed by the same firm,¹⁵ which was described by Ms Dunstan as being “intended as a test case”. In that case an application was filed for an order nisi calling upon an executor to show cause why probate should not be granted to other applicants alone, with only the New Zealand based applicant producing the original will. The overseas applicants produced a copy of the will. The memorandum filed in support of the application expressly drew attention to the difference in the respective affidavits. Nevertheless, the application was said to have been granted without comment from either the Registrar or the presiding Judge.

[13] On the basis of this decision, the applicants say that the law as to whether all applicants for probate must depose on the basis of the original will is not settled. They say that there are arguable errors of law in Grau J’s decision. They say that the question is one of public importance because of the inconvenience and cost to overseas executors as a result of the current practice. They wish to seek a declaration that:

In an application by more than one applicant for probate or letters of administration with will annexed, it is prima facie unnecessary for every applicant to produce the original will, as long as one applicant produces the original will and the applicants produce a copy.

¹⁴ At [9].

¹⁵ The only detail provided was the filing number CIV-2024-485-600078.

[14] Ms Simes has identified two specific errors that she says are arguable. She says, first, that form PR 1 and r 27.4 do not in fact require the physical handling or production of the original will by each applicant. In reaching the conclusion she did, the Judge failed to take into account other provisions in the High Court Rules, particularly r 1.21(1) which provides that variations may be made to any form as the circumstances of a particular case require and r 27.4(9) which provides that a form presented for filing under r 27.4 is not invalid just because it contains minor differences from the prescribed form as long as the form still has the same effect and is not misleading. Moreover, she argues that s 19 of the Legislation Act 2019 (under which words in the singular include the plural and vice versa) permits individual affidavits to be filed by multiple applicants so that if one applicant files an affidavit that produces and proves the original will, the rule will be complied with.

[15] Ms Simes also submits that the Judge incorrectly relied on *Re Crawford (deceased)* for the proposition that applicants must sight the original will whereas, on Ms Simes's argument, *Re Crawford (deceased)* actually stands for the proposition that the preservation of the integrity of the original will is at the heart of probate practice and the Registrar must examine the original will rather than requiring each applicant to do so. She also submits that the application of r 27.4 should take account of technological developments which now allow reliable copies of an original will to be transmitted electronically.

[16] As a separate ground, Ms Simes submits that the High Court erred in failing to consider s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), which confers the right to freedom of expression, including the right to impart information and opinions in any form.

[17] In our view, it is arguable that the Judge erred in her reliance on *Re Crawford (deceased)* as authority for the proposition that all applicant executors must inspect the original will and provide an affidavit sworn in reliance on it. On this point, the Judge said:¹⁶

[6] As explained by [MacKenzie J] in *Re Crawford*, because the grant of probate revolves around the authenticity of the purported original will

¹⁶ Leave judgment, above n 2 (footnotes omitted).

document itself, providing an affidavit sworn in reliance on a copy of the original will is not enough. Inspection of an original document by an executor is important. Sighting an original enables the signatures of the testators to be examined, the condition of the will to be examined, and may alert an executor to the possibility of pages or sections of a will that may be missing. Where, as in this case, there are two executors, it is not inconceivable that one executor may believe a certain document to be the full original will, but the other does not. In such cases, probate of course could not be granted. Because of such possibilities, both named executors must sight and provide assurances as to the same physical document where the physical document is still intact.

[18] However, in *Re Crawford (deceased)* the original will was not provided to the Registrar at all; the original will had been destroyed and the application was made on the basis of an electronically scanned copy of the original will. The Court held that the Registrar was correct to decline probate and require that a new application be made in accordance with the usual practices where the original will is not available.¹⁷ The Court emphasised that “[various matters] require inspection of the original will by the Registrar in the process of examining and determining an application for grant”.¹⁸ MacKenzie J did not explicitly consider any requirement for all applicant executors to inspect the original will or swear their affidavits in reliance on it (in a situation where the original will had been provided to the court).

[19] We do not see any arguable error in the Judge failing to consider the NZBORA. Even if a requirement for applicants to rely on the original will when swearing their affidavits in support of the application for probate engaged s 14 of the NZBORA (which we doubt) such a constraint would likely be justified under s 5 of the NZBORA on the basis that it increases the likelihood of irregularities being identified before probate is granted and therefore assists in ensuring the authenticity of wills subject to a probate application.

[20] Given that the applicants’ interests will not be affected by the outcome of the proposed appeal, whether leave should be granted depends on whether there is sufficient general or public importance to warrant determination of the point. Probate practice is a matter of general importance. If there were real uncertainty as to the requirements of the High Court Rules, we would be inclined to grant leave, notwithstanding the mootness of the proposed appeal. However, the information

¹⁷ *Re Crawford (deceased)*, above n 12, at [14].

¹⁸ At [12].

provided in this case falls short of demonstrating that. Even allowing for the Judge's (arguable) error of law, we do not see that there is any basis on which to interpret r 27.4 in the way Ms Simes contends. The fact that Ms Simes has identified a single incident in which probate appears to have been granted other than in accordance with r 27.4 does not satisfy us that there is real uncertainty as to what the High Court Rules require in terms of executors' affidavits.

[21] Whether there is a case for change to the current requirements of r 27.4 is a matter that is properly raised with the Rules Committee, by letter to the clerk of the Committee.

Result

[22] The application for leave to appeal is declined.

Solicitors:
Kiwilaw Probate and Estates Ltd, Oxford for Applicants