

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2023-485-611153
[2023] NZHC 2134**

UNDER section 5 of the Administration Act 1969 and
r 27.25 of the High Court Rules 2016

IN THE MATTER OF the estate of **Molly Janette Mabee** of
Auckland, widow, deceased

On the papers:

Counsel: H E M Thorrington for Applicant

Judgment: 10 August 2023

JUDGMENT OF CHURCHMAN J

Introduction

[1] The applicant seeks to review a decision of the Registrar not to grant her application for an order that letters of administration with will annexed in respect of the estate of the deceased be granted to her.

Background

[2] The deceased died on 7 September 2022. On 12 May 2023, the applicant filed an application for an order that letters of administration with will annexed of the estate of the deceased be granted to the applicant, pursuant to s 5 of the Administration Act 1969 (the Act) and r 27.25 of the High Court Rules 2016 (the Rules). The application was also made in reliance on rr 27.25(4), 27.26(3) and 27.35(7) of the Rules and s 6 of the Act.

[3] On 25 July 2023, the Registrar served counsel for the applicant with a minute declining the application on the following basis:

- (a) the documents filed were inconsistent. The applicant had filed an application for letters of administration with will annexed but the document filed for sealing was for letters of administration;
- (b) the application filed was not the correct application. The application was being made by one of the surviving executors and therefore the application should have been for grant of probate; and
- (c) the will was stapled to the affidavit. The applicant would need to file an affidavit of plight to explain this and to confirm there were no other testamentary documents attached to the will when it was found.

[4] On 27 July 2023, counsel for the applicant, by email, queried the grounds of the minute.

[5] On 28 July 2023, the Registrar responded to counsel by email, stating that after discussing the matter with her colleagues, they agreed that:

... the failure of the gifting is not a circumstance included in rule 27.25. As the residuary beneficiary no longer exists it is a partial intestacy. Rule 27.35(7) deals with partial intestacies. So the correct application is one of probate.

[6] The Registrar said her minute stood and an application for probate was required.

Application for review

[7] By application dated 2 August 2023, the applicant now seeks to review the Registrar's decision.

[8] Counsel acknowledges that the documents were inconsistent and if the review is successful will provide consistent draft orders for sealing.

[9] Counsel maintains, however, that the order sought is for a grant of letters of administration with will annexed, not probate. This is on the following basis:

- (a) the MG Mabee Family Trust (the Trust) named in the will as the residuary beneficiary wound up on 21 April 2018, with the result that the deceased died partially intestate, having disposed by her will of some but not all of her assets;
- (b) the applicant is one of the beneficiaries of the Trust, and the two other beneficiaries have been served with this application;
- (c) the Court has discretion under s 6 of the Act to grant letters of administration with will annexed to those entitled to the “intestate” portion of an estate on a partial intestacy;
- (d) the Court has the power under r 27.25 of the Rules to grant letters of administration with the will annexed to the person entitled to them according to r 27.26;
- (e) the applicant falls within the ambit of r 27.26(3)(c)(i), in that:
 - (i) the will does not dispose of the whole residue; and
 - (ii) the will does not dispose of the whole or substantially the whole of the estate; and
 - (iii) the applicant is a person entitled to a share in the residue not disposed of, in that the applicant was named as a beneficiary of the Trust, which has been wound up.
- (f) the Court has the power under r 27.35(7) of the Rules to make an order granting letters of administration with the will annexed to the applicant, who is entitled to them according to r 27.26;
- (g) it would not be appropriate for the executors named in the will to obtain a grant of probate, given that the will does not dispose of substantially the whole of the estate;

- (h) the grant of letters of administration with the will annexed to the applicant would be appropriate given the applicant was a named beneficiary of the Trust and the applicant will faithfully execute the will for the use and benefit of the beneficiaries of the Trust as residual beneficiaries of the deceased's estate in accordance with the law.

[10] Counsel therefore requests that the Court exercise its discretion to grant the order for letters of administration with will annexed to the applicant.

Relevant law

[11] The applicant relies on ss 5 and 6 of the Act and rr 27.25(4), 27.26(3) and 27.35(7) of the Rules. Though lengthy, it is worth setting out these provisions in full.

[12] Part 1 of the Act deals with administration of an estate by an administrator. Section 5 provides:

5 Probate jurisdiction of High Court

- (1) The court shall continue to have jurisdiction and authority in relation to the granting and revoking of probate of wills and letters of administration with or without a will annexed of the estates of deceased persons, and in regard to the hearing and determining of proceedings relating to testamentary matters and matters relating to the estates of deceased persons.
- (2) Without restricting subsection (1) or any other enactment, the court shall have jurisdiction to make a grant of probate or letters of administration in respect of a deceased person, whether or not the deceased person left any estate in New Zealand or elsewhere, and whether or not the person to whom the grant is made is in New Zealand.

[13] And s 6 provides:

6 Discretion of court as to person to whom administration is granted

- (1) In granting letters of administration with or without a will annexed, or an order to administer with or without a will annexed, in respect of the estate of any deceased person or any part thereof, the court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with a will annexed may be granted to a devisee or

legatee; and any such administration may be limited in any way the court thinks fit:

provided that, subject to the provisions of subsection (2), where the deceased died wholly intestate as to his or her estate, administration shall be granted to some 1 or more persons beneficially interested in the estate of the deceased, if they make an application for the purpose.

- (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:
 - (b) grant probate to 1 or more of the executors appointed by a will, notwithstanding that some other person or persons may also be appointed as an executor or executors.
- (3) A grant may be made under subsection (2) notwithstanding that any person excluded from the grant would be competent to take it.
- (4) Before determining to exclude from any such grant any person who, apart from this section, would by law be entitled to, or be included in, the grant, and wishes to have, or to be so included in, the grant, the court shall have regard to his or her competency and solvency, his or her ability effectively to administer the estate, the rights of all persons interested in the estate, and any changes in circumstances between the making of the will (if any) and the time when the court is asked to make the grant.
- (5) The court may, in its discretion, make any grant of administration (other than the probate of a will) conditional upon the person to whom the grant is made giving such security as the court may require for the due collection, getting in, and administration of the estate of the deceased:

provided that the court shall not require any trustee corporation, or any person obtaining administration to the use or for the benefit of the Sovereign, to give any such security.

- (6) The court shall not exercise its powers under subsection (5) unless it is satisfied that, in the special circumstances of the case, the imposition of the requirement of security would be expedient having regard to the following matters:
 - (a) the value of the estate:
 - (b) the financial position of the proposed administrator:
 - (c) the extent of his or her interest (if any) in the estate:

- (d) whether or not he or she is a creditor in the estate:
 - (e) whether or not there are any minor beneficiaries or beneficiaries under any other disability:
 - (f) such other matters as the court thinks relevant.
- (7) It shall not be necessary in any motion for a grant of administration, or in any affidavit filed in support of such motion, to include any information for the purposes only of subsections (5) and (6) unless the court in a particular case expressly requires that information to be supplied.

[14] Part 27 of the Rules covers administration (including probate). Subpart 3 deals with administration with will annexed. Rule 27.25 provides:

27.25 Circumstances in which grant may be made

- (1) This rule applies if a will exists but does not appoint an executor.
- (2) This rule also applies if the executor or each of the executors appointed—
 - (a) has died during the will-maker's life; or
 - (b) has survived the will-maker but has died without obtaining a grant; or
 - (c) has renounced probate of the will; or
 - (d) is a former spouse or former civil union partner of the will-maker whose appointment is void under section 19 of the Wills Act 2007, for a will made on or after 1 November 2007; or
 - (e) is a former spouse of the will-maker whose appointment is void under section 19, as modified by section 40(2)(q), of the Wills Act 2007, for a will made before 1 November 2007; or
 - (f) is incapable of acting as an executor but does not have an attorney for the purposes of section 9A of the Administration Act 1969.
- (3) This rule also applies if—
 - (a) section 19 of the Administration Act 1969 applies to an executor; and
 - (b) no one entitled to apply for an order nisi under that section has done so within 4 months after the will-maker's death.
- (4) The court may grant letters of administration with the will annexed to the person entitled to them according to the priority in rule 27.26.

[15] Rule 27.26 deals with the priority of potential administrators for the purposes of r 27.25. It provides:

27.26 Priority of potential administrators for purposes of rule 27.25

- (1) The first in priority is a residuary beneficiary holding in trust for any other person.
- (2) The second in priority is a residuary beneficiary for life.
- (3) The third in priority is,—
 - (a) if the will disposes of the whole residue, the ultimate residuary beneficiary; or
 - (b) if the will does not dispose of the whole residue but the court is satisfied that it disposes of the whole or substantially the whole of the estate as ascertained by the time the application for the grant is made,—
 - (i) a beneficiary entitled to the estate; or
 - (ii) a beneficiary entitled to a share in the estate; or
 - (c) if the will does not dispose of the whole residue and the court is not satisfied that it disposes of the whole or substantially the whole of the estate as ascertained by the time the application for the grant is made,—
 - (i) a person entitled to a share in the residue not disposed of or the person's personal representative; or
 - (ii) the Attorney-General, if entitled to claim the residue as bona vacantia on behalf of the Crown.
- (4) The fourth in priority is—
 - (a) a specific beneficiary or the beneficiary's personal representative; or
 - (b) a creditor or the creditor's personal representative; or
 - (c) if the will does not dispose of the whole estate, a person who has no immediate beneficial interest in the estate because of its small amount but may have a beneficial interest if the estate increases.
- (5) The fifth in priority is a specific or residuary beneficiary who is entitled on the happening of a contingency.
- (6) The sixth in priority is a person who—
 - (a) has no interest under the will; and

- (b) would be entitled to a grant if the deceased had died wholly intestate.
- (7) Persons who are third, fourth, or fifth in priority, and are entitled to the grant, are entitled to the grant in order of priority in their class according to the value of their interests or the amounts of their debts.

[16] Finally, subpart 8 deals with priorities on intestacies. Rule 27.35 provides, in this respect:

27.35 Order of priority for grant in case of intestacy

- (1) If a person has died wholly intestate, the right to apply for letters of administration of that person's estate is determined in accordance with the order of priority set out in subclause (3).
- (2) Subclause (1) is subject to section 6 of the Administration Act 1969.
- (3) The order referred to in subclause (1) is as follows:
 - (a) the first in priority is persons having a beneficial interest in the estate, according to the order of priority set out in subclause (4):
 - (b) the second in priority is the Attorney-General, if he or she claims bona vacantia on behalf of the Crown:
 - (c) the third in priority is a creditor of the deceased, or any person who, even though having no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion to it.
- (4) Persons having a beneficial interest in the estate are entitled to a grant of administration in the following order of priority:
 - (a) the surviving spouse or civil union partner or de facto partner entitled to succeed on the intestacy, if paragraph (b) does not apply and his or her beneficial interest in the estate is not affected,—
 - (i) in the case of a surviving spouse, by section 12(2) of the Matrimonial Proceedings Act 1963 (as applied by section 191(3) of the Family Proceedings Act 1980); or
 - (ii) in the case of a surviving spouse or a surviving civil union partner, by section 26(1) of the Family Proceedings Act 1980; or
 - (iii) in the case of a surviving de facto partner, by section 77B of the Administration Act 1969; or
 - (iv) in every case, by the choice of option A under section 61 of the Property (Relationships) Act 1976:

- (b) in a case of the kind referred to in section 77C of the Administration Act 1969 (succession on intestacy if intestate dies leaving a spouse or a civil union partner and 1 or more de facto partners, or 2 or more de facto partners), a surviving spouse, surviving civil union partner, or surviving de facto partner entitled to succeed on the intestacy, if his or her beneficial interest in the estate is not affected in any of the ways stated in paragraph (a)(i) to (iv):
 - (c) the children of the deceased (including any persons entitled by virtue of the Legitimation Act 1939 or the Status of Children Act 1969) or, failing them, the issue of a child who has died during the lifetime of the deceased:
 - (d) the parent or parents of the deceased:
 - (e) brothers and sisters of full or half blood, or, failing them, the issue of any such brother or sister who has died during the lifetime of the deceased:
 - (f) grandparents:
 - (g) uncles and aunts of full or half blood, or failing them, the issue of an uncle or aunt who has died during the lifetime of the deceased.
- (5) The personal representative of a person in any of the classes referred to in subclause (4) or the personal representative of a creditor has the same right to a grant as the person represented.
- (6) The Adoption Act 1955 applies in determining entitlement to a grant in the same way that it applies to devolution of property on intestacy.
- (7) If a person has died partially intestate, that is, his or her will has disposed of some but not all of that person's assets, the court must make a single grant of administration for the whole of the estate. The executor, or executors, named in the will has priority in applying for that grant, but otherwise rule 27.26 applies.

Analysis

[17] Rule 27.25(4) provides that the Court may grant letters of administration with the will annexed to the person entitled to them according to the order of priority in r 27.26. However, r 27.25(4) applies only where there is a will, but for any of the reasons listed in that rule there is no executor to whom probate can be granted.

[18] In this case, there is an executor to whom probate can be granted, namely the applicant herself, as well as the other surviving named executor (although I note she has renounced all her rights and title to letters or administration and execution of the

will). Rule 27.25 therefore does not apply and the power under r 27.25(4) is not available.

[19] The failure of the gifting of the residual estate to the Trust is not a circumstance that falls within and triggers r 27.25.

[20] Where there is a valid last will, application must still be made for probate even if the provisions have failed.¹ This rule was set down in *Re Young*, even though in that case the sole executor and beneficiary died before the testator.²

[21] The failure of the gifting does mean there is a partial intestacy. Rule 27.35(7) deals with partial intestacies. It states that if a person has died partially intestate, the court must make a single grant of administration for the whole of the estate. The executor named in the will has priority in applying for that grant, but otherwise the priority as listed in r 27.26 applies.

[22] As the authors of *Nevill's Law of Trusts, Wills and Administration* state:³

The only difference between total and partial intestacy is that in the first case an administrator appointed by the court distributes the estate, but in the second, an executor (if any) may prove the will even where there are no effective dispositive provisions contained in it.

[23] The law is clear that where there is a valid will and an executor, the executor must apply for probate of the will. At that point, if there is a partial intestacy, as here resulting from the failure of the gifting, r 27.35(7) provides that the executor has priority in applying for a grant of administration over those persons listed in r 27.26, but otherwise r 27.26 applies.

[24] It is not in dispute that there is a valid will and an executor. The Registrar was correct to conclude that on this basis, the correct application is for probate.

¹ See Robert Osborne and others *McGechan on Procedure* (online looseleaf ed, ThomsonReuters) at [HR27.25.06].

² *Re Young* [1951] NZLR 70 (SC).

³ *Nevill's Law of Trusts, Wills and Administration* (14th ed, 2023) at [18.1], citing *Re Young*, above n 2.

[25] The only question becomes whether the Court should nevertheless exercise its discretion under s 6(2) of the Act, which the applicant also relies on. Section 6(2)(a) of the Act gives the Court a discretion in special circumstances where the Court thinks it necessary or expedient to do so, to grant administration to such person as it thinks expedient notwithstanding that some other person is appointed an executor or that, apart from the subsection, some other person would by law be entitled to a grant of administration. Section 6(2)(b) gives the Court the discretion in the same circumstances to grant probate to one or more of the executors appointed by the will, notwithstanding that some other person may also be appointed as an executor.

[26] I do not consider this is a situation involving special circumstances in which intervention under s 6 is necessary or expedient. Section 6(2) gives the Court a discretion when appointing an administrator or granting probate to an executor to bypass the person who would normally be entitled to appointment or grant probate to only one or some of the named executors, even though the excluded executors are competent.⁴

[27] Section 6(2) may come into play when the applicant applies for probate, if she is wishing to be granted probate solely herself and not have probate granted to the other surviving executor as well. However, that is not the case here. This application is for review of the Registrar's decision declining to grant letters of administration with will annexed. I do not consider this is a situation where s 6(2) is engaged, and I decline to exercise my discretion under that section.

Conclusion

[28] The application is dismissed. The Registrar's decision declining to grant the applicant an order that letters of administration with will annexed of the estate of the deceased to her was correct.

⁴ See for example *Re Storm* [2018] NZHC 742; *Re Estate of Tanuvasa* [2015] NZHC 3283; *Re Alesana* [2021] NZHC 1128; *Hall v Radich-Chaytor* [2020] NZHC 409; and *Rosinger v Sachs* [2021] NZHC 3022.

[29] The applicant is to apply for probate and file the additional documents listed in the Registrar's minute of 25 July 2023.

Churchman J

Solicitors:
Gellert Ivanson Limited, Auckland for Applicant