IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2017-425-000120
[2018] NZHC 3268

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER	of the will of James Alexander McLean
BETWEEN	ALLAN DAVID MCLEAN Plaintiff
AND	PUBLIC TRUST Defendant

Hearing:	27 November 2018
Appearances:	A D McLean (Plaintiff) in person A R Gilchrist for the Defendant R B Stewart QC and L W Dixon for J M Flaus
Judgment:	12 December 2018

JUDGMENT OF NATION J

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[1] James Alexander McLean (Mr McLean) was a farmer in Southland. He died on 6 April 1989 leaving a will dated 1 September 1986. Probate was granted to his widow Ruth and his sons Allan and John. He was also survived by his daughter Lesley. In his will, Mr McLean left a life interest in his estate to his widow. Upon the death of his wife, he bequeathed farm plant and machinery, some stock and a central part of his farm, known as the home block, to his son John. He left the balance of his residuary estate for such of his children as survived him in equal shares.

[2] John died without a will on 24 July 2010, unmarried and without issue. The whole of his estate passed to his mother Ruth as his surviving parent under the provisions of the Administration Act.[1]

[3] Mr McLean's widow, Ruth, died on 30 July 2017. Under her will, she left her interests in the Southland farm to Allan's former wife, Allan's son, Allan's daughter and the daughter of Ruth's daughter Lesley. She gave the residue of her estate to be divided among such of her grandchildren who survived her and reached the age of 20.

[4] In these proceedings, the plaintiff, Allan McLean, says that, under his father's will, the gifts of stock, land, plant and machinery and the share of the residue to John were contingent upon John surviving Ruth. Because John did not do so, that property fell into the residuary estate so it should now be divided equally between Allan and his sister Lesley.

[5] The present trustee of Mr McLean's estate is the Public Trust which was appointed by Court order dated 1 September 2016.

[6] The proceedings were directed to be served on the then executors and trustees of the will of Margaret Ruth McLean, Allan's sister Lesley and the four named beneficiaries of Ruth's will. John Malcolm Flaus is the surviving trustee of Ruth's estate.

[7] Statements of defence were filed on behalf of the Public Trust as the now trustee of Mr McLean's will, and on behalf of John Flaus.

[8] On 21 August 2018, Associate Judge Osborne directed there should be a trial of the following question:

> Whether, on their true construction, the gifts comprised in clause 5 of the Will of James Alexander McLean dated 1 September 1986 (probate of which was granted to Margaret Ruth McLean and John McLean under probates no. 162/89) vested an [sic] interest on the death of the same James Alexander McLean or were each contingent on the beneficiary (in whose favour the gift was made) surviving the said Margaret Ruth McLean.

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1 Administration Act 1969, s 77.

I note there was a slip in the question as framed. Probate had originally been granted to Margaret Ruth McLean, Allan David McLean and John McLean.

The factual background

[9] The will is referred to in a memorandum of agreed facts. Mr McLean's last will included the following clauses:

> 5. UPON the death of my said wife:
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> (a) I GIVE DEVISE AND BEQUEATH all my farming plant and machinery, Four Hundred (400) Ewes and that piece of land known as Section 46 Block X New River Hundred containing 32.3635 hectares and being all of the land in Certificate of Title 21/212 to my said son JOHN McLEAN.
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> (b) TO HOLD the balance of my residuary estate for such of them my children as survive me and if more than one as tenants in common in equal shares.
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> 6. I DECLARE that if any beneficiary shall predecease me or die before attaining a vested interest in my estate leaving a child or children who shall survive me or be born after my death and who shall attain the age of twenty (20) years such child or children shall take and if more than one in equal shares the share in my residuary estate that his her or their parent would have taken had he or she survived me and attained a vested interest hereunder.
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> 7. I DIRECT that my son JOHN McLEAN shall have the option to be exercised within TEN (10) years from the date of my death of purchasing the balance of my farm property together with all remaining stock other than that bequeathed to him under paragraph 5(a) of this my Will used in connection therewith at a valuation as fixed by the Inland Revenue Department for estate duty purposes and I EMPOWER my trustees to leave the whole or any part of the purchase price owing to be secured by a registered charge over the property upon such terms as to repayment and interest (if any) as my trustees may in their absolute discretion see fit NOTWITHSTANDING that such advance may not be of a class authorised by law.

[10] The agreed summary of facts records that:

> In or around 1993 John exercised his option under clause 7 of the will and purchased the balance of the farm property owned by James other than the land devised to him under clause 5 of the will.

[11] Although it is not referred to in the agreed statements of facts, it is a matter of Court record that, in earlier proceedings, between Allan and Lesley as plaintiffs and Ruth McLean as defendant, orders were made vesting two blocks of the land in respect of which John had purported to exercise the option referred to wholly in the trustees of Mr McLean's estate. One further block vested in Mr McLean's estate as to seven-tenths and Ruth's estate as to three-tenths. Another block vested in the trustees of Mr McLean's estate as to 37-one-hundredths and Ruth's estate as to 63-one-hundredths. All stock then owned by Ruth vested in the trustees of Mr McLean's estate. There was no dispute that these orders were made in settlement of proceedings brought by Allan and Lesley challenging the purported exercise of the option, and decisions made in the administration of Mr McLean's estate, including as to an issue over ownership of stock on the farm.

[12] Whether or not the land referred to in cl 5(a) of the will is part of Mr McLean's estate to be distributed as part of the residue to Allan and Lesley or whether it is part of John's estate depends on how Mr McLean's will is to be interpreted.

Submissions

[13] All three parties who had taken steps in the proceedings filed written submissions in advance of the hearing. At the hearing, I asked Mr Stewart QC to present his submissions on behalf of Mr Flaus as executor in the estate of Ruth McLean first. He was followed by Mr Gilchrist for the Public Trust as trustee of Mr McLean's estate and then by Allan on his own behalf.

[14] In summary, Allan McLean contends:

(a) this case is about the interpretation of his father's will. The words he used are clear, plain and simple. The Court should give effect to his intentions;

(b) in interpreting the will, it is important to look at the will as a whole;

(c) the gifts in cls 5(a) and (b) are all inextricably linked to the words at the beginning of cl 5 which states that the gifts are to take effect "upon the death of my said wife". Those words make it clear that the gifts in cls 5(a)

and (b) are contingent upon the beneficiaries being alive after the death of Mr McLean's wife, ie the gifts are conditional upon their surviving Ruth;

(d) the words "upon the death of my said wife" have to be considered as a condition precedent, one which must be filled or performed before the gift dependent upon it can take effect;[2]

(e) the requirement through cl 5(b) to hold the residue of the estate for "such of them my children as survive me and if more than one as tenants in common in equal shares", is to have effect only "upon the death of my said wife" so reinforces the fact that those words are a condition precedent;

(f) the option to John McLean to purchase parts of the farm in cl 7 was clearly given to him with the expectation that he would be alive to exercise it;

(g) there was nothing in the will to indicate that Mr McLean intended to give any part of his estate to the beneficiaries of John's estate;

(h) in his will, Mr McLean had given nothing to his son John until Ruth died so this could not be a case where John's interest and right to property had been delayed to allow for his mother's life interest. He had no interest in property to be delayed so the situation with this will can be distinguished from those cases relied on for Mr Flaus and the Public Trust as supporting the interpretation that they argue for, ie that under the will, John obtained a vested interest in the property referred to in cl 5(a) but delayed taking that interest in possession to allow for the life interest of his mother; and

(i) contrary to cases other parties were relying on, this was not a case where John was being left the remainder in an estate. Allan McLean argued "John was the sole beneficiary".

[15] In his submissions, Allan referred to a number of opinions as to how the will was to be interpreted, obtained by both other parties and himself. He was ready to present arguments as to why these opinions were wrong. I indicated that what he

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2 Allan referred to the text of Andrew Alston *Garrow and Alston: Law of Wills and Administration* (5th ed) Butterworths, Wellington 1984, at 422-423.

needed to do was address the submissions which had been presented to me during the hearing. Allan did acknowledge that the opinions he was referring to and challenging were consistent with the submissions advanced for Mr Flaus and the Public Trust.

[16] In presenting these submissions, Allan made strong attacks on the integrity of the law firm that for a time acted in the administration of Mr McLean's estate and in the administration of John's estate. He made strong criticisms of some who had advanced interpretations of Mr McLean's will contrary to his own, with references to dishonesty, fabrications and suggestions of self-interest. Somewhat typical of the way Allan has addressed opinions different from his own, was his summary in respect of such opinions as demonstrating "a level of deliberate orchestrated legal blindness".

[17] The submissions for Mr Flaus and for the Public Trust are reflected in the discussion below.

Discussion

[18] As was highlighted by Allan in his submissions, where there is an issue as to the correct interpretation of the will:[3]

> The fundamental principle is to give effect to the intention of the will-maker as expressed in the words of the will. The intention is collected from the whole will (not merely the particular part about which there is some doubt) together with such evidence as the rules allow.

[19] In *Tanner v New Zealand Guardian Trust Co Ltd*, the Court of Appeal stated:[4]

> It is appropriate to consider, as did the Judge, the principles which the courts have applied in interpreting similar gifts by will. As the Judge said, the draftsman and the testator should be presumed to have such interpretations in mind when the form of the will was prepared and executed. Draftsmen should be able to rely on consistency of construction by the courts so that similar words will produce similar results unless the context requires otherwise.

[20] An example of the guidance a solicitor would have obtained as to how words in a will would be interpreted is in *Nevill's Will Drafting Handbook*:[5]

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3 Submissions of Allan McLean, citing *Wills and Succession* (online looseleaf ed, LexisNexis) at [6.6].
4 *Tanner v New Zealand Guardian Trust Co Ltd* [1992] 3 NZLR 74 (CA) at 77.
5 WLB Douglas *Nevill's Will Drafting Handbook* (4th ed, Butterworths, Wellington, 1998) at 24.

> **Vested and contingent gifts**
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> Where it is doubtful whether a gift is vested, or is contingent (that is, subject to a condition precedent) the Courts favour the former construction. There are several ways of expressing contingency …, but a draftsman will avoid doubt or ambiguity if in a gift to a single person he expresses the condition directly, using the word "if" ("$1,000 to my son A if he is living at my death and attains the age of 20 years") or, in class gifts, by building the condition in precise language into a relevant clause. Thus, whereas a gift of residue to trustees upon trust to pay the income to the testator's widow for her lifetime and after her death to hold the residue "upon trust as to capital and income for my brothers A, B, C, and D in equal shares" creates a vested remainder in each of the brothers, "upon trust for such of my brothers A, B, C, and D as are then living, in equal shares if more than one" would in the same context create for each brother a remainder contingent on his being alive at the life tenant's death.

[21] As referred to there, relevant is the observation in *Garrow* that:[6]

> In cases of doubt or ambiguity, the courts favour a construction that leads to the vesting of gifts rather than one which would make them contingent and uncertain… Early vesting is favoured so that gifts shall not lie in suspense…

Despite this, the authors recognise that the clearly expressed intention of a testator that a gift is conditional on the happening of a certain contingency cannot be overridden. Nevertheless, the authors also recognise:[7]

> The established rule for the guidance of the Court in construing devises of real estate is that they were held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

[22] Under cl 3 of Mr McLean's will, he gifted to his wife absolutely chattels of personal or domestic use or ornament in the home he shared with her, along with any motor car he owned at the time of his death.

[23] Under cl 4, he gave the remainder of his estate to his trustees to hold first to pay debts, funeral, monumental and testamentary expenses including any death duties, and then as to a life interest for the benefit of his wife Ruth. There were a number of sub-clauses consistent with that life interest. The trustees would be able to continue operating his farm with the right to use income to meet liabilities charged over farming assets and for capital expenditure. Ruth was to have the right during her lifetime to free use and occupation of the home but with the trustees having the ability to acquire

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6 Alston *Garrow and Alston: Law of Wills and Administration*, above n 2, at 381.
7 At 381.

or build a substitute residence. The trustees also had the right to utilise capital if they considered income from the estate was insufficient for Ruth's proper maintenance.

[24] Under cl 5, Mr McLean provided that "upon the death of my said wife", he devised and bequeathed the assets referred to in 5(a) to John.

[25] In cl 5(b), he directed the balance of his residuary estate was to be held for "such of them my children as survive me and if more than one as tenants in common in equal shares".

[26] In cl 5(b), the use of the words "for such of them my children as survive me" was consistent with Mr McLean intending that the residue of his estate should be shared amongst the children who survived him, not the children who survived both him and his wife.

[27] Clause 6 provided for a grandchild to take their deceased parent's share in Mr McLean's estate if that grandchild survived Mr McLean. There was no requirement in cl 6 for the grandchild to also survive Ruth. There was a condition included in cl 6, namely, that a grandchild born after Mr McLean's death could take that child's deceased parent's share if the child attained the age of 20 years. Such a child did not also have to survive Ruth.

[28] Clause 7 gave John an option to purchase, within 10 years, "the balance of my farm property together with all remaining stock other than that bequeathed to him under paragraph 5(a)" of the will. That clause was consistent with it being Mr McLean's understanding and intention that, under the will, he was giving to John the land and other assets referred to in cl 5(a) but that, if he wanted to acquire the balance of the farm property and stock for himself, he would have to do so by exercising an option to purchase those assets at valuation, otherwise they would fall into the residue of the estate which he would then share equally with his brother and sister.

[29] I do not accept Allan's submission that, with cl 7, John was to be the sole beneficiary of the estate and there would be no remainder to be disposed of under the will. Had John properly exercised the option, the purchase price would have formed

part of Mr McLean's estate and part of the residue which John, Allan and Lesley would have been entitled to share equally under cl 5(b) of the will. With the orders made in settlement of the earlier proceedings, Mr McLean's estate now includes interests in various blocks of land. Those interests are part of the residue in the estate to be shared in accordance with cl 5(b) of the will.

[30] Considering the will as a whole, there is nothing to suggest that the gifts in cls 5(a) and (b) were conditional or contingent upon each of the children surviving their mother or that the gift to John in 5(a) was conditional upon John surviving his mother.

[31] Allan however argues that the gifts in cls 5(a) and (b) were clearly and unambiguously conditional upon John and the other two children surviving their mother through the way they became entitled to those gifts only "upon the death" of Mr McLean's wife, Ruth.

[32] Mr Stewart and Mr Gilchrist both referred me to judgments which established beyond argument that, with the particular words used in John's will and the way it was framed, it must be presumed that the testator intended that the gift to John in cl 5(a) was intended to vest in him upon his father's death but his entitlement to take the bequest in possession was to be delayed until the end of his mother's life interest.

[33] The issue is not whether it was clear Mr McLean intended that the property being gifted to John would go to the beneficiaries of his estate in the event of John's death before that of the life tenant, that is before his mother died. The issue is whether or not Mr McLean intended in his will to provide for John to have a vested interest in the assets referred to in cl 5(a) so that they would be his, with full rights, obligations and consequences of ownership, subject only to the life interest which Ruth was to have in them.

[34] I accept the submission of Mr Stewart that a testator can make a will whereby the beneficiaries take an immediately vested interest in the estate (or a portion of it) subject to their right to enjoy the interest being postponed. In such a case:

> 20. A testator can make a will whereby the beneficiaries take an immediately vested interest in the estate (or a portion of it) subject to their right to enjoy the interest being postponed. In such a case, the interest/gift is said to be "*vested in interest but postponed in possession*". That situation most commonly arises where the testator makes provision for a specified person or persons (either by name or by reference to a class) ("Person A") but interposes a life interest for the benefit of another person or persons, such that the enjoyment and possession of the interest by Person A is postponed until the expiry of the life interest (see generally *Garrow* 35.9).

[35] Where an interest is postponed in possession only for the convenience of the estate or on account of the nature of the property, it is taken to have vested in interest on the deceased's death.

[36] *Browne v Moody* is a decision of the Privy Council on appeal from the Supreme Court of Canada.[8]

[37] There, the will provided that income on a fund of $100,000 was:[9]

> … to be paid to my said son during his lifetime … On the death of my said son … I direct that the said fund of $100,000 is to be divided as follows: One half of the said fund to my granddaughter … and the remainder of the said fund to be divided between my daughters … share and share alike.

[38] The will further provided that:[10]

> In the event of my grand-daughter … or any of my said daughters predeceasing me or predeceasing my said son leaving issue … the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived.

[39] Lord MacMillan, who delivered the opinion of the Board, said:[11]

> Their Lordships observe, in the first place, that the date of division of the capital of the fund is a dies certus, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries, such as their attainment of majority or the life. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

8 *Browne v Moody* [1936] AC 635 (PC).
9 At 641.
10 At 642.
11 At 642-645.

> The distinction between a present gift coupled with a postponement of the date of payment and a direction to pay at a future date without any words of present gift is no doubt an important distinction, and is in certain circumstances an element in determining whether vesting a morte testatoris [on the death of the testator] has or has not taken place, as where conditions of survivorship and the life are adjected to the direction to pay. But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other names and ascertained beneficiaries on his death, even though there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a morte testatoris in the remaindermen.

[40] At 646, his Lordship adopted the following dictum of Sir William Page Wood V-C in *re Bennett's Trust* as reflecting the law:[12]

> The true criterion is that which is mentioned in *Leeming v Sherratt*, namely, whether the postponement of the payment or division was on account of the position of the property, or of the person to whom the deferred interest is given. If the reason is simply, that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death, and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift for life, with a vested remainder to the legatees who are to take subject to the life interest.

[41] I accept Mr Stewart's submission that the position in *Browne v Moody* represents the law in New Zealand and was explicitly adopted by the Court of Appeal in *Tanner v New Zealand Guardian Trust Co Limited*.[13]

[42] The relevant clauses of the will in that case provided:[14]

> (a) As to all my real estate upon trust for my son Alfred Robert Tanner for and during his lifetime subject to his paying thereout the annual sum of five hundred pounds to my wife Mary Maud Elizabeth Tanner (by equal calendar monthly payments free and clear of all rates taxes and impositions of every kind) for and during the lifetime of my said wife;
>
> (b) Upon the death of my said son to hold my real estate upon trust for the sons of my said son Alfred Robert Tanner and if more than one then as tenants in common in equal shares.

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12 *re Bennett's Trust* 3 K&J 280, at 283.

13 *Tanner v New Zealand Guardian Trust Co Ltd*, above n 3, at 76.

14 *Tanner v New Zealand Guardian Trust Co Ltd* [1992] 1 NZLR 57 at 59.

[43] One of the grandsons predeceased the son and the question arose whether the surviving grandson would take his brother's share or whether the deceased grandson's share passed to his own issue.

[44] The Court of Appeal said:[15]

> The clause itself defines the beneficiaries as "the sons of my said son Alfred Robert Tanner". It does not add, as it could so easily have done, the words "who are then living". There is nothing in the clause that would justify adding such a qualification. In the absence of qualification, the will speaks from the date of death and those persons then living who fit the description "sons of my said son Alfred Robert Tanner" must take, subject to a partial divesting if additional members of the class are born thereafter.

[45] The wording in *Tanner* can be contrasted with the will in *Re Dawson*, which created a gift "for such of my nephews and nieces as shall be living at the date of death of my said wife".[16] There was an explicit requirement that the nephews and nieces survive the widow. The Court held that the wording in that case created a true contingency and the nieces and nephews did not have a vested interest during the widow's lifetime. That is not the position in the present case.

[46] In *Acland v Friedlander*, the Court was concerned with a will where the testator had left a life interest in the residue of his estate to his wife and then provided "on the death of my said wife I direct my trustee to divide all my trust estate among my children equally …".[17]

[47] In *Re Wood (deceased), Miles v MacBeth*, the Court was concerned with a will by which the deceased provided for his widow to receive an annuity of £300 per annum during her life and "at her death" all his estate was to be divided into eight equal parts to be divided amongst his children.[18]

[48] In both instances, Sim J held that the share for each child vested on the death of the testator, because of the:[19]

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15 *Tanner v New Zealand Guardian Trust Co Ltd*, above n 3, at 76.
16 *Re Dawson* [1987] 1 NZLR 580 at 582.
17 *Acland v Friedlander* [1924] NZLR 446.
18 *Re Wood (deceased), Miles v MacBeth* [1924] NZLR 529.
19 *Acland v Friedlander*, above n 16, at 530.

> … general rule established by the cases … that a bequest in the form of a direction to divide at a future period vests immediately if the payment be postponed for the convenience of the estate or to let in some other interest.

[49] In response to questions from me, Allan could not explain how the words used in the cases relied upon by Mr Stewart, in particular *Browne v Moody* and *Tanner v New Zealand Guardian Trust Co Ltd*, were materially different from the words used in the will here.

[50] As in *Tanner*, if Mr McLean had intended that John should benefit in the way provided for in both cls 5(a) and (b) only if he survived his mother, that could have easily been made clear through adding at the end of 5(a) the words "if he survives my said wife" and through adding in 5(b) words so that the balance of the residuary estate "was to be held for such of them as survive me [and survive my wife]".

[51] The words actually used in the will have to be interpreted and given the construction that the courts have authoritatively stated is appropriate. On such a construction, it is clear that John's interest in the property referred to in cl 5(a), and in the residue as provided for in cl 5(b), vested in John on his father's death.

[52] My answer to the question put before the Court for determination is this:

On their true construction, the gifts comprised in cl 5 of the will of James Alexander McLean dated 1 September 1986 (probate of which was granted to Margaret Ruth McLean, Allan David McLean and John McLean under probates no. 162/89) vested in interest on the death of the same James Alexander McLean and were not each contingent on the beneficiary (in whose favour the gift was made) surviving the said Margaret Ruth McLean.

[53] In the course of his submissions, Allan said the 400 ewes referred to in cl 5(a) were "a vital part" of the gift to John. He submitted that, if the stock part of the bequest failed, then the bequest as a whole would fail. He argued there had been no identification of the 400 ewes on the setting up of the estate in 1989. He then referred to the orders made by the High Court in settlement of the earlier proceedings whereby all stock on the farm was vested in the trustees of Mr McLean's estate. He asserted, with regard to his mother, that "this was due to her dishonesty in selling the estate

stock and keeping the money, $287,025" and submitted "as those stock cannot now be vested into John's estate for transfer to Mrs McLean's estate, the bequest to John in cl 5(a) must fail and the bequest must go into the residue of the estate".

[54] The submission made in this regard was not relevant to the question which was before me for determination. I note however that such allegations were the basis of claims made by Allan in 2014 proceedings.

[55] Those proceedings were settled without any evidence for or against those allegations being tested. There was an order, amongst others, that "all stock owned by Margaret Ruth McLean shall vest in the trustees of estate James Alexander McLean". Mr Stewart was correct in observing that, if there were no sheep in Mr McLean's estate on his death, cl 5(a) would not have failed in its entirety. Rather, the gift of the ewes would have been adeemed and the balance of the gift would have taken effect. Ademption occurs where there is a specific bequest or devise in a will but no property answering to the description of the gift on the testator's death.[20]

[56] Mr Stewart referred to correspondence which indicated at 5 July 2016 the most recent accounts for Ruth showed her as owning closing stock of 1,042 ewes. With the consent order, any stock owned by her was transferred to Mc McLean's estate. Ruth continued to have a life interest in them. Because she succeeded to John's one-third interest in the residue through his intestacy, she would have been entitled to one-third of the stock that remained in Mr McLean's estate after John's death, subject to her life interest in all the stock.

Costs

[57] The Public Trust and Mr Flaus have been successful on the issue the Court had to determine. They are entitled to costs. If there is no agreement over costs, counsel are to file a memorandum as to costs by 31 January 2018. Mr McLean is to file his memorandum in response by 22 February 2019. The Public Trust and counsel for Mr

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[20] WM Patterson *Laws of New Zealand* Wills (online ed) at [136], citing *Durrant v Friend* (1852) 5 De G & SM 343.

Flaus may file any memorandum in reply within a further 14 days. All memoranda are to be no longer than five pages.

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