IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.47/74
P.593/73

BETWEEN PATRICK CAMPBELL formerly of Auckland Company Director, now deceased and KEITH HENRY DUNCAN BURT of Hamilton, Solicitor

Plaintiffs

A N D IVY WINIFRED DORCAS INFIELD formerly of Taihape, Widow, now deceased

First Defendant

AND NEW ZEALAND RATIONALIST ASSOCIATION INCORPORATED

Second Defendant

AND THE PUBLIC TRUSTEE

Defendant to the Counter-claim

Counsel: A.S. Menzies for Plaintiffs
J. Haigh for First and Second Defendants
R.S. Garbett for Defendant to the Counter-claim

Hearing and Judgment: 11 December 1984

ORAL JUDGMENT OF GALLEN J.

This is an action for Probate in solemn form of a Will of Holly Alice Graham, which Will bears date 10 April 1972. Mrs Graham died at Hamilton on 4 July 1973 and these proceedings have had an exceedingly chequered and rather unusual history.

A caveat was filed against the granting of probate of the Will, the subject of these proceedings and as a result of that, the proceedings were issued. A statement of defence was filed by the first defendant, Mrs Infield and in that statement of defence, allegations were raised that the deceased lacked testamentary capacity at the time that she executed her last Will and testament. That was supported by affidavits, one from a Dr J.S. Barnes and a further affidavit from a Mrs Arthur as well as an affidavit from Mrs Infield herself. It appears that the proceedings were followed by extended negotiations and those who were concerned with the proceedings endeavoured to resolve them by the execution of a deed of arrangement.

The approval of this Court was sought when that deed and the matter came before Barker J. who, on the basis of the affidavits filed in support of the caveat, expressed a concern as to the problem relating to the allegations of lack of testamentary capacity on the part of the deceased. As a result of that concern, a further deed of arrangement was entered into and that was done on the basis that Mrs Infield, the defendant to the proceedings, was understood to be the sole next of kin of the deceased. On that basis, on 1 September 1977, Barker J. made an order pronouncing against the 1972 Will and in fact granted probate in solemn form in respect of an earlier Will made by the deceased. That Will was referred to as having been made in 1942 - that was an error, the Will in fact being executed in 1949.

The executor in that Will was the Public Trustee, but before distribution, it was discovered that Mrs Infield was not the only next of kin of the deceased and that there were a large number of other relatives with possible claims against the estate. Further proceedings were then issued and ultimately by consent of all parties, an order was made by Bisson J. setting aside the judgment of Barker J. which was made on 1 September 1977 but without prejudice to the rights of any person to challenge the validity of the Will dated 10 April 1972.

The original action was therefore revived and now falls to be determined. Mrs Infield has in the meantime died. Her estate has filed a discontinuance and takes no further interest in the proceedings. Service was effected on all those persons who may have been considered to have a claim against the estate and none of them has seen fit to take any part in these proceedings.

Mr Menzies for the plaintiffs, called to give evidence the solicitor who prepared the Will of 10 April 1972, Mr Burt. Mr Burt has given detailed evidence during the course of which he indicated the extent of his relationship with the deceased. It appears that he knew her well and that he had discussed with her on a number of occasions the desirability of her making a Will to replace the 1949 Will. It is significant that the deceased was aware that her 1949 Will was of no

significance in disposing of her estate because the sole beneficiary was her husband, who had pre-deceased her. Certainly at that time she was clearly enough aware of her testamentary responsibilities. Mr Burt acted for her in connection with her affairs generally and became aware of the extent of her estate and of the interests she had, as well as with the family position. Eventually she gave him instructions to prepare a Will.

The instructions which he took at the time and the note of those instructions, has been produced to the Court. The deceased indicated that she wished to leave the whole of her estate to the New Zealand Rationalist Association, the second defendant in these proceedings. Mr Burt gave evidence that he discussed this with her because he regarded it as a somewhat unusual provision, but he was aware of her membership of the association and her acceptance of the philosophy on which it is based. He accordingly prepared a Will on the basis of those instructions; that Will has been produced and is the subject of this action. Subsequent to execution - and Mr Burt has given detailed evidence of the circumstances surrounding execution - he prepared a memorandum which indicates a knowledge of her family position and the lack of any particular obligations or responsibilities to relatives which indicates her concern over her relationship with friends and her knowledge of the extent of her assets. It is clear from this material that the deceased was aware of the obligations that

she had; of the lack of persons with any call upon her generosity and of the extent of her assets and estate. Because of deteriorating eyesight, the Will was read to her and it seems to have been dealt with with considerable care.

Subsequently, Mr Burt remained in touch with the deceased and actually saw her on the day before her death. On that occasion, he saw her in connection with a sale of shares and was satisfied as to her knowledge of what was involved in the decision which was made. He completed a memorandum as to that transaction as well.

In view of the concern which was expressed by Barker J. on the material before the Court relating to lack of testamentary capacity, it is necessary for me to give consideration to the evidence which is now before the Court and to consider whether or not the necessary requirements for the admission of the Will to probate in solemn form have been made.

The evidence of Mr Burt is clear and detailed and in normal circumstances would have been more than sufficient to justify an order as sought. As against that, the Court is aware of the material on the file relating to lack of testamentary capacity. The affidavits of friends really go no further than suggesting that at the time the Will was made, Mrs Graham had become somewhat querrulous and quarrelsome with her friends. The affidavit of Dr Barnes goes further than this.

He suggests that she was certifiable; that he considered that she was in need of psychiatric assistance which she refused to have and he expressed in general terms, a considered medical opinion that she was not in a fit state of mind to settle her affairs, nor did she have a testamentary capacity to make a Will.

The basis of that conclusion is not expressed in the affidavit. The Doctor has not been called. It appears that he had known Mrs Graham for some 9 months only and that he too had had some sort of breach with her. Although he refers to her as having been certifiable, no certification proceedings have ever been initiated and no second medical opinion seems to have been obtained which would have been necessary if that procedure was to be followed. The comments made by the Doctor are general in nature; they are controverted by the detailed evidence which is given by Mr Burt. It is clear that Mr Burt who is an experienced solicitor, was fully aware of the matters which it was necessary to take into account before completing the Will. He had ample opportunity to consider the state of mind of the deceased since he had known her over a period and was in a position to advise her as to her affairs over the whole time. He had no doubt whatever over her testamentary capacity. He has clearly raised with her the matters which are normally considered significant in relation to testamentary capacity and I accept that there is ample authority to the effect that

although a person may have some mental deterioration, that does not necessarily mean that they lack testamentary capacity. I think it is significant that right up until the day of her death, Mr Burt was in touch with the deceased and indeed in relation to the disposition of assets.

Under those circumstances, I am satisfied that there is sufficient evidence to meet the standard which the authorities require and I am prepared to make an order admitting the Will of 10 April 1972 to probate in solemn form as sought in the action.

Mr Garbett for the Public Trustee seeks an order for costs. There will be an order for costs in favour of the Public Trustee in the sum of 1,000 dollars.

R Q Allen J

Solicitors for Plaintiffs: Messrs Harkness, Henry, Hamilton

Solicitors for First and Second Defendants: Messrs Haigh, Lyon and Company, Auckland

Solicitors for Defendant to the Counter-claim: Messrs McKinnon, Garbett and Company, Hamilton