

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

12/3

(3)

X

No Special  
Consideration

A.782/83

IN THE MATTER of The Family  
Protection Act  
1955

AND

BETWEEN F  
SUMMERFIELD

Plaintiff

AND THE PUBLIC TRUSTEE OF  
NEW ZEALAND

Defendant

135

A.752/83

IN THE MATTER of the Family  
Protection Act  
1955

AND

IN THE MATTER of the Estate of  
M  
SUMMERFIELD late  
of Takapuna,  
Auckland, Retired  
Artist, Deceased

BETWEEN D  
CARRINGTON

Plaintiff

AND THE PUBLIC TRUSTEE OF  
NEW ZEALAND as  
Executor and Trustee  
of the will of the  
said M  
SUMMERFIELD, deceased

Hearing: 12 February 1985

Counsel:

Judgment: 12 February 1985

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(ORAL) JUDGMENT OF BARKER, J.

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These two originating summonses are brought in the estate of M Summerfield, late of Auckland, retired artist, deceased. She died on 1983 aged leaving a will in which the whole of her estate was bequeathed and devised to the Society for the Prevention of Cruelty to Animals (Auckland) Inc.

Separate originating summonses were issued by each of her two children. For some reason, which was not explained to me at all, each of the two proceedings moved in tandem. I should have thought that it was unnecessarily costly to repeat every affidavit and file it in each separate proceeding. Because the Family Protection Act 1955 provides that a claim brought by one potential claimant is deemed to be brought on behalf of all, I should have thought the sensible course was to have decided that one of the originating summonses would continue and the other either discontinued or struck out. However, such was not done; in the result, there was unnecessary repetition of documentation.

The deceased was married twice. She married her first husband, a Mr Lander, in 1929; the plaintiff, Mrs Carrington, was born on The deceased divorced Mr Lander in 1940. She then married Mr Summerfield to whom she bore the other plaintiff, P Summerfield, born on She divorced Mr

Summerfield in 1973. It seems clear that she cherished an intense dislike of her former husband which, at times, amounted to paranoia.

At the time of making her will (which is dated 13 December 1978) she gave to the officer on the staff of the Public Trustee, who prepared the will, four reasons for excluding both of her children. He had explained to her the provisions of the Family Protection Act. These four reasons were:

- (a) She suspected that her son was aware of her former husband's whereabouts but denied such knowledge when she asked him for that information.
- (b) She suspected that moneys given by her to her son had been passed on to the father.
- (c) Her son had suggested to her that her house property which she had purchased with her own moneys be transferred into his name and she suspected his motives for so doing.
- (d) Although her daughter had been living in Orakei, Auckland, for some four years, she had only been in the daughter's house once and that neither of her children nor their children apparently took any interest in her apart from her son whose motives she suspected.

It is clear that the first two reasons stemmed from her paranoia against her second husband. I am satisfied from the affidavits that there is nothing in the third reason - the allegation concerning her son. With regard to the fourth allegation that the daughter did not keep in contact with her, it seems clear from the daughter's affidavits that the deceased nurtured an unreasonable dislike of the daughter's husband and did not want him visiting her.

Mr Ivory, appearing for both the Public Trustee and

for the residuary beneficiary which is a charity, abides the decision of the Court.

It is quite clear from the affidavits that the deceased failed in her moral duty in excluding both her children from her will. The question arises as to what should be the proper provision for them.

The estate, in round terms, after payment of costs, is of the order of \$90,000. There is some \$25,500 in cash; a house property in Takapuna has a July 1983 Government valuation of \$66,500. Affidavits were filed to the effect that this house is in a considerable state of disrepair. There appears to have been some difficulty between the claimants over the repair of this property. The Public Trustee has been unable to put the property into lettable form. If it is to be sold, it will be in the interests of all parties for money to be expended in refurbishing the house; it is notorious that a house in a reasonable state of repair is usually likely to command a better price than one in the state of repair that this house appears to enjoy.

I now look at the situations of both claimants. They have agreed between themselves that neither should receive more than the other.

The plaintiff Mrs Carrington is now aged 55. She married in 1973; she has no children. As stated earlier, her mother did not approve of her husband; that disapproval seems to have been the cause of much disagreement between them. The affidavits show, however, that over the years, she has been a dutiful daughter to a rather difficult mother. She made loans to her mother; in the latter years she did keep in touch through telephone communication; her conduct did not justify the action of her mother in excluding her from her will. She seems to

have had a reasonably deprived childhood when she and her parents led a somewhat nomadic existence.

Mrs Carrington is employed as a typist in the Social Welfare Department. She suffers from severe health problems. Certificates from specialists show that she suffers from a mild form of multiple sclerosis which does not cause significant incapacity; it does produce some difficulty in working and quite severe fatigue. It has remained relatively static over the years; the symptoms have interfered with her life to some degree. Combined with this problem is one of severe migraine attacks. The combination does represent, in the view of Dr Wallis, a neurologist, a significant medical problem for her. A report from Mr Barrowclough, an obstetrician, indicates that this plaintiff suffers from an oestrogen deficiency which causes osteoporosis - a bone disorder. She will need regular medical supervision for this condition for an indefinite period.

Her medical problems have had an effect on her work; she has had to take long periods of sick leave; she has well and truly exhausted her entitlement to sick leave with pay from the Public Service.

She and her husband do not own their own house; they live in rented accommodation. Their financial situation is not good. The husband is a working director in two companies - Rustkill Services Ltd and Panel Brick Veneer Ltd. The latter company has ceased to trade; it is to be liquidated with no return to the shareholders. She and her husband are guarantors of an overdraft of \$11,000; they may be called upon to make good some of the amount due by the company under the overdraft. Though the other company appears to be in a better financial position, no dividends are expected from it for some years.

The husband is likely to retire in March 1985. His only income will then be his national superannuation. The plaintiff has a weekly income of \$212 from her employment as typist; that income varies from week to week according to the amount of time she needs to take off for sick leave. Her total assets, including the shares in and loans to this small company, Rustkill Services Ltd, moneys in the bank and Government stock, are about \$12,700. The husband has few assets of any consequence.

There is a clear need for relief demonstrated; the plaintiff is now aged 55; she is in indifferent health and she and her husband have few assets. They do not even own their own home.

The plaintiff Mr Summerfield, although he does not have the health problems of his half-sister, is also in a weak financial position. His affidavit shows that he had been a dutiful son to his mother over the years. Although for the last 13 years, prior to her death, he lived in Taumarunui and she in Auckland, he did maintain a close contact with her, although she seems to have been a rather difficult person.

There are a number of affidavits from persons who knew the deceased, which confirm that the son did what he could for his mother; he himself deposed to taking her with him on frequent holiday trips to various parts of the country.

He is married with one child who is adult and who lives in Australia; although technically a potential claimant under the Act, he makes no claim and, through Mr Midlane, he abides the decision of the Court.

The plaintiff is employed as a fitter by the King Country Electric Power Board. His wife works as a nurse in the local hospital. He earns \$11,500 per annum and his wife \$9,000 per annum. They, too, live in rented

accommodation; their only assets of any consequence are furniture and a motor vehicle each.

Clearly in his case, the deceased failed in her moral duty. His financial position is not good either although his health is not as bad as that of his half-sister.

In deciding what is the appropriate award to make, I recognise that it has been said many times that the Court cannot "do the right thing" or "make a new will for the testator". However, the provision that the deceased made in this case was rather quixotic and completely disregarded her moral responsibilities to her family. Although it is admitted that she was always fond of animals, one should have thought that her duty to her own flesh and blood should have rated much higher than any feelings she may have had about the welfare of animals.

I think that this case calls for a legacy to be given to the Society for the Prevention of Cruelty to Animals. I vary the will by awarding the Society a legacy of \$10,000; the residue of the estate is to be shared equally between the two claimants.

Counsel will no doubt agree on a suitable form of order. I also award the Society the sum of \$250 costs and disbursements.

*R. J. Baum J.*

SOLICITORS:

McVeagh, Fleming, Coldwater & Ptners, Auckland for Mrs Carrington.

Menefy, Tapp & Co., Taumarunui, for P.H. Summerfield and M. Summerfield.

District Solicitor, Public Trust Office, Takapuna, for Defendant.

R.C. Robinson & Co., Auckland, for Society for the  
Prevention of Cruelty to Animals (Auckland) Inc.