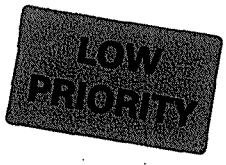
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY



M.980/75

IN THE MATTER of the Trustee Act 1956

AND

IN THE MATTER of the estate of MARIE LOUISE JOSEPHINE FITZHERBERT FALLON of Auckland, Spinster, Deceased

A.52/83

IN THE MATTER of the Estate of MARIE LOUISE JOSEPHINE FITZHERBERT FALLON Deceased

BETWEEN THE PUBLIC TRUSTEE

Plaintiff

AND MYRTLE FRANCES BORGIA HOPIKINS AND OTHERS

Defendants

Hearing: 2 February 1987

Counsel: H. Fulton and B.J. O'Meagher for Public Trustee
H.F. Murphy for N.J. Wood & M.E. Lardner
D.M. Piggin for M.P. Attewell
Miss Galvin for M.M. Lardner & M.J. Binstead
A.G. Stuart for H.I. Hopkins & F.M.B. Hopkins
E.J.M. Rawnsley for W.A. Lardner and G.P. Lardner

Interim Judgment: 2 February 1987

(INTERIM) JUDGMENT OF BARKER J

On 11 September 1981 (in M.980/75), Vautier J made an order under s.76(3) of the Trustee Act 1956 in favour of

the Public Trustee, as administrator of the estate of Marie Louise Josephine Fitzherbert Fallon, late of Auckland, spinster, deceased ('the deceased'). The order, which was of the kind known as a 'Benjamin order', permitted the Public Trustee to distribute the estate "subject to the rights of the Trustee to apply for interpretation of or directions concerning the will of the deceased as if every person (other than Her Majesty the Queen and the descendants of Mary Ann Lardner and those who would have been entitled to the deceased's estate under the Adminitration Act 1908 and its amendments at the date of her death) who would have been entitled to the estate of the deceased under the Statute for Distribution of Intestate Estates had she died intestate after the death of the last survivor of her brothers had never existed". A further order provided that "there be deferred to a later date any determination of the rights of persons claiming through the said Mary Ann Lardner or through those persons entitled to the estate of the deceased under the Administration Act 1908 and its amendments and of Her Majesty the Queen ...".

The Public Trustee has applied for an amendment of this order which has been sealed, by adding "the word 'following' before the word 'descendants' in the 21st line of the Order and the words '(namely MYRTLE FRANCES BORGIA HOPKINS, NYRA JEAN WOOD, MABEL MILLICENT LARDNER, MICHAEL ERNEST LARDNER, MARIE GENE BENSTEAD, GRAEME PHILIP LARDNER, WALLACE ANTHONY LARDNER, LUCILLE CLARINDA LLOYD and MAY PATRICIA (also known as MOLLY PATRICIA) ATTEWELL)' after the name 'Lardner' in the 22nd line of the said Order and adding the word 'abovenamed' before 'persons' in the 30th line of such Order".

The ground for this amendment application is that there was an omission in the order as sealed; the effect of the amendment is to specify the persons who might be considered either to be potential beneficiaries under the

power of appointment given jointly to the Roman Catholic Bishop of Auckland and the Public Trustee in the will or else persons who might share in an intestacy.

Clearly there was an omission from the sealed order; counsel for all parties are in agreement that the omission be rectified and that the application be granted as moved. Counsel for the Crown, who has a potential interest if there are no beneficiaries upon an intestacy, is not present today; however, I am assured by counsel for the Public Trustee that counsel for the Crown is aware of what is being sought and is content that an order should be made.

I therefore make an order varying Vautier J's order by consent and await a draft. The question of costs on M.980/75 will be the subject of a separate judgment.

A.52/83 is an originating summons concerning interpretation. On the principal matter of interpretation of the will of the deceased, counsel are now in agreement as to the proper orders to be made on the substantive order. This agreement follows a judicial conference before Speight J on 3 December 1986 in which he had referred to him a very comprehensive memorandum by Mr M.P. Crew, counsel for the estates of certain life tenants as to the correct legal situation.

The deceased died in 1946. She made her will in 1929 at a time when the 'Statutes of Distribution of Intestate Estates' were in force; the view which appeals to all counsel is that the testatrix was referring to these statutes in her will rather than to any statute governing distribution of deceased estates which might have been in force at the ultimate date of distribution which turned out to be 1963 - when the last life tenant died.

The Public Trustee and the Roman Catholic Bishop of Auckand had a power of appointment under Clause 2(b) which were to be exercised within 6 months of 11 October 1963 (the date of death of the last surviving brother). This power was never exercised within the time and still has not been exercised.

What happens when a power of appointment has not been exercised was discussed by Mr Crew in his memorandum; counsel are now all of the view that the legal situation is as set out in para.810 of 36 Halsbury (4th Edition) viz:

> "If the instrument itself gives the property to a class, but gives to a named person a power to appoint in what shares in and in what manner the members of the class are to take, the property vests in all the members of the class until the power is validly exercised, and they all take in default of appointment. The fact that the power is exercisable only by will does not postpone the period of vesting, nor does the fact that the testator has given a prior life interest. However, the gift of a prior life interest may serve to keep the class open, although the mere continued existence of the power will not."

This principle seems to fit the present situation; it was accepted by Speight J, and now by me. At the time of the conference before Speight J, there was no agreement whether the persons in the class of donees of the power of appointment took per stirpes or per capita. All those affected are now in agreement that they will take per stirpes regardless of the strict legal position.

Accordingly, the originating summons can, by consent, be answered as follows:

Question: Was Mary Ann Lardner (also known as Mary Ann Larner) a sister of Daniel Fallon the father of the abovenamed Marie Louise Josephine Fitzherbert Fallon?

Answer: Yes.

Also, the will provided that any beneficiary under the power of appointment (which was never exercised) be a New Zealand citizen and "a practical follower of the Roman Catholic religion". In view of the decision of the Court of Appeal in Re Sutcliff (1982) 2 NZLR 330, it seems that such conditions attaching to the power of appointment are to be considered sufficiently clear and certain in law. Accordingly, that clause is valid; it seems, therefore, that Question (e) should be answered 'No'.

I also note the agreement of the potential beneficiaries that they are to share per stirpes; for the sake of the distribution of the estate, this feature should be mentioned in the draft order.

As there is to be considerable argument on the question of costs, these will be the subject of a separate judgment.

Miss Galvin, Mr Rawnsley and Mr Stuart are content that the argument on costs should be left to Mr Murphy and Mr Piggin. They are accordingly given leave to withdraw.

R.D. Barker J.

SOLICITORS

Solicitor, Public Trust Office, Auckland, for Plaintiff
Duggan & Murphy, Auckland, for Wood & Lardner
O.J. Bramwell, Auckland, for Attewell
Kensington Swan, Auckland, for MM Lardner & MT Binstead
Webster Malcolm & Kilpatrick, Auckland, for HI & FMB Hopkins
Wood Ruck & Co, Auckland for WA & GP Lardner