IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP.44/90

UNDER The Declaratory Judgments Act 1908

IN THE MATTER OF The Estate of JANICE THELMA BAKER of Napier, Married Woman, Deceased

BETWEEN THE PUBLIC TRUSTEE
as administrator of the Estate of the abovenamed deceased
Plaintiff

A N D DEAN LOGAN BAKER
of Napier, Fencing Contractor
Defendant

Hearing: 7 March 1991

Counsel: P.F. O'Leary for Plaintiff
No Appearance for Defendant
M.W. Robertshawe for Children

Judgment: - 1 APR 1991

JUDGMENT OF GALLEN J.

The late Mrs Janice Thelma Baker executed a Will dated 2 August 1980. She appointed her husband Dean Logan Baker as executor provided he survived her for 30 days and if he did not, two other persons as trustees and executors. She also provided that if he survived her for 30 days her husband Dean Logan Baker was to receive the residue of her estate. If he failed to survive her for that period then the residuary

estate was to be held for such of the testatrix's children as should survive her and attain the age of 20 years and if more than one, equally between them. There is a substitutionary clause in favour of the children of children who should fail to survive her, that clause however not extending to the event of a child failing to attain the age of 20 years.

Subsequent to the death of Mrs Baker the defendant was charged with murder in respect of her death. He was convicted in the High Court at Napier on the charge he faced and an appeal against the conviction was unsuccessful in the Court of Appeal. Mr Baker admitted that no further appeal could be brought against the conviction. The authorities make it clear that in spite of the provisions of the Will, Mr Baker cannot succeed to any part of the estate and I find accordingly in terms of the prayer of the statement of claim that the defendant is precluded from taking any benefit under the Will of or in the estate of the deceased. The Public Trustee is the administrator of the Will and estate of the testatrix by virtue of an order to administer with Will annexed granted to him by this Court in this Registry on 15 March 1989.

At the time of her death the testatrix and the defendant owned two residential properties as joint tenants. Both have now been sold and the Public Trustee is holding $8,700 and $12,000 respectively, in each case representing one half of the net sale proceeds received from the sale of those properties. The second question raised by the statement of

claim is as to whether or not those sums are to be held by the Public Trustee as assets of the estate of the deceased. There is authority to the effect that a joint tenant who is convicted of the murder of another joint tenant cannot benefit from his or her right of survivorship, see In re Barrowcliff. Elder's Trustee and Executor Company Limited v. Kenny and Others 1927 S.A.S.R. 147, this being regarded as an illustration of the general principle that as a matter of public policy a person in such circumstances cannot benefit from the act which lead to the conviction.

I hold therefore that the sums of $8,700 and $12,000 held by the Public Trustee arising from the sales of the jointly owned properties are held by him as assets of the estate of the deceased.

That leaves over the question as to how they are to be distributed. There are two lines of authority considered and discussed by Heron J. in Re Shirlee Anne Lentjes, Brown v. Lentjes and Tweeddale (Wellington Registry CP.359/86, judgment delivered 7 July 1988). The first line of authority depends upon the decision in Jones v. Westcomb 1711 Prec. Ch.316, 24 E.R. 149. In such cases the Will is construed according to the intention which the Court finds must have been the intention of the testatrix. The alternative line of cases is illustrated by the decision in Davis v. Worthington and Others 1978 W.A.R. 144. In that case the testatrix was murdered by the sole beneficiary under her Will who was to take only if he survived

her for a period of 14 days which in fact he did. The Court held that there was an intestacy for the beneficiary was unable to claim or take the specific bequest. Heron J. in the case to which reference has already been made, considered that each case had to be considered in relation to its own circumstances. He drew attention to the fact that in some situations a testator's Will might by its very structure implicitly encompass all possibilities so that when a forfeiture of entitlement operated it could accommodate the same within the intention expressed by the Will. While that is a not unattractive proposition it is difficult to postulate a particular situation where it could be said to clearly apply. In Re Fox's Estate (1937) 4 All E.R. 664, Greene M.R. cited the rule in Jones v. Westcomb as being "where a testator has provided for the determination of an estate in any one of two or more events and has then given a gift over expressly to take place in one only of those events, the Court will in the absence of any indication to the contrary, imply by way of necessary implication an intention on the part of the testator that the gift offer shall take effect not merely in the specified event but on the happening of any of the events which were to determine the previous estate." That seems to me to contemplate a very different situation. It is one where the testator has actually had in mind the particular circumstances. I do not think that many testators would contemplate the possibility that they might be murdered by a beneficiary.

If the testator or testatrix has in fact dealt with the particular contingency, no problem arises. If he or she has not, I think there must be an intestacy.

In this case the testatrix has not dealt with the contingency which arose and in my view the assets of the estate of the deceased are to be held by the Public Trustee as distributable in the estate pursuant to the rules of intestacy on the basis that she has not in the circumstances which have occurred, made any provision for disposition of her estate.

Solicitors for Plaintiff: Public Trustee, Napier

Solicitors for Children: Messrs Bisson, Moss and Company, Napier