

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

12/111

M. 30/93

1984
~~1892~~

IN THE MATTER of the Trustee Act
1956

AND

IN THE MATTER of an application
for Directions
pursuant to Ss.66 & 76
of the Trustee Act
1956 by ROBERT NOEL
SADLER and PETER
JAMES CONNOR as the
Executors and Trustees
of the Will of the
late DORA ADELAIDE
KATHLEEN BURKE of
Petone, Widow, now
deceased

Applicants

MEDIUM
PRIORITY

Hearing: 22 October 1993

Counsel: R.D. Guy for the trustees
D.L. Mathieson Q.C. for Wellington Medical
Research Foundation Inc
S.L. Rees-Thomas for The New Zealand
Neurological Foundation Inc
R.C. Laurenson for Constance Burke abides
decision of the Court

Judgment: 22 October 1993

(ORAL) JUDGMENT OF BARKER ACJ

Dora Adelaide Kathleen Burke late of Petone Widow ('the deceased') died on 16 April 1989; her last will was made on 27 January 1989. Under that will she left the residue of her estate to "the Medical Research

Foundation" with the request that the bequest be used for research into the disease known as multiple sclerosis. The deceased made no provision for her only surviving child, Constance Burke; the latter has filed a claim under the Family Protection Act 1955 which has yet to be heard. The deceased had made previous wills dating back to 1986; in each there was a bequest to the Medical Research Foundation.

It appears that multiple sclerosis or another neurological disease called Huntington's disease afflicted her deceased's only other child and possibly also her husband both of whom predeceased her.

The deceased lived in the Wellington region all her life; the title to her house demonstrates that she resided in the same house in Petone for 48 years. This house represents the only substantial asset in the estate; it has not yet been sold. Its only value is as a section in an industrial zone. Counsel for the trustees has indicated that the property market for land of this sort is not particularly propitious at the moment.

The trustees of the estate seek directions pursuant to S.66 and S.76 of the Trustee Act 1956 because of the difficulty that there is no organisation called "the Medical Research Foundation". There are a series of regional medical research foundations. In particular, there is the Wellington Medical Research Foundation Inc.

This organisation is well established; according to its June 1992 balance sheet, it has investments of \$2.667 million. It provides funds for medical research of various sorts. It attracts donations and bequests from members of the public but it does not currently fund research into the disease of multiple sclerosis. However, when it receives funds tagged for a particular purpose, it invites applications from individuals who are undertaking or intend to undertake research into the particular stipulated field.

All the various regional medical research foundations were served with the application but only the Wellington Medical Research Foundation Inc ('WMRF') has taken an interest in this proceeding. There was an order made that the trustees' application be advertised. The New Zealand Neurological Foundation Inc ('NZNF') was thereupon joined as a party. This body is an incorporated society with the objective of research into neurological and nervous disorders such as multiple sclerosis and Huntington's disease. Its registered office is in Auckland but it has a Wellington office able to receive donations from members of the public in the Wellington region.

Enquiries were made by the NZNF of members of the extended family of the deceased; these revealed a history of neurological disease in the family, though it is not clear whether there had been multiple sclerosis or

Huntington's disease which are different maladies. NZNF works closely with the Multiple Sclerosis Society of New Zealand which is responsible for care, therapy and assistance for victims of multiple sclerosis. NZNF has contributed some \$98,000 to two different researchers in recent times and is committed to funding research into neurological disorders. Needless to say, medical research of any kind is expensive and all medical research bodies could do with more funding.

The principal question to be determined is whether the words describing the beneficiary in the will "The Medical Research Foundation" refer to either the WMRF or the NZNF. It is not contended that any other organisation should be considered. This is a sensible view because of the association of the deceased with Wellington where she lived all her life.

If neither of these organisations is to benefit, then counsel agree that there is nevertheless a general charitable intention; the appropriate course would be then to apply under the Charitable Trusts Act 1957 for the Court's approval to a scheme. This would be a costly exercise and would erode the sum available for medical research.

That sum cannot be assessed at the moment because of: (a) the claim of the daughter, the only surviving child of the deceased who received no provision under the will and

who might be thought to have a strong claim since she is 60 years of age, unmarried and said not to be in affluent circumstances; and (b) the uncertainty surrounding the price which might be obtained for the sole substantial asset in the estate.

I hope that it is possible to find a solution to this matter which does not involve further costly litigation.

In re Buckley, [1928] NZLR 148 the testatrix bequeathed a legacy to "the Society for the Prevention of Cruelty to Animals of New Zealand". A society with that name had never existed; there were several local or district societies having as their object, the prevention of cruelty to animals. It was held that, although the words of the will were not apt to express an intention to give legacies to the independent local or district societies, they showed a general charitable intention and so prevented a lapse of the legacy. The Court invoked the cy-pres doctrine. This case can be distinguished because there there was reference to a national body whereas here there is no such reference.

One much decide the matter on the "armchair" principle and look at extrinsic matters, most of which I have already mentioned. The accurate use of a name in the will creates a strong presumption against anyone benefitting who is not the possessor of the name in the will. See National Society for the Prevention of

Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children [1915] A.C.207.

Where, however, there is not an exact correspondence between a claimant and the name used in the will the claimant cannot always rely on the strong presumption. See Re Satterthwaite's Will Trusts Midland Bank Executor & Trustee Co. Ltd. & Anor v Royal Veterinary College & Ors, [1966] 1 All ER 919.

Those cases are not particularly helpful. My task is to ascertain the deceased's intention. Unlike Buckley's case, where the testatrix had resided in Wellington for only a short time, this deceased lived all her life in the Wellington region. She wished to benefit a particular organisation known as The Medical Research Foundation as is witnessed by the several wills where that organisation is named as a beneficiary. She would have known of the incidence of neurological disorders in her family. The name of WMRF is similar to that used in the will.

In my view, using the "armchair" principle, the likelihood is that the deceased would have wished WMRF to benefit with the stipulation that the money be used for research into multiple sclerosis. WMRF seems to have a reasonably high profile in the Wellington district. That is not of course to say that NZNF does not perform valuable work; its existence was possibly known to the

deceased because there was some contact between that Foundation and some of the deceased's extended family.

Therefore, I consider that rather than find a vague charitable general purpose I am able to find, using the "armchair" principle that the deceased intended to benefit WMRF.

One matter which does concern me, which strictly does not bear on the interpretation point, is the statement in the affidavits that WMRF is not currently conducting research into multiple sclerosis but that NZNF is. Clearly, the deceased wished research to be undertaken into that disease. One would not think that WMRF would wish to do other than comply with the deceased's wishes. One hopes that, with goodwill between two reputable medical research organisations, there might be some measure of co-operation. For example, if the amount eventually received after payment of costs and settlement of the daughter's claim, was not particularly high to justify a large project, then NZNF might make some application to WMRF for a grant to be used in conjunction with some project of NZNF into multiple sclerosis; possibly of a similar sort of research to that referred to in Mr Thompson's affidavit. I merely mention that suggestion in the knowledge that funds for medical research are scarce and that the deceased's intention could the more readily be fulfilled through some sort of co-operation of this nature.

Accordingly, the questions posed by the trustees are answered. The beneficiary under the will is WMRF. I do not think any further questions need to be answered. Solicitor-and-client costs of both the institutions represented are to be borne out of the estate with liberty to apply in case agreement as to quantum cannot be reached.

R. J. Barker A.C.J.

Solicitors: Sievwright Quinn & Porter, Wellington,
for trustees
Gault Mitchell & Co, Wellington, for
Wellington Medical Research Foundation
Inc
Russell McVeagh McKenzie Bartleet & Co,
Wellington, for The New Zealand
Neurological Foundation Inc
Brandons, Wellington, for Constance Burke

