IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2009-412-000981

BETWEEN	JOHN RICHARD HODGKINSON First Applicant
AND	JUNE MOYA OSWALD Second Applicant
AND	PUBLIC TRUST Respondent

Hearing: 10 December 2009 (By Telephone)

Counsel: J K Stewart for Mrs Z Greet
T C Whitcombe and L N Pegg for Applicants

Judgment: 11 December 2009

JUDGMENT OF FOGARTY J

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[1] Leonard Hogkinson died leaving an estate worth over $1 million. By his will he left $5,000 each to the two applicants, his son and daughter, and the balance of the estate to his companion of 27 years, Mrs Zena Greet.

[2] His children have applied for relief under the Family Protection Act 1955. They originally lodged their application in Auckland but were told that under the Family Court rules it had to be lodged in Dunedin. The reason they lodged it in Auckland is that Mrs Greet lives in Auckland. She is 86 years old and frail.

[3] Mrs Greet, the beneficiary under the will, now applies to have these proceedings both transferred to Auckland and transferred to the High Court.

[4] I am quite satisfied on the basis of the medical evidence that the case should be transferred to Auckland. She is not in good health. She cannot travel to Dunedin. She may not even be able to get to the Court in Auckland. It may be necessary for the Judge to go to her bedside if there is to be any cross-examination.

[5] The only question is whether or not it should be transferred from the Family Court to the High Court.

[6] This is a case which I am quite satisfied the Family Court is well capable of hearing. The point being taken by the applicant is that that is not the question. Section 3A of the Family Protection Act provides:

> **3A Courts to have concurrent jurisdiction**
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> (1) Subject to the succeeding provisions of this section, the High Court and a Family Court shall each have jurisdiction in respect of proceedings under this Act.
>
> (2) A Family Court shall not have jurisdiction in respect of any application under this Act if, at the date of the filing of the application, proceedings relating to the same matter have already been commenced in the High Court.
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> (3) Notwithstanding anything in subsection (1) of this section, if a Family Court Judge is of the opinion that any proceedings under this Act, or any question in any such proceedings, would be more appropriately dealt with in the High Court, the Judge may, upon application by any party to the proceedings or without any such application, refer the proceedings or the question to the High Court.
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> (4) The High Court, upon application by any party to any proceedings pending under this Act in a Family Court, shall order that the proceedings be removed into the High Court unless it is satisfied that the proceedings would be more appropriately dealt with in a Family Court. Where the proceedings are so removed, they shall be continued in the High Court as if they had been properly and duly commenced in that Court.

[7] Ms Stewart submits that the effect of this section is that an application to transfer to the High Court must be granted unless the Court is satisfied that the proceedings would be more appropriately dealt with in a Family Court.

[8] Both the High Court and Family Court have concurrent jurisdiction, see s 5.

[9] It may be noted that s 3A(3) and (4) apply the same criteria (would be more appropriately dealt with) to a transfer by a Family Court Judge to the High Court as in an order from the High Court removing it from the Family Court into the High Court.

[10] However, there is a crucial difference between subs (3) and (4). Where an application is made to a Family Court Judge the Judge has a discretion whether or not to refer the proceedings or the question to the High Court. In the absence of an application the Family Court Judge also has a discretion.

[11] However, where an application is made to the High Court the High Court has a duty to remove the proceedings to the High Court; if the criterion applies.

[12] These differences between subs (3) and (4) are designed to enable any party to have the proceedings removed to the High Court unless the High Court is satisfied positively that the proceedings would be more appropriately dealt with in a Family Court.

[13] Accordingly, it is not sufficient that I am satisfied that the Family Court is well capable of dealing with the disputes in this case. I must be positively satisfied that the proceedings would be more appropriately dealt with in a Family Court. I have no reason to form such a view. This is not a case where a High Court Judge would have insufficient expertise to deal with the issues. Therefore, it is ordered that these proceedings be removed into the High Court, to the Auckland Registry.

[14] Costs are reserved.

Solicitors:
O'Neill Devereux, Dunedin, for Applicants
Minter Ellison Rudd Watts, Auckland, for Mrs Z Greet