IN THE SUPREME COURT OF NEW ZEALAND
ROTORUA REGISTRY.

No.A.163/76.

Special Consideration

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BETWEEN: EDITH LAVINIA SAINSBURY (also known as EDITH LAVINIA HERLIHY of Taupo, Widow.

Plaintiff.

A N D: THE PUBLIC TRUSTEE OF NEW ZEALAND

Defendant

Counsel: R. Joyce for Plaintiff.
G.T. O'Sullivan for Defendant.

Hearing and Judgment: 17 July, 1979.

ORAL JUDGMENT OF VAUTIER, J.

This is a notice of motion in which directions are sought in relation to various aspects of an action commenced by the plaintiff in which she seeks relief in terms of the Law Reform (Testamentary Promises) Act 1949. Primarily what the plaintiff is seeking is directions as to service of the proceedings and as to representation as required by the procedure laid down for actions under the statute mentioned.

The action concerns the estate of John Charles Herlihy who died on 15 November, 1975, leaving a will in respect of which the defendant filed an election to administer on 30 January, 1976. The plaintiff in her statement of claim in the action which was commenced on 9 November, 1976, alleges that she lived with Mr Herlihy in a de facto relationship from 1965 until the time of his death. The affidavits filed in support of the motion now before the Court show that the plaintiff learned quite soon after the death of Mr Herlihy that he had left as his last will the will which the defendant is now administering

and in terms of which three named children of the deceased are the sole beneficiaries. She advised the defendant through her solicitors that she claimed certain unspecified rights against the estate and in further correspondence clarified the nature of her claim to some degree and then on 9 November, 1976, the writ, as already mentioned, was issued. In this she advanced not only a cause of action in terms of the Law Reform (Testamentary Promises) Act, but also an alternative claim based on an alleged resulting trust in her favour as to part of the estate and as a further alternative claim, an alleged agreement by the deceased to reward her for work done and services performed by her for him. I mention here that these alternative claims are put forward in the statement of claim as additional or alternative claims and they can clearly in terms of the statute be advanced and included in this action only as alternative claims (see s.3(8) of the Law Reform (Testamentary Promises) Act 1949 as inserted by s.2 of the Law Reform (Testamentary Promises) Amendment Act 1961.) This writ was served on the defendant on 17 November, 1976 and a statement of defence to the statement of claim was filed on 10 December, 1976, and, subsequently, the defendant obtained an order for discovery against the plaintiff. The writ however was issued without it being accompanied by any motion for directions as to service as required by s.5(2) of the Act (as inserted by s.5 of the 1961 Amendment). The attention of the plaintiff's solicitors was drawn to this omission by the solicitor for the defendant but this was not done until near the end of 1977 and thus after, it will be noted, the expiry of the 12 month period from the date of issue of the writ allowed by R.32 of the Code of Civil Procedure for effecting service of a writ. Thereafter the plaintiff's solicitors from 25 January, 1978, until the month of August, 1978, made continual efforts to obtain from the defendant the particulars which the plaintiff

sought to enable it to make the necessary application for directions to the Court in accordance with the Rules of the Code to which I will refer in a moment. They had no success in this regard. On 30 June, 1978, a letter was written by the defendant's solicitors to the plaintiff's solicitors in which it was said:

> "Our client is having a little difficulty in supplying the information you require."

It was also said in this letter that there were some procedural matters whichit was necessary to overcome before the information sought was furnished. The letter is not worded quite in that way but it was made plain in the course of the argument that this was what was intended and that the defendant considered by this stage that the information sought by the plaintiff's solicitors should not be furnished to them because the writ issued by the plaintiff's solicitors in November, 1976 was considered to be a nullity. The defendant's solicitors indeed in a letter dated 23 August, 1978, expressly put forward this latter contention. It was then also said that any further proceedings would be out of time and that the continuance of the existing proceedings or any application for leave to commence fresh proceedings would be opposed. Following this the present motion was filed. The situation here is rendered a little unusual of course by reason of the fact that the plaintiff has chosen to join in her action in terms of the Law Reform (Testamentary Promises) Act causes of action apart from that Act which causes of action, had they alone been included in the statement of claim, would have been subject neither to the 12 month limitation from the date of taking out representation imposed by the Testamentary Promises Act, nor to the procedural requirements with regard to the motion for directions unless, of course, the Court itself decided to impose some requirements upon the plaintiff with regard to the question of representation in regard to those other causes of action.

S.5(2) of the Act already mentioned is in the following words:

> "Every such action shall be commenced by writ of summons. With every such writ of summons the plaintiff shall file a notice of motion for directions as to service; and the rules of the Code of Civil Procedure shall apply as if the motion were filed with an originating summons."

Prior to the amendment which came into force on 1 January, 1962, there was no requirement that proceedings under the 1949 statute should be brought by way of a writ of summons. Obviously the intention of the amendment was that claims under this legislation should proceed by way of writ of summons so that all the interlocutory proceedings relating to an action would clearly be available to both parties and perhaps more important the action would require to be dealt with on viva voce evidence instead of affidavit evidence. This particular case, however, provides an illustration - although admittedly a rather unusual illustration - of the difficulties to which Rules 32 and 35 can give rise when applied to these particular actions under the Testamentary Promises Act. One of the cases referred to by counsel, Melgren v. Public Trustee (1971) N.Z.L.R. 681, was another case where, as here, the plaintiff had run into difficulties because the necessary information to enable a motion for directions to be filed had not been obtained in time and in that case the position was in some respects more serious for the plaintiff in that the time for service had run out without any service at all having been effected and the plaintiff was also, as here, in the difficulty arising because of the 12 month period fixed by s.6 of the Act having also expired as regards a fresh action. At p.685 Moller, J. in the course of his judgment said this:

> "For what it is worth I also throw out the suggestion that the peculiar position of actions arising out of alleged testamentary promises, when they fall to be considered in relation to RR 32 and 35, might be something to which should be given thought by the Rules Committee."

It is clear of course that when the legislature came to enact the amendment to s.5 it was realised that the imposing of the procedure by way of writ of summons would, if nothing more were done, give rise to many difficulties as to representation in that the elaborate procedure laid down to achieve proper representation in originating summons cases would not be available and the parties would be thrown back on the much more limited forms of procedure applicable to writs of summons. To overcome this difficulty it was required that a notice of motion for directions should be filed and it is noted that the section goes on to say that the rules of the Code are to apply to these actions as if the motion for directions was filed with an originating summons.

The question for consideration is whether the mandatory requirement in s.5(2) for the filing of a notice of motion with the writ of summons has the effect of rendering the whole proceedings a nullity if the procedure laid down by the section is not followed. It is clear on the affidavits that the omission to file this motion at the outset was due to the fact that the solicitor acting in the matter was unaware of the requirements of the section.

In my view non-compliance with the requirements of s.5(2) does not, as Mr O'Sullivan has submitted, have the effect of making the writ invalid and of no effect. R.554A of the Code of Civil Procedure contains a provision with regard to the obtaining of directions worded in exactly the same way as the section in question, that is to say it is there required that the plaintiff shall file the notice for directions along with the originating summons. That, it is to be noted, is a provision applicable only to originating summonses which do not fall within the scope of the special rules 550 and 551 relating to vendors and purchasers and mortgagors and mortgagees. As regards the

requirements of R.554A itself it is, of course, quite clear that it could not be successfully argued that the Court had no jurisdiction to deal with an originating summons if there was a non-compliance with this Rule. R.599 of the Code expressly provides:

> "Non-compliance with any of these rules shall not render the proceedings in which such non-compliance has occurred void, unless it is expressly so provided by these rules, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and on such terms as the Court of a Judge on any motion with reference to such non-compliance may deem just."

In my view, although what is here being considered is a statutory provision and not a Rule of Procedure made pursuant to the Judicature Act, the same approach as that laid down by R.559 should be followed because the matter is procedural and the two requirements are so much in pari materia. The legislature in my view in enacting s.5(1) was clearly simply seeking to apply to writs of summons under the Law Reform (Testamentary Promises) Act the procedure as to representation laid down by R.554A et seq which of course is applicable in the very analagous proceedings under the Family Protection Act. This conclusion, too, can be supported I think as Mr Joyce has submitted by reference to the express inclusion in the section of the words "the rules of the Code of Civil Procedure shall apply as if the motion were filed with an originating summons." In this way it can properly be said in my view that R.599 itself is imported into the procedural requirements laid down in the section

I should also mention that Mr O'Sullivan, being helpful as usual to the Court, has referred me to two cases which support the view that an action should not be defeated by reason of non-compliance with procedural requirements even where such non-compliance may, as here, be said to be due to the failure of the plaintiff's advisers to give consideration to clearly laid down

statutory provisions. The cases mentioned are, first, Kaikoura County Council v. Boyd (1949) G.L.R. 23, where proceedings were commenced by a petition for mandamus instead of by writ and it was contended that the Court had no jurisdiction to deal with the matter on that action. The Court of Appeal, in the judgment given by Fair, J. said at p.32:

> "To hold that the Court had no jurisdiction to to treat the action as commenced by writ would be attaching an importance to formal matters that would be inconsistent with the clear spirit and intention, in modern times, of rules of procedure."

The other case is Doyle v. Olby (Ironmongers) Ltd. and Others (1969) 2 All E.R. 119 where Lord Denning in relation to a case of procedural error said this:

> "We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side."

The mistake that has been made in these proceedings by the plaintiff's solicitors in not making the application for directions at the proper time was clearly procedural and can clearly in my view be corrected here without injustice to the other side. There is no indication on the material before the Court that any real detriment will be sustained by either the defendant or the parties who are entitled to benefit from the deceased's estate by reasons of the delay which this error has in part brought about. I say in part because on the view which I take some of the delay might have been avoided by information seemingly within the knowledge of the defendant being furnished at an earlier stage to the plaintiff's solicitors.

In my view the writ in the present case indeed was served at a time which makes it unnecessary for the plaintiff to make application for an extension of time in terms of R.35 of the Code and the writ and the service upon the defendant without an order being made in terms

of s.5 were not invalid. Mr Joyce has referred me to the various Rules which show that in the ordinary case of a writ of summons, the executor administrator or trustee is the correct defendant and it is not necessary to join in other parties in the first instance and the Court is empowered to give directions at a later stage if it is deemed necessary for other parties to be joined or represented in some way in the proceedings. I refer here to RR 65, 88 and 90. R.35 in itself refers only to service upon the defendant named and the defendant named in this case has certainly been served. Moreover, as Mr Joyce has pointed out, there is some apparent conflict in the Rules concerning the requirements laid down in relation to service upon executors, administrators and trustees in that R.541 which is applicable to originating summonses generally expressly requires that such a summons, when taken out by other persons is to be served upon the executors, or administrators, or trustees, as the case may be and upon such other persons as by analogy to RR 65, 88 and 90 as the Court or a Judge may direct. It may of course be said that that provision has now been superseded by R.554A. Be that as it may the whole matter is one in my view which the Court is able to deal with under its inherent jurisdiction to control matters of procedure. I accordingly find here that the writ has been duly issued and served but the plaintiff must of course now comply as she seeks to do with the requirements of R.554A before the action can be taken any further or the matter brought on for hearing. I say that of course on the basis that it is assumed that the plaintiff wishes to maintain the cause of action in terms of the Testamentary Promises Act. She would be entitled to maintain the other causes ofactions in any event and, as Mr Joyce has submitted, that it is one of the matters which tends to indicate that there is no injustice here being suffered by the defendant by the

question of representation and service upon other necessary parties being dealt with at this late stage.

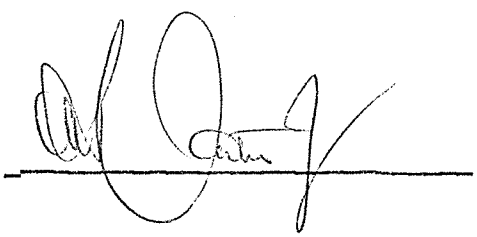
I also am of the view that this would have been a proper case for the making of an order in terms of R.35 if that had been necessary. I say that on the basis of reasoning which I would respectfully adopt which was expressed by Moller, J. in the case already referred to, Melgren v. Public Trustee (supra). There it was held that the Court will exercise its discretion to renew a writ out of time if the plaintiff shows sufficient reason or good cause for such extension and that it is not necessary for the plaintiff to show exceptional circumstances. The inability of the plaintiff to obtain sooner the necessary information to enable a motion for directions to be filed, even though the efforts in this direction were made after the 12 month period for service had expired would in all the circumstances in my view here constitute good reason for the exercise of the jurisdiction conferred by R.35 and R.494 of the Code of Civil Procedure. I say that having regard to the fact that the defendant has here I think to some extent lulled the plaintiff into a sense of security by filing the statement of defence and issuing the discovery leading the defendant's solicitors to think the action was proceeding in the normal way.

The question then is how the motion which of course is framed in such a way as to seek whatever orders may be necessary, having regard to the view ultimately taken by the Court, should now be dealt with. It is submitted by Mr Joyce that the defendant should be directed to represent the widow, children and grandchildren, if any, of the deceased. He has suggested that this order should be made on the basis that such order be regarded as an interim order only and that further orders as to representation could then be made if information subsequently placed before the Court shows that the defendant is embarrassed

by the order so made or that for any reason some further or other representation order should be made. Mr O'Sullivan opposes any order in this form and I can well understand why he should do so. The Public Trustee may well be in some difficulty in ascertaining just who the persons are who should be represented in these proceedings and it is true that the primary obligation to obtain the necessary information does, in terms of R.554B rest directly upon the plaintiff. She, however, is clearly in a difficult position as regards obtaining any such information and the defendant, it appears to me, is certainly likely either to hae within his knowledge the necessary information or certainly to be in a better position than the plaintiff to acquaint the Court with the situation.

What I propose to do therefore in this case is to follow the same course of action as that which was followed by Moller, J. in the case already referred to, Melgren's case (supra) and direct that the Public Trustee file an affidavit in these proceedings. This affidavit is to set forth all information within the knowledge of the defendant as to the names, addresses and descriptions of the persons who are entitled to claim benefit or provision from the estate of the deceased either under his last will or in terms of the Family Protection Act, 1955, and if he does not have such information the affidavit is to set forth details of the inquiries made to date to ascertain who and where such persons may be and generally furnish such information as is within the defendant's possession as will enable this Court on the further consideration of the matter either to make an appropriate order in terms of R.554C or give directions to the plaintiff as to the further inquiries to be made by her to enable such information to be placed before the Court.

So that the further progress of this action may be expedited I direct that that affidavit is to be filed in Court within 35 days from the date of this judgment. The present motion is adjourned and is to be brought on for hearing again after the expiration of the time above mentioned or the filing of the affidavit from the defendant, whichever is the earlier and the costs of the present application are reserved.



SOLICITORS:

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