N2LR

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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.189/73

No Special Consideration

641

IN THE MATTER of the Status of Children Act 1969

A N D

IN THE MATTER of an application by E RANGI

BETWEEN E RANGI
First Plaintiff

A N D H WORTH
Second Plaintiff

NAMES NOT TO BE PUBLISHED

A N D THE PUBLIC TRUSTEE
Defendant

Hearing : 5th, 8th June 1984

Counsel : H.H. Roose for Mrs J.F. Everitt in support
C.J. Harding for Plaintiffs to oppose
A.S. Menzies for Defendant

Judgment : 8th June 1984

(ORAL) JUDGMENT OF BARKER, J.

This is a motion to dismiss, for want of prosecution, an originating summons brought under the Status of Children Act 1969 ("the Act") for an order determining the paternity of two children, of whom it is alleged that the father was one T Donaldson, deceased (hereinafter called "the deceased").

The first child is named J Rangi; his guardian

ad litem is his natural mother, Earlene Rangi. He was born on
1965. The other child is Ma Worth, born
1966. She was adopted on 1975 by Mr and Mrs
Worth; her guardian ad litem is now Mr Worth, her adoptive father.

The deceased, T Donaldson, died on 23rd March 1971; on 19th November 1971, letters of administration of his intestate estate were granted to his father, J Donaldson. The estate of the deceased consisted of an insurance policy which was worth, at the date of his death, approximately $5,500.

After an advertisement by the trustee's solicitors for claimants, a claim was made on behalf of the first-named plaintiff, J Rangi, by his natural mother, Earlene Rangi. She saw solicitors sometime in 1972; on 15th August 1973, an originating summons was issued in this Court under the Act, seeking a declaration of paternity in respect of J Rangi only. Under the law of intestacy, the estate of the deceased, in the absence of his dying without wife or children, would go to his father, J Donaldson. Some enquiries were made as to the details of the deceased's family. After the proceedings were issued, orders were sought seeking service on various members of his family. Why these orders were sought I do not know; I should have thought that the only proper person to be served at that stage was J Donaldson in his capacity both as administrator and as sole beneficiary. This additional service on additional parties consumed quite a deal of time; it took most of 1974. That was completely unproductive and unnecessary time wasted.

In December 1974, the existence of Maryanne Worth was brought to the attention of the solicitors acting on behalf of J Rangi. Because any right she may have had to share in the Thomas Donaldson estate occurred before the adoption order was made, a claim can still be made on her behalf in the Thomas Donaldson estate despite the adoption.

In April 1975, a praecipe was circulated; for some reason, which is not clear to me, M Worth was not joined as a party at that early stage. J Donaldson died on 1975.

From that time, until the appointment of the Public Trustee as substituted administrator on 3rd August 197[illegible], there was in my view quite an unreasonable delay in appointing a substitute trustee. There was further delay until July 1980 when the Public Trustee was substituted as defendant and another delay until March 1982 when M Worth, through her guardian <u>ad litem</u>, was joined as a co-plaintiff.

Around about this time, there was the suggestion of separate representation for the widow of J Donaldson, the sole beneficiary in his estate, who would have succeeded to his interest in the estate of T Donaldson. The originating summons was set down for hearing but removed from the ready list when an order for separate representation was made. This present motion to strike out was filed in December 1982, only a few months after Mr Roose had become instructed on behalf of Mrs Everitt, the widow of J Donaldson.

At this stage, it is not necessary to record the somewhat meagre evidence in support of the substantive claim; however, it is noteworthy that, until Tuesday 5th June 1984, when this matter first came before me and I had discussions with counsel, there was not, on the file, an affidavit from the mother of Maryanne Worth stating that she was M Worth's natural mother and that Thomas Donaldson was the father.

The documentation for both claimants is sparse. I should have thought that, regardless of this present motion, there will be severe difficulties in the way of a claimant in procuring an order such as being sought.

The principles for striking out proceedings for want of prosecution are tolerably well-known; they have in New Zealand been enunciated by the Court of Appeal in New Zealand Industrial Gases Limited v. Andersons Limited, (1970) N.Z.L.R. 58 and in Fitzgerald v. Beattie, (1976)1N.Z.L.R. 265. Generally speaking, the applicant must establish that:

(a) There has been inordinate delay;

(b) Such delay was inexcusable; and

(c) The defendants were likely to be seriously prejudiced.

Nevertheless, even if these matters are established, there is still discretion to make the order or not.

In this present case, despite Mr Harding's valiant endeavours to offer an explanation for the delays, I consider that

the delays were inordinate and, cumulatively, they were inexcusable. Obviously, Mrs Everitt must be prejudiced by the delay; the witnesses will be asked to state whether, 18 years ago or so, a certain person must have been the father of the two plaintiffs.

However, that is not the end of the matter; Mr Harding carefully pointed out to me that there is no limitation period for claims under the Act. This submission provides a very real reason in favour of not dismissing the application. As was stated in Fitzgerald v. Beattie at p.269, a case where there was a limitation period, the fact that a general limitation period had expired was an important feature and one which normally leads to striking out. However, as the House of Lords indicated in [illegible] the proceedings sought to be struck out are still within the limitation period is usually a conclusive consideration against striking out.

However, dicta such as that must be read in the light of there being a finite limitation period; there is none in this case. As Mr Roose pointed out in his equally careful submissions, the reason why there is no limitation for proceedings under the Act for paternity declarations is that such declarations may be required for all sorts of reasons; he instanced a recent decision of my own where a declaration was sought for the purpose of establishing nationality.

Counsel also referred to the fact that no paternity proceedings had been taken and that the time for taking such proceedings had well and truly expired; he mentioned a number of

statutory amendments brought into the Act in 1978 which establish a system for a trustee to give notice to a claimant requiring him to bring proceedings; the trustee may distribute the estate if proceedings are not brought within a reasonable time. However, I cannot use those sections (incorporated into the Act after these proceedings were commenced) as a guide to what I should do in the present case.

The absence of limitation is a very relevant consideration because if these proceedings were struck out, the likelihood is that a fresh proceeding would be instituted and the Court would be faced with hearing that application on the merits or an application such as Mr Roose foreshadowed for striking out the second proceedings as an abuse of the process of the Court. That tactic was employed in Janov v. Morris, (1981) 3 All E.R. 780; the decision does not appear to be decisive in a situation such as the present.

I therefore think, in the exercise of my discretion, that, provided this matter is litigated promptly, I should not exercise my discretion to strike it out. That is not to say that the application made by Mr Roose has not been thoroughly justified. In my view, a matter of this complexity should have been litigated promptly. There has not been displayed the sense of despatch and urgency which should accompany such an application; indeed, as I mentioned to counsel in the course of argument, Mr Harding seems to have advanced the matter more in two days than it has been over 11 years. Since the hearing 3 days ago, he was able to obtain an affidavit from Mrs Rangi which covers the deficiency mentioned

in respect of M it also provides an explanation why she did not tell the solicitors, when she was making the application in respect of the first child, of the existence of M

I mentioned earlier in the judgment that there were grave deficiencies in the affidavit. Mr Harding has seen that some of the deficiencies have been answered. However, an affidavit on the file from Mr Worth, dated 18th February 1983, contains such unacceptable statements as "I am sure that T Donaldson is the natural father of M He was living with E T when she was born. Further communications with him after we assumed control made me sure that Tommy was the father of M

That sort of hearsay statement with no particularity is quite unacceptable. The cases show that the burden of a plaintiff on an application of this nature is a heavy one. Corroboration, though not required in the legal sense, is frequently expected: decided cases already show that the Court will greet claims of this nature with scepticism, particularly when they are prosecuted years after the alleged father has died.

It seems to me that the plaintiffs, if they do proceed, face difficulties on the state of the evidence at the moment. However, as Mr Harding reminded me, I am not required to take too much notice of the merits of the case on an application of this nature. I therefore do not do so.

I accordingly make the following procedural orders:

1. Any further affidavits on behalf of either plaintiff are to be filed within 14 days; no application for extension is to be entertained; no further affidavits are to be filed after the period.

2. Any affidavits in reply by the defendant or Mr Roose's client are to be filed within a further period of 14 days.

3. The praecipe to set down the originating summons must be filed within 7 days after the final affidavits are filed.

4. The matter is to be placed on the Judge Alone list for hearing as soon as possible after the praecipe has been filed.

All parties are on legal aid apart from the defendant. [illegible] power to award costs I should [illegible] have made an award of costs against the plaintiffs. I fix them at $300 if that is of any use to the Legal Aid Committee.

Certainly, as I have said, the application was thoroughly justified. I consider that I have given an indulgence to the plaintiffs which they probably do not deserve; I do it for the sake of those young people who might possibly benefit in the estate and who are still under the age of majority.

R.J. Barker, J.

The application is therefore formally dismissed.

SOLICITORS:

Edge, Beeche & Norton, Auckland, for 1st Plaintiff.
Gubb, McNiece & Vlatkovich, Auckland, for 2nd Plaintiff.
Harkness, Henry & Co., Hamilton, for Defendant.
Boot & Roose, Hamilton, for Mrs Everitt.