IN THE HIGH COURT OF NEW ZEALAND 27/12
TIMARU REGISTRY P. No.155/91

2538

IN THE ESTATE of K........ ..... COX
formerly of Timaru
but latterly of
Waimate, in
New Zealand,
Unemployed, Deceased

Judgment: 12 December 1991

JUDGMENT OF TIPPING, J.

This application for letters of administration with will annexed has been referred to a Judge because Mr Registrar Perry saw in it certain difficulties which counsel for the Applicant has submitted do not exist.

The late K Cox died on 1991. His last will and testament is dated 14 September 1990 and appoints his son M Cox executor and trustee. M Cox was born on 1973 and has therefore not attained his majority. He is accordingly not yet entitled to a grant of probate. In these circumstances a brother of the deceased, B Cox, has applied for letters of administration with will annexed. In his affidavit in support the Applicant annexes various consents. There is first a consent from the father of the deceased. The deceased's mother died before him. The deceased had no other brother and two sisters both of whom consent to the application. The

deceased had only one other child, a daughter, who is of full age but lives beyond the jurisdiction in Australia. The estate is sworn at under the modest sum of $35,000.00.

When the papers first came before the Registrar he issued a minute questioning whether the executor had a natural guardian, i.e. his mother, or some other person appointed or nominated. The Registrar also indicated that the Court "may well have to appoint a guardian ad litem". The solicitors for the Applicant responded to this minute by pointing to s.9 of the Administration Act 1969 and to Rule 656A of the High Court Rules.

The Registrar then issued a further minute asserting "that the law regarding the assignment or election of a guardian" had been settled for some time. He referred to In Re Matheson (1906) 27 N.Z.L.R. 99 and to the decision of Quilliam, J. in Re Hofmann Nelson Registry P.220/87 (judgment 18/12/87) noted by the learned authors of McGechan in their notes to Rule 656A. They there make the comment that in the light of Hofmann's case "it would appear that correct course is for the intended applicant to first seek appointment as guardian ad litem of the minor under R83 for the purpose of bringing the application for administration during minority".

The Registrar ruled that an application should therefore be made for the appointment of a guardian ad litem followed by an amended application for letters of

administration with will annexed. The solicitors for the Applicant have submitted that this is not necessary.

The starting point is s.9(1) of the Administration Act 1969 which provides as follows:-

> "Where a person who is sole executor of a will is at the date of the testator's death a minor who is not entitled to a grant of probate under subsection (3) of this section, administration with the will annexed may be granted to such person as the Court thinks fit, until the minor becomes entitled to and obtains a grant of probate to him; and on his attaining full age or sooner becoming entitled to a grant of probate under that subsection and not before, probate of the will may be granted to him."

In the present case subsection (3) does not apply because the executor, being a minor, has not yet attained full age and has not attained the age of 18 and been married. It should be noted that s.9(1) expressly says that in present circumstances letters of administration with will annexed may be granted "to such person as the Court thinks fit". The grant enures only until the minor becomes entitled to and obtains a grant of probate. Rule 656A provides:-

> "Where a person who is the sole executor of a will is at the date of the testator's death a minor who is not entitled to a grant of probate under s.9(3) of the Administration Act 1969, administration with the will annexed may be granted to such person as the Court thinks fit until the minor becomes entitled to and obtains a grant of probate."

This mirrors exactly s.9(1). Rule 656A was introduced into the Rules by Rule 14 of the High Court Amendment Rules 1990 (S.R. 1990/66) and came into effect on 1 June 1990. It was therefore in effect at the date of the present testator's death.

At the same time a consequential amendment was made to Rule 655 dealing with the conditions of, and order of priority for, grants of administration with will annexed. Previously Rule 655(1)(b)(iv) provided that where there was a will but the executor appointed by the will "is incompetent by reason of the executor's minority, mental disorder or other disability", letters of administration could be granted to the person entitled in accordance with the order of priority set out in subclause (2). However this provision was amended at the same time as the introduction of Rule 656A by the deletion of the word "minority" from the passage noted above.

Thus in the case of a sole executor who is a minor the position is now covered by Rule 656A in conjunction with s.9(1) and one is not required to consider the order of priority set out in Rule 655(2). The simple position is that the Court may in terms of Rule 656A and s.9(1) make a grant to such person as the Court thinks fit. The decision of Quilliam, J. in Re Hofmann of course pre-dates the introduction of Rule 656A. No doubt the framers of the Rules realised that Rule 655 did not accurately match the terms of s.9(1) in the case of a sole executor who at the date of the testator's death is a minor. Therefore the Rules were amended by the introduction of Rule 656A so as to make them coincide with s.9(1).

Whatever may have been the earlier practice it seems to me that it is now quite unnecessary to require,

as the Registrar has directed, that the applicant be appointed as guardian ad litem for the minor. I see no reason why s.9(1) and Rule 656A should not be construed to mean exactly what they say. The Court may grant letters of administration with will annexed to such person as it thinks fit. That person must of course be of full age and capacity, within the jurisdiction and otherwise appropriate. There is no need to introduce the complexities which troubled the Registrar who was no doubt influenced by the comment in McGechan. Indeed a close examination of Hofmann's case demonstrates that the circumstances there were somewhat different from the present; but there is no need for me to lengthen this judgment by pointing out the differences.

The evidence satisfies me that the Applicant, Bruce Cox, is of full age and capacity and is in all respects an appropriate person to receive a grant in present circumstances. I therefore grant administration of the estate of K Cox, with the will dated 14 September 1990 annexed, to B Cox of Timaru retired until M Cox, the executor and trustee therein named, becomes entitled to and obtains a grant of probate to himself.

Alc T[illegible] J