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RECOMMENDED**

NZLR

1431

JUDGMENT DISTRIBUTION LIST 718

NAME OF PROCEEDING: ESTATE OF R.L. RYAN

REGISTRY AND FILE NUMBER: ROTORUA M. 65/91

JUDGMENT DATE: 22 July 1992

DESCRIPTION AND CATCHPHRASES

WILLS - Wills and Administration - application under s.19(2) Administration act 1969 - named executor refused to take oath as executor and retained original of will - order nisi - no cause shown - original will not returned - grant of probate to other named executors - photocopy of will admitted to probate - costs on solicitor client basis ordered against defendant's share in residue.

LIMIT ON PUBLICATION :

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ASSESSMENT: Not Recommended (Yellow)

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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

7/8

M. 65/91

IN THE MATTER of the Administration
Act 1969

1431

AND

IN THE ESTATE of RICHARD LESLEY
RYAN

BETWEEN JAN LESLEY
WILLIAMSON of
Wellington, Public
Servant, and KAY DENISE
McKENZIE of Papamoa,
Home Executive.

Plaintiffs

AND PETER WILLIAM RYAN of
Porirua, Farmer.

Defendant

Hearing &
Judgment

22 July 1992

Counsel

S.T. Scott for Plaintiffs
No appearance for Defendant

ORAL JUDGMENT OF PENLINGTON J

This is an application for a grant of probate under s.19(2) of the Administration Act 1969 to two of three executors named in the testator's will, together with an application to admit a copy of that will to probate and an application for costs against the defendant.

The background to these applications is as follows. The testator, Richard Leslie Ryan, died at Tauranga on 1 June 1990. His last will was executed on 17 May 1988. Under that will he appointed the

plaintiffs, Jan Lesley Williamson of Wellington, public servant, and Kay Denise McKenzie of Papamoa, home executive, together with the defendant, Peter William Ryan of Porirua, joiner, as the executors of his will and trustees of his estate.

Following the testator's death the plaintiff, Jan Williamson, instructed Tauranga solicitors to apply for probate of the testator's will in common form. An affidavit to lead grant of probate to the three named executors was then prepared and forwarded to Jan Williamson together with the original will. She in turn then sent that affidavit together with the original will to the defendant so that the affidavit could be sworn. Neither the affidavit nor the original will have been returned either to Jan Williamson or to the solicitors for the estate in spite of numerous requests so to do.

In this situation the plaintiffs commenced an action out of this Court on 21 August 1991 seeking an order nisi under s.19(1) of the Administration Act 1969 and an order for the return of the original will and, in the alternative, an order that a copy of the will be admitted to probate and that probate be granted to the plaintiffs alone.

The statement of claim in this proceeding was served on the defendant. He took no steps. The plaintiffs then moved for an order nisi and for an order directing the return of the will. The application was served on the defendant. He did not take any steps. The application came on for hearing before Fisher J on 30 October 1991. Fisher J made an order nisi calling on the defendant to show cause why probate of the will should not be granted to the plaintiffs alone and an order directing the defendant to return the original of the deceased's will.

Following the making of the order of Fisher J there were further informal requests to the defendant to return the original will and to indicate his position. There was no response from the defendant and the original will was not returned at any time. A sealed copy of the order of Fisher J together with a copy of the present application was served on the defendant. An affidavit of service proving this service has been filed. Again, the defendant has taken no steps.

The plaintiffs' application has now come on for hearing before me today.

Section 19(1) and (2) read as follows:

"(1) In any case where any executor named in a will neglects or refuses to prove the will, or to renounce probate thereof, within 3 months from the death of the testator, the Court may, upon the application of any other executor or executors or of any persons interested in the estate or of the Public Trustee or of the Maori Trustee or of any creditor of the testator, grant an order nisi calling upon the executor who so neglects or refuses to show cause why probate of the will should not be granted to that executor alone, or with any other executor or executors or, in the alternative, why administration should not be granted to the applicant or some other person.

(2) Upon proof (whether by affidavit or otherwise) of service of the order, or upon the Court dispensing with service of the order, if the executor who is so called upon does not appear or upon cause being shown, the Court may make such order for the administration of the estate, and as to costs, as appears just."

(For commentary thereon see Garrow and Alston's Law of Wills and Administration, 5th ed. page 513 para 43.31 and Dobbie's Probate and Administration Practice 4th ed. page 166 para 239.)

On the evidence before me I am satisfied that there should be a grant of probate to the plaintiffs only. The defendant was called upon to take the oath as an executor. I infer that he refused to take office because first, he was requested to sign and swear the affidavit to lead grant of probate and, secondly, he failed to take this step and return the original will. See Re Palmer Deceased (1919) 21 GLR 82.

The next question which I must determine is whether the photocopy of the deceased's last will, which is annexed to an affidavit to lead grant of probate to the plaintiffs, can be admitted to probate. Since Jan Williamson sent the original of the testator's will to the defendant it has not been seen again. Accordingly, the will has been lost. I am satisfied on the evidence adduced before me that the original copy of the testator's last will existed at the date of his death and that the copy now placed before the Court is a true copy of that will.

Having regard to the circumstances I find that the photocopy should be admitted to probate.

I now address the last issue which relates to costs. The application of the plaintiffs in this regard is that the defendant should be ordered to pay the solicitor/client costs occasioned by these proceedings and that those costs ought be borne by the defendant's share of the deceased's residuary estate. The total solicitor/client costs generated by these proceedings amount to \$2157.47. Detailed fee notes are exhibited to the affidavit of the second named plaintiff, Kay McKenzie, which is now before me. I have considered those fee notes. The charges appear to me to be reasonable and proper in all the circumstances of the case. Under s.19(2) I have an unfettered discretion as to costs. The inaction of the defendant and his failure to reply to informal approaches and correspondence have necessitated the present proceedings. The defendant has not at any time either taken steps to renounce probate or to show cause why the order nisi should not be made absolute. Neither has he taken any other steps which would indicate or explain his position.

It is now over 2 years since the deceased died and the administration of the estate has been delayed on account of the defendant's unexplained stance. That has directly led to these proceedings. The costs would not have been incurred if the defendant had indicated his position. For these reasons I am of the opinion that it would be just if the solicitor/client costs incurred by the plaintiffs were borne by the defendant's share in the testator's residuary estate. I order accordingly.

I therefore make the following orders:

1. An order granting probate of the testator's last will and testament of 17 May 1988 to the plaintiffs, Jan Lesley Williamson of Wellington, public servant, and Kay Denise McKenzie, of Papamoa, home executive, alone.
2. An order that the photocopy of the testator's will dated 17 May 1988 which is annexed to the affidavit in support of an application to lead grant of probate severally sworn by the plaintiffs of 16 and 30 May 1991 be admitted to probate.

3. An order that costs be fixed in the sum of \$2157.47. and that these costs be paid to the plaintiffs from the defendant's share of the testator's residuary estate.



P.G.S. PENLINGTON J

Solicitors for the Plaintiffs

Holland Beckett Maltby
Tauranga.

