**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2023-404-000286**
**[2023] NZHC 2735**

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|---|---|
| UNDER | the High Court Rules 2016 |
| IN THE MATTER OF | the estate of ALAN O'DONOGHUE of Christchurch, Deceased |
| BETWEEN | RUSSELL O'DONOGHUE<br>Plaintiff |
| AND | MARC LESTER PANSOY COMIA<br>Defendant |

Hearing: 21 September 2023

Appearances: D Foster / T Andrews for the Plaintiff
D Ryken / R Grand for the Defendant

Judgment: 29 September 2023

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## JUDGMENT OF ASSOCIATE JUDGE BRITTAIN

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*This judgment was delivered by me on 29 September 2023 at 4 pm.*
*Pursuant to Rule 11.5 of the High Court Rules.*

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*Registrar/Deputy Registrar*

Solicitors / Counsel:
Thomson Wilson, Whangārei
Ryken & Associates, Auckland

## Introduction

[1] Alan O'Donoghue (the deceased) died intestate in late December 2021. He is survived by his husband, the defendant, Marc Comia.

[2] The deceased and Mr Comia married in 2016. The couple later separated but the precise date of separation is in dispute. It appears to have been some time in 2019. There is no separation order. There is a dispute regarding whether they reconciled in 2021.

[3] The deceased is not survived by any children. The deceased's mother has disclaimed any interest in the deceased's estate.

[4] On 20 September 2022, the Court granted letters of administration to Mr Comia.

[5] The plaintiff, Russell O'Donoghue, is the deceased's brother. Mr O'Donoghue claims that Mr Comia is not beneficially entitled to the deceased's estate, and therefore not entitled to be administrator, due to a settlement agreement between the deceased and Mr Comia dated 6 April 2020 (the agreement).

[6] Mr Comia contends that the agreement, as properly interpreted, does not contract out of his statutory beneficial interest in the estate that arises under s 77 of the Administration Act 1969, or alternatively, that the agreement is unenforceable because it does not satisfy the requirements of s 21F of the Property (Relationships) Act 1976 (the PRA).

[7] Mr O'Donoghue now applies, by way of summary judgment, for recall of the grant of letters of administration to Mr Comia and for a fresh grant of letters of administration to Mr O'Donoghue. Mr Comia opposes that application and applies for defendant's summary judgment sustaining the grant of letters of administration to him.

[8] The parties agree that if Mr Comia has no beneficial interest in the estate, then Mr O'Donoghue is the beneficiary and the person entitled to a grant of letters of administration.

[9] The cross-applications for summary judgment raise issues of fact and law, which I address in the following order:

(a) the jurisdiction to recall a grant of letters of administration made in common form;

(b) contracting out of a statutory beneficial interest in an intestate estate that arises under s 77 of the Administration Act;

(c) the interpretation of the agreement;

(d) the requirements of s 21F of the PRA; and

(e) the appropriate relief in this case.

**The jurisdiction to recall a grant of letters of administration in common form**

[10] A grant of letters of administration in respect of an intestate estate is governed by pt 27 of the High Court Rules 2016 (HCR). Rule 27.35 relevantly provides:

> **27.35 Order of priority for grant in case of intestacy**
>
> (1) If a person has died wholly intestate, the right to apply for letters of administration of that person's estate is determined in accordance with the order of priority set out in subclause (3).
>
> (2) Subclause (1) is subject to section 6 of the Administration Act 1969.
>
> (3) The order referred to in subclause (1) is as follows:
>
> (a) the first in priority is persons having a beneficial interest in the estate, according to the order of priority set out in subclause (4):
>
> (b) the second in priority is the Attorney-General, if he or she claims *bona vacantia* on behalf of the Crown:
>
> (c) the third in priority is a creditor of the deceased, or any person who, even though having no immediate beneficial interest in

the estate, may have a beneficial interest in the event of an accretion to it.

(4) Persons having a beneficial interest in the estate are entitled to a grant of administration in the following order of priority:

(a) the surviving spouse or civil union partner or de facto partner entitled to succeed on the intestacy, if paragraph (b) does not apply and his or her beneficial interest in the estate is not affected,—

(i) in the case of a surviving spouse, by section 12(2) of the Matrimonial Proceedings Act 1963 (as applied by section 191(3) of the Family Proceedings Act 1980); or

(ii) in the case of a surviving spouse or a surviving civil union partner, by section 26(1) of the Family Proceedings Act 1980; or

(iii) in the case of a surviving de facto partner, by section 77B of the Administration Act 1969; or

(iv) in every case, by the choice of option A under section 61 of the Property (Relationships) Act 1976:

…

(e) brothers and sisters of full or half blood, or, failing them, the issue of any such brother or sister who has died during the lifetime of the deceased:

…

[11] The surviving spouse has priority, unless one of the exceptions in r 27.35(4)(a) and (b) applies. None of the exceptions in r 27.35(4)(a) apply in this case. The exception in r 27.35(4)(b) is not relevant, it relates to succession on intestacy in the event a deceased is survived by a spouse and one or more de facto partners.

[12] Rule 27.35(2) provides that the order of priority of rights of administration prescribed in r 27.35(4) is subject to s 6 of the Administration Act:

**6 Discretion of court as to person to whom administration is granted**

(1) In granting letters of administration with or without a will annexed, or an order to administer with or without a will annexed, in respect of the estate of any deceased person or any part thereof, the court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with a will annexed may be granted to a devisee or

> legatee; and any such administration may be limited in any way the court thinks fit:
>
> provided that, subject to the provisions of subsection (2), where the deceased died wholly intestate as to his or her estate, administration shall be granted to some 1 or more persons beneficially interested in the estate of the deceased, if they make an application for the purpose.
>
> (2) Where by reason of the insolvency of the estate or other special circumstances the court thinks it necessary or expedient to do so, it may—
>
> (a) grant administration to such person or persons as it thinks expedient notwithstanding that some other person is appointed an executor or that, apart from this subsection, some other person would by law be entitled to a grant of administration:
>
> (b) grant probate to 1 or more of the executors appointed by a will, notwithstanding that some other person or persons may also be appointed as an executor or executors.
>
> (3) A grant may be made under subsection (2) notwithstanding that any person excluded from the grant would be competent to take it.
>
> (4) Before determining to exclude from any such grant any person who, apart from this section, would by law be entitled to, or be included in, the grant, and wishes to have, or to be so included in, the grant, the court shall have regard to his or her competency and solvency, his or her ability effectively to administer the estate, the rights of all persons interested in the estate, and any changes in circumstances between the making of the will (if any) and the time when the court is asked to make the grant.
>
> …

[13] In summary, the person with the highest order beneficial interest in the intestate's estate will usually be appointed administrator, except where the estate is insolvent or other special circumstances render it necessary or expedient to grant administration to some other person, notwithstanding that the person appointed does not have priority under r 27.35 of the HCR.

[14] I note that s 21 of the Administration Act also provides the Court with jurisdiction to remove an administrator where it is expedient to do so. The approach to an application under s 21 was set out by the Court of Appeal in *Tod v Tod*:[1]

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[1] *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145 at [22] citing *Farquhar v Nunns* [2013] NZHC 1670.

(a) The starting point is the Court's duty to see estates properly administered and trusts properly executed.

(b) This jurisdiction involves a large discretion which is heavily fact-dependent.

(c) The wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given consideration, but ultimately the question is as to what is expedient in the interests of the beneficiaries.

(d) Expedience is a lower threshold than necessity, and imports considerations of suitability, practicality and efficiency. Misconduct, breach of trust, dishonesty, or unfitness need not be established.

(e) Hostility as between administrators/trustees and beneficiaries is not of itself a reason for removal, but hostility will assume relevance if and when it risks prejudicing the interests of the beneficiaries.

[15] Relevantly, r 27.36 of the HCR provides:

**27.36 Justification of entitlement to grant**

(1) When application is made for a grant of letters of administration of the estate of a person who has died wholly intestate and persons other than the applicant would have (if living and competent), under rule 27.35, a priority higher than or equal to that of the applicant, the applicant—

(a) must prove to the satisfaction of the court—

(i) that those persons are dead or incompetent; or

(ii) that notice of the intended application has been given to them; or

(b) must file their consents in writing, duly verified by affidavit.

…

(3) The applicant must prove the identity and relationship with the deceased of any person who, under rule 27.35, has a priority higher than or equal to that of the applicant.

(4) If the applicant is the surviving spouse or the surviving civil union partner, the applicant must prove that at the time of the death of the deceased neither a decree of separation made under section 11 of the Matrimonial Proceedings Act 1963 nor a separation order made under Part 3 of the Family Proceedings Act 1980 was in force between the applicant and the deceased.

…

[16] An entitled person may apply without notice under r 27.4, referred to as an application in common form. The form of the without notice application is prescribed in sch 1 to the HCR, forms PR 3, 4, 5 or 6, depending on the relationship of the applicant to the deceased.

[17] Under r 27.34, the Court may recall a grant made in common form. The application for recall may be an interlocutory application in certain circumstances prescribed in r 27.34(2), none of which apply in the present case. Otherwise, the application for recall must be made in an ordinary proceeding under pt 5 of the HCR, as in this case, and the plaintiff is entitled to apply for summary judgment.

[18] An application for recall can be combined with an application in solemn form for a grant of letters of administration to an alternative administrator, as in this case. That is also an ordinary proceeding under pt 5 of the HCR, and the plaintiff is entitled to apply for summary judgment.

[19] A grant of letters of administration may be revoked where it has been obtained upon a false suggestion which obscures a defect in the title to the grant, whether the false suggestion is made fraudulently or ignorantly.[2]

[20] The principle underpinning revocation is the maintenance of the public interest in ensuring the integrity of the Court's processes in making grants of administration.[3] For example, in *Deng v Ye*,[4] the successful applicant for a grant of letters of administration had applied without notice based on her alleged standing as the deceased's wife. The applicant had failed to disclose to the Court that the deceased's capacity to marry the applicant had been disputed in a Chinese court. Palmer J recalled the grant based on the public interest in ensuring the integrity of the Court's process.[5]

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2 Halsbury's Laws of England (5th ed, 2021, online ed) vol 103 Wills and Intestacy at [851].
3 *Lee v Archer* [2012] NZHC 3551 at [26].
4 *Deng v Ye* [2018] NZHC 391, [2018] NZAR 560.
5 At [39].

**Contracting out of a statutory beneficial interest in an intestate estate that arises under s 77 of the Administration Act**

[21] There is an apparent split in High Court authority as to whether a spouse may still succeed under s 77 of the Administration Act in a situation where spouses have separated and a relationship property settlement has been executed, but the marriage has not been formally dissolved. The Act itself is silent on whether such contracting out is permissible. Cases are rare because ordinary practice sees a separating spouse execute a will on the conclusion of a relationship property settlement.

[22] In *Re Trotter*,[6] Mr and Mrs Trotter had separated eight years prior to Mr Trotter's death. The two had concluded a matrimonial property agreement after their separation but never obtained a separation order. The agreement effected a final settlement between the parties and explicitly stated that it would be binding on death. Panckhurst J granted letters of administration to Mrs Trotter, holding that as the deceased's surviving wife she had the sole beneficial interest in his estate, regardless of the property settlement.[7]

[23] In *Warrender v Warrender*,[8] this Court was faced with a similar set of facts. Mr and Mrs Warrender had separated in 1995 and shortly thereafter executed a separation agreement. The marriage was never dissolved and Mr Warrender died intestate in 2010. Mrs Warrender sought a grant of letters of administration which was opposed by Mr Warrender's siblings.

[24] Woodhouse J held that, as a matter of policy, contracting out of an interest under s 77 was permissible.[9] The Judge distinguished *Re Trotter* on the basis that there had been no argument on contracting out and no indication that Panckhurst J had been referred to s 77.[10]

[25] In support of his position on contracting out, Woodhouse J referred to Canadian authority, including the following statement from Ford JA in *Re Rist*:[11]

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6 *Re Trotter* HC Christchurch CIV-2009-409-2584, 10 May 2010.
7 At [10] and [13].
8 *Warrender v Warrender* [2013] NZHC 787, [2013] NZFLR 565.
9 At [18].
10 At [32].
11 *Re Rist* [1939] 2 DLR 644 (ABSC(AD)) at [23].

> There is I think ample authority for the proposition of law that a wife may forfeit her rights upon her spouse's intestacy by express agreement made either prior or subsequent to the marriage and indeed that an express or implied agreement may exist between the spouses excluding the survivor from any claim to the other's property on intestacy.

[26] In *Re Rist*, the contracting out clause expressly referred to contracting out of a right to succeed on an intestacy. However, in *Warrender*, Woodhouse J held that the point of principle from *Re Rist* did not turn on an express contracting out.[12]

[27] Woodhouse J found that the compromise effected by the relationship property agreement in *Warrender* was effective to contract out of s 77.[13] Notably, the agreement also included a clause providing that the agreement was binding on the death of one or both parties.

[28] Consistent with the principle in *Re Rist*, the learned authors of *Dobbie's Probate and Administration Practice* suggest that all that is required to contract out of a beneficial interest in the deceased's estate is an agreement which deprives the survivor of any interest in the deceased's property:[14]

> If the parties have signed a separation deed or relationship or matrimonial property agreement which deprives the survivor of any interest in the deceased's property … the grant will be made to the next of kin …

[29] *Baker v Storm*,[15] a case decided after *Warrender,* concerned an application by the deceased's daughter for a grant of letters of administration. Mr and Mrs Storm had separated and executed a separation agreement that contained similar provisions to those in *Re Trotter* and *Warrender*, including a clause confirming that the agreement was binding on the death of one or both parties.

[30] The daughter's application was unopposed by the surviving spouse. Whata J considered that the surviving spouse had priority to a grant of letters of administration, however, he exercised the Court's discretion under s 6 of the Act and appointed the

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12 *Warrender v Warrender*, above n 8, at [24].
13 At [46].
14 John Earles and others (eds) *Dobbie's Probate and Administration Practice* (6th ed, LexisNexis, Wellington, 2014) at [29.3.1].
15 *Baker v Storm* [2018] NZHC 742.

daughter as administrator on the basis that it was necessary and expedient.[16] It is apparent that Whata J was not referred to *Re Warrender* or *Re Rist*, as there is no mention of those cases in his judgment.

[31] The Law Commission has very recently reviewed the law on succession. It noted the inconsistency of High Court authority on this issue and commented on the undesirability of preventing contracting out:[17]

> Giving the surviving spouse entitlements under the intestacy regime is arguably inconsistent with the partners' intentions to conclude their property matters and sever the economic ties of their former relationship.

[32] The Law Commission went on to state its preliminary view as to how the issue should be addressed in a new statute governing succession law:[18]

> Our preliminary view is that an agreement between former partners on their separation that purports to be a full and final settlement of relationship property claims should be presumed to be full and final settlement of the surviving partner's claims and entitlements under the new Act unless the agreement provides otherwise.

[33] I adopt the law on contracting out as stated by Woodhouse J in *Warrender*. The issue for me to determine is whether Mr Comia has expressly or impliedly contracted out of his statutory entitlement to the deceased's estate, by entering into the agreement.

**Interpretation of the agreement**

[34] The agreement was drafted by a firm of solicitors, Webb Ross McNab Kilpatrick Limited (WRMK). It was drafted and executed after the deceased and Mr Comia had separated and settled the sale of a jointly owned residential property for which WRMK had completed the conveyancing.

[35] WRMK acted for the deceased in respect of the agreement. Mr Comia did not receive independent legal advice. WRMK encouraged Mr Comia to obtain independent legal advice on several occasions before execution of the agreement.

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16 At [10].
17 Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021) at [11.16].
18 At [11.30].

[36] The relevant provisions of the agreement are as follows:

**Background**

A. Alan and Marc were married in June 2016 but have separated (they disagree about their separation date).

B. They owned a property together at 15 Old Parua Bay Road, Whangarei. The property has been sold.

C. Alan and Marc have reached agreement about the division of the sale proceeds and want to make this agreement to record that agreed division and confirm to each other that they will bring no further claims of any sort against each other in [the] future no matter what.

**Agreed**

1. **Division of Property**

1.1 The parties acknowledge that the net sale proceeds of the property at 15 Old Parua Bay Road Whangarei are $195,416.16 (plus any interest) and are held in the trust account of WRMK Lawyers in the parties' joint names.

1.2 The parties agree that those funds shall be divided as follows:

(a) $11,000 to Marc.

(b) The balance to Alan.

1.3 The parties will do all things and sign all documents necessary to implement and give effect to the terms contained in this agreement.

2. **Final Settlement**

2.1 This agreement is in full and final settlement of all property claims each party has against the other, under any statutory enactment, in equity or in common law. They will each retain the other property and debt in their sole name and possession.

2.2 The parties disagree about whether the equal sharing regime of the Property (Relationships) Act 1976 applies to their relationship property. In particular:

(a) Marc says the relationship had a duration of more than three years and therefore he is entitled to share equally in all relationship property including the sale proceeds of the family home. By entering into this agreement he is agreeing to waive any such claim to the sale proceeds and take less than he says he is entitled to.

(b) Alan says the relationship had a duration of less than three years and therefore the sale proceeds of the family home are to be divided in accordance with the parties' respective

contributions. By entering into this agreement, he is agreeing to pay Marc more than he says Marc is entitled to.

(c) Regardless of their difference in opinion about relationship length they both agree to the same final outcome described in clause 1.2.

2.3 The parties agree this agreement does not comply with the formalities required by section 21F of the Property (Relationships) Act 1976 but consider that the amount involved does not justify the cost, time and expense of them each obtaining complete advice as to the effects and implications of this agreement. Marc acknowledges he has been encouraged by Alan to obtain independent legal advice and has elected not to do so.

2.4 They further acknowledge the ability of them both to take and obtain such advice is made more difficult, costly and time consuming by the outbreak of COVID-19 and the requirements of Alert Level 4.

2.5 They therefore both ask any Court considering this agreement to take those factors into account and to give effect to this agreement to the maximum extent possible, including to prevent either of them from commencing or continuing any sort of proceedings against the other under the Property (Relationships) Act 1976.

[37] Mr Comia left the following handwritten message, which he initialled, underneath his signature at the end of the agreement:

> P.S. I DON'T WANT TO FIGHT ANY LONGER. PLEASE LOOK AFTER YOURSELF. THANK YOU FOR EVERYTHING AND I'M SORRY. GOD BLESS AND KEEP SAFE. I AM STILL HERE IF YOU NEED SUPPORT. I LOVE YOU. GOODBYE.

[38] Counsel for Mr Comia, Mr Ryken, submitted that the compromise effected by cl 2.1 was limited to "property claims", and that those words do not encompass succession on intestacy. He further argued that there is no provision in the agreement confirming that it applies on the death of one of the parties. Therefore, *Warrender* is distinguishable, and the agreement does not amount to a contracting out of Mr Comia's statutory entitlement under s 77 of the Administration Act.

[39] Counsel for Mr O'Donoghue, Mr Foster, argued that the meaning of "property claims" in cl 2.1 of the agreement extends to all possible claims against the estate of either of the parties. Mr Foster submitted that the Court could take extrinsic evidence into account when interpreting the agreement, including:

(a) An email from the deceased to WRMK on 2 April 2020, which included the statement:

> And make it binding. No further claim.

(b) A file note, dated 3 April 2020, created by the WRMK solicitor handling the matter, which recorded a telephone discussion between the solicitor and Mr Comia:

> I confirmed that I would draft an agreement and it would say that the 11,000 is full and final. Marc agreed. He added that he would not make any claims against Alan's will either. Then he said he would like their dog if Alan dies. He wouldn't want the dog going anywhere else. I said I would pass that on.

[40] The file note was produced in evidence by Mr O'Donoghue. The solicitor that made the file note has not provided an affidavit in this proceeding. The note is inadmissible to prove the contents of the statement alleged to have been made by Mr Comia.

[41] However, I am able to interpret the agreement without resort to the extrinsic evidence referred to by Mr Foster. Recitals A–C of the agreement are sufficient to provide background. They clearly indicate that the parties were seeking a clean break.

[42] The agreement does not include a clause providing that the agreement shall continue to apply on the death of one of the parties. However, the existence of such a clause is not determinative of the parties' objective intention. The terms of the agreement must be considered in their entirety.

[43] The critical provision is cl 2.1, which provides for the "full and final settlement of all property claims each party has against each other, under any statutory enactment, in equity or in common law".

[44] As Woodhouse J noted in *Warrender,* the statutory right of succession provided by s 77 of the Administration Act is a provision dealing with the distribution of private property; the section is concerned with rights to private property.[19]

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19 *Warrender v Warrender*, above n 8, at [19].

[45] The reference in cl 2.1 to "property claims … under any statutory enactment" is sufficiently broad to encompass Mr Comia's rights under s 77, notwithstanding the absence of a clause referring to the compromise enduring on the death of one of the parties. If the agreement is binding, then Mr Comia has contracted out of his right to succession.

**The requirements of s 21F of the PRA**

[46] The PRA is a statutory code governing relationship property and it applies to the deceased and Mr Comia as spouses. Under s 21 of the PRA, spouses may contract out of provisions of the PRA, and under s 21A, spouses may settle any differences between them concerning property by agreement.

[47] Sections 21F and 21H provide:

> **21F Agreement void unless complies with certain requirements**
>
> (1) Subject to section 21H, an agreement entered into under section 21 or section 21A or section 21B is void unless the requirements set out in subsections (2) to (5) are complied with.
>
> (2) The agreement must be in writing and signed by both parties.
>
> (3) Each party to the agreement must have independent legal advice before signing the agreement.
>
> (4) The signature of each party to the agreement must be witnessed by a lawyer.
>
> (5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.
>
> **21H Court may give effect to agreement in certain circumstances**
>
> (1) Even though an agreement is void for non-compliance with a requirement of section 21F, the court may declare that the agreement has effect, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.
>
> (2) The court may make a declaration under this section in the course of any proceedings under this Act, or on application made for the purpose.

[48] The agreement does not comply with the requirements of s 21F(3)–(5). Mr Comia did not receive independent legal advice and the parties' signatures were not witnessed by a lawyer providing the required certification. The agreement is therefore prima facie void.

[49] Mr Foster submitted that there are no formalities required for a contracting out of rights under s 77 of the Administration Act, other than the usual principles applicable to enforceability of contracts, which are not in question. Mr Foster argued that the contracting out of s 77 could be severed from the relationship property provisions.

[50] I reject that submission. Clause 2.1 of the agreement only operates to effectively contract out of s 77 of the Administration Act if it is first a valid settlement of all property claims under the PRA. If the agreement is void under s 21F, it is void ab initio.[20] It would make for an absurd outcome if an agreement to "settle all property claims" was void between living parties yet binding on death.

[51] In regard to its recommendation of a new statutory presumption of contracting out of s 77 of the Administration Act (see para [32] above) the Law Commission stated:[21]

> Our preliminary view is the presumption should apply equally to a non-complying agreement that a court has ordered should be given effect.

[52] This comment by the Law Commission supports my view that if contracting out of s 77 of the Administration Act is by a relationship property agreement, then that agreement must either meet the requirements in s 21F or be validated under s 21H.

[53] Accordingly, the agreement will only amount to Mr Comia contracting out of his statutory right of succession under s 77 of the Act, if cl 2.1 of the agreement is validated under s 21H of the PRA.

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[20] Property (Relationships) Act 1976, s 21M.
[21] Law Commission, above n 17, at [11.30] note 16.

[54] In the present context, it is not open to this Court to rule on the validity of the agreement. The relevant application must be commenced in the Family Court.[22] The discretion to order validation under s 21H lies with that Court. Such an application will determine whether the division of relationship property pursuant to the agreement stands, which will have consequences for determining the assets that form part of the deceased's estate. The validity of the agreement goes to the substance of the estate and who should administer it.

[55] It appears that there are grounds for the Family Court to exercise its discretion under s 21H in favour of giving effect to the agreement, given cls 2.3–2.5 of the agreement. These clauses confirm that the parties were aware of their non-compliance with the formalities under s 21F; explain the parties' reasons for not complying; and recorded their intention that any Court considering the agreement take those factors into account to "give effect to this agreement to the maximum extent possible".

**The appropriate relief in this case**

[56] At the time that Mr Comia applied for a grant of letters of administration, he was aware that his beneficial entitlement to the estate was disputed. Mr Comia knew that Mr O'Donoghue had instructed a solicitor to act for him in respect of the estate on the basis that Mr O'Donoghue anticipated being appointed administrator.

[57] On 17 March 2022, Mr O'Donoghue's solicitor held a Zoom call with Mr Comia. During that call, the solicitor expressed her view to Mr Comia that he did not have a claim against the estate. Mr Comia plainly appreciated that Mr O'Donoghue was likely to apply for a grant of letters of administration because, on 31 March 2022, Mr Comia lodged a caveat against the issue of letters of administration.

[58] When Mr Comia applied for a grant of letters of administration to him in common form, he elected not to disclose the agreement in his affidavit even though he knew that Mr O'Donoghue was claiming priority to the estate based on the agreement.

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22 Property (Relationships) Act, s 22.

It is in the public interest that the grant of letters of administration to Mr Comia in common form be recalled, to ensure the integrity of the Court's processes.

[59] Whether Mr Comia is beneficially entitled to the estate under s 77 of the Act requires a determination of the validity of the agreement under the PRA. That application can be brought by an administrator of the deceased's estate or by Mr Comia in his capacity as a party to the agreement. There is nothing to compel Mr Comia to bring the application in the latter capacity.

[60] It is not appropriate for Mr Comia to be a party to a proceeding in the Family Court in two capacities: as administrator of the deceased's estate and as a party to the agreement in his own right. Therefore, it is necessary and expedient for a grant of letters of administration to Mr O'Donoghue.

[61] As indicated, the validity of the agreement goes to the substance of the estate. The Court has a duty to ensure that estates are properly administered. It is appropriate that Mr O'Donoghue be directed to commence a proceeding in the Family Court, seeking a declaration under s 21H as to the extent that the agreement has effect, if at all.

**Result**

[62] I make the following orders:

(a) the plaintiff's application for summary judgment is granted;

(b) the defendant's application for summary judgment is dismissed;

(c) the grant of letters of administration to the defendant is recalled;

(d) the plaintiff is appointed as administrator of the deceased's estate;

(e) the letters of administration authorise the plaintiff to:

(i) administer the deceased's estate;

(ii) demand and recover whatever debts may belong to the deceased's estate;

(iii) pay whatever debts the deceased owed, so far as the estate extends;

(f) the plaintiff is directed to apply to the Family Court for a declaration under s 21H of the PRA, in respect of the agreement;

(g) if the Family Court exercises its discretion under s 21H in favour of the defendant, declining to make a declaration that cl 2.1 of the agreement has effect, then leave is reserved to the defendant to make an application for the removal of the plaintiff as administrator of the deceased's estate under s 21 of the Administration Act, and for the appointment of the defendant in his place.

[63] My preliminary view is that the defendant should pay the plaintiff's costs on a 2B basis, however I note that the defendant has recently obtained a grant of legal aid. I make the following directions regarding costs:

(a) within **three working days** of this judgment, the defendant shall provide the plaintiff with evidence of his grant of legal aid;

(b) the plaintiff may file a memorandum seeking costs, of no more than five pages, by **13 October 23**;

(c) the defendant may file a memorandum regarding costs, of no more than five pages, by **20 October 23**;

(d) I will determine costs on the papers.

**Associate Judge Brittain**