been placed for adoption. The solution is not in eroding the traditional protection of the natural rights of parents but in providing for a time after which a parent cannot exercise these rights. A proper balance of interests can be achieved by implementing the previously mentioned provision into our Child Welfare Act, whereby the consent of a parent may be withdrawn at any time prior to the placement of the child for adoption with an applicant, but not thereafter.

—MYER RABIN*

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ADMINISTRATOR AD LITEM—TRAPS AND PITFALLS—RULE 63 OF THE CONSOLIDATED RULES OF COURT

With the increasing incidence of litigation following death, there has been a pressing requirement for provision of a sueable defendant in cases where the person who might have caused the wrong is deceased without leaving a personal representative.

The unfortunate results of certain recent cases make it worthwhile to review the relevant rules, cases and legislation. Prior to the Amendments to the Fatal Accidents Act and the Trustee Act in 1960,[1] Rule 63 of The Consolidated Rules exclusively governed the appointment of administrators to represent a deceased in an action. It provides as follows:

> Where in any action or other proceedings commenced or intended to be commenced it is made to appear that a deceased person who was interested in the matters in question, or would, if living, have been for any reason a necessary party to such action or other proceeding, has no legal personal representative, the Court or Judge may by Order direct that the action or other proceeding may be commenced or continued in the absence of any person representing the estate of the deceased person or appoint some person to represent such estate for all the purposes of the action or other proceeding notwithstanding that the estate in question may have a substantial interest in the matters in question or that there may be active duties to be performed by the person so appointed or that he may represent interests adverse to the plaintiff or that there may be embrassed in the matter an administration of the estate whereof representation is sought or that the interest of the estate affected is the entire interest in the matters in question or that the person so appointed has no control over the assets of the estate; and the order made and all subsequent proceedings shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person and such legal personal representative had been a party to the action or other proceeding and had duly appeared therein.[2]

One would think that the very wide wording of the Rule would provide a safe procedure for nearly any such situation. However, the rule has been restrictively interpreted.

In the case of *Bodnaruk* v. *C.P.R.* in the Appellate Division of the Supreme Court of Alberta,[3] John and Michael Bodnaruk sued the C.P.R., claiming *inter alia* for damages under the provisions of The Trustee Act[4] and The Fatal Accidents Act[5] in respect of the death of

1 The Fatal Accidents Act, S.A. 1960, c. 311, s. 5A; The Trustee Act, S.A. 1960, c. 111, s. 33A.
2 Rules of the Supreme Court of Alberta, O.C. 1200/62.
3 [1947] 1 W.W.R. 279.
4 The Trustee Act, R.S.A. 1942, c. 215, s. 32.
5 The Fatal Accidents Act, R.S.A. 1942, c. 125, s. 4(2).

their respective wives in a truck-train collision. Although they were described in the Statement of Claim as being the administrators of their deceased wives' estates, they were not so in fact; therefore an *ex-parte* Order was obtained from Mr. Justice Shepherd under Rule 63 which appointed the widowers to represent the estates of their deceased wives for the purpose of the action. The Appellate Division held that Rule 63 did not authorize the appointment of an Administrator *ad litem;* it also held that the claim under The Fatal Accidents Act could not be perfected after the expiry of the limitation period by deleting the description of each husband as "the Administrator", even though, had he sued the claim as an individual, it would have been properly brought.

Riley, J. commenting critically on the Bodnaruk case in *Farish and Ellison* v. *Papp*[5] advocated reform:

> It is noted that in Ontario, for example, there is an express provision in The Trustee Act, RSO, 1950, ch. 400, clarifying the position of an administrator ad litem, and under sec. 2(a) of that Act it is provided:
>
> (a) The administrator ad litem shall be deemed to be an administrator against whom an action may be brought . . .
>
> (b) Any judgment obtained by or against the administrator ad litem shall be of the same force an effect as a judgment in favour or or against the deceased person, as the case may be.
>
> It is perhaps unfortunate that similar legislation does not exist in this Province.[6]

Johnson, J. A. stated in *Joncas* v. *Pemnock*:

> As I have said, Rule 63 is wider than sec. 44 and while it may not be strictly correct that a person appointed under the Rule is not an administrator ad litem, such an administrator has very limited rights and these would not extend to commencing or carrying on an action.[7]

The foregoing cases leave little doubt that in Alberta Rule 63 will not authorize that an action be brought by or against a person appointed to represent the estate of a deceased person pursuant to the Rule.

Following the comments of Mr. Justice Riley in the *Farish* case suggesting that Alberta required remedial legislation similar to Ontario, certain amendments were passed in 1960 to The Fatal Accidents Act and The Trustee Act. These amendments provide:

The Fatal Accidents Act

> 5A. (1) Where a person dies who would have been liable in an action for damages under this Act had he continued to live, then, whether he died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default, an action may be brought and maintained or, if pending, may be continued against the executor or administrator of the deceased person.
>
> (2) Where neither probate of the Will of the deceased person mentioned in subsection (1) nor letters of administration of his estate have been granted in Alberta, a judge of the Supreme Court or a judge of the district court as the case may require, may, on the application of any party intending to bring or to continue an action under this section and on such terms and on such notice as the judge may direct, appoint an administrator ad litem of the estate of the deceased person, whereupon—
>
> (a) the administrator ad litem is an administrator against whom and by whom an action may be brought under subsection (1), and
>
> (b) a judgment in favour of or against the administrator ad litem in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator ad litem in his personal capacity.
>
> (3) This section applies whether the wrong was committed or the deceased person died before or after the commencement of this section.

6 (1957), 23 W.W.R. 690, 696.
7 (1959), 27 W.W.R. 174.

The *Trustee Act*

> 33A. (1) Where a person wronged is unable to maintain an action under section 33 because neither probate of the will of the deceased person nor letters of administration of the deceased person's estate have been granted in Alberta, a judge of the Supreme Court or a judge of the district court, as the case may require, may, on the application of the person wronged and on such terms and on such notice as he may deem proper, appoint an administrator ad litem of the estate of the deceased person, whereupon,
>
> (a) the administrator ad litem is an administrator against whom an action may be brought under section 33, and—
>
> (b) a judgment in favour of or against the administrator ad litem in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator ad litem in his personal capacity.
>
> (2) This section applies whether the wrong was committed or the deceased person died before or after the commencement of this section.

At first glance these amendments would appear to be helpful clasifications. Since both refer to an administrator *ad litem* as an "administrator against whom and by whom an action may be brought, it would appear initially that such an administrator might be appointed to commence an action as well as to defend an action. However, a closer reading of these sections makes it clear that one cannot create a plaintiff by the provisions of the amending sections; the sections are restricted to appointing an administrator *ad litem* for a wrongdoer against whom an action may be brought.

Similar amendments have been passed by most other provinces; subsequent reported decisions indicated that the Courts would interpret the legislation strictly.

The first case in point was *Samaniuk* v. *Benson,* Schroeder, J. A. stated:

> The amendment to the Trustee Act quoted above created a new right in favour of a person injured by the tortious act or omission of another and subjected the estate of a deceased tortfeasor to a heavier obligation than that which existed prior to the passing of this legislation. Accordingly, it must be strictly construed.[8]

The next case of note was the decision of the Alberta Appellate Division in *Public Trustee* v. *Larsen,*[9] where a plaintiff was sought to be created by the ex-parte order. The case reached the Appellate Division where Johnson, J. A. stated the views of the Court as follows:

> It is argued that these sections permit the appointment of an administrator ad litem to commence and carry to judgment an action under both of these Acts. While at first glance these amendments would appear to have that effect, a closer examination shows that they do not go so far. Although each amendment states the matter differently, it is only an administrator ad litem who has been appointed to represent an estate as defendant who may bring an action—in such circumstances, a counterclaim or third party proceedings. Dealing first with *The Fatal Accidents Act* in subsec. (2) the application is limited to a party intending to begin or continue an action under this section. By subsec. (1), the only person who is given a cause of action is one who has a claim against a person who dies and 'who would have been liable in an action for damages under this Act'. The opening words of subsec. (2) make it clear that it is only this person's estate for which an administrator ad litem can be appointed.
>
> It is the same under the Trustee Act. Sec. 32 of that Act gives a cause of action to an estate of a deceased person for injuries to his person or estate. By sec. 33, the one that is here amended, a wronged person (except in cases of libel and slander) has his cause of action continued against the Estate of the deceased person who has committed the wrong. The amendment to this section permits appointment of an administrator ad litem for the estate of a person who

8 [1960] O.W.N. 354.
9 (1964), 49 W.W.R. 416.

> is about to be sued 'by a wronged person'. The administrator ad litem is thus limited to acting as defendent and by these amendments he is empowered to counterclaim and serve a third-party notice, the only kind of action that a defendant may bring.

The ambit of the legislation has further been restricted with respect to conditions precedent which must be fulfilled if an administrator *ad litem* is to be secured. In the case of *Mantle* v. *McIntyre*,[10] the proposed plaintiff obtained an order under the Trustee Act of Ontario whose provisions are, for our purposes, similar to those of the Alberta Act. At the relevant time Letters Probate had been in fact taken out. In the Court of Appeal Roach, J. A. expressed the prevailing view:

> It is a statutory condition precedent to the granting of an order appointing an administrator ad litem that neither letters probate or letters of administration have theretofore been granted. Here that condition was not satisfied although it was made to appear that it had been. That order was therefore void ad initio.

A similar decision was reached in the British Columbia Court of Appeal in the case of *In Re Wong Gem Estate*[11] where it was held, in respect of legislation identical for all practical purposes to ours, that one cannot appoint an administrator ad litem where letters probate have been issued.

The most recent case on the effect of Letters Probate or Letters of Administration being granted prior to application for appointment of an administrator ad litem is *Weisbrod* v. *The Public Trustee*.[12] In this case, the Alberta Appellate Division approached the amendments more liberally. It was held that the appointment of an administrator *ad litem*, in the case where the administrator of the estate had been already discharged, was within the legislative intention of section 33a of The Trustee Act, even though section 33a does not cover that situation in express terms. The Court felt that it should remedy the omission, which was clearly due to an oversight, even at the expense of creating an exception to the general rule that the Court should not stray from the plain meaning of the words when a statute is clear and unambiguous.

Leave to appeal the *Wiesbrod* case was sought from the Supreme Court of Canada during October 1967 but was refused. The Court commented only that it was not a proper case for leave.

Despite the hopeful prosepect provided by the recent *Weisbrod* case's more lenient approach to legislation governing appointment of administrator's ad litem, procedures under either Rule 63 or the amendments to The Trustee Act and The Fatal Accidents Act, are fraught with pitfalls. Great care must be taken in applying for an order under the governing legislation.

—HOWARD L. IRVING*

10 [1965] 2 O.R. 130.
11 (1965), 54 W.W.R. 504.
12 (1967), 59 W.W.R. 96.
* Of the Alberta Bar.