

NZLR

15/10

NOT RECOMMENDED

M.158/89

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1787

UNDER Section 76 of the Trustee Act 1956

IN THE MATTER of the Estate of JANINA MELGIES late of Lower Hutt, Widow, Deceased

BETWEEN TERRENCE JOSEPH KILLALEA of Waikanae, Solicitor and LEOKADIA O'SULLIVAN of Newlands, Married Woman, the executors and trustees of the Estate of Janina Melgies Intended Plaintiffs/ Applicants

AND KRYSTINA FENNESSY STAN MELGIES ZOFIA HEATH HELENA LEPIONKA ZBYS MELGIES LEE MELGIES Intending Defendants/ Respondents

Hearing: 23 September 1993

Counsel: M. Gallaher for Mrs Fennessy
Marlo Greenhough for Mrs Lepionka
J.A.L. Gibson QC for the Trustees
Mr Z.F. Melgies in person
No appearance for Zofia Heath, Lee Melgies, Zbys Melgies

Judgment: 30 SEP 1993

JUDGMENT OF HERON J

This is an application brought pursuant to s.66 of the Trustee Act 1956. That section reads:

"(1) Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every such application shall be served upon and the hearing may be attended by, all persons interested in the application or such of them as the Court thinks expedient."

The deceased in this matter, Janina Melgies, died as long ago as 21 June 1981. She left a will leaving her estate equally between all her children. All have been served with this application. She directed that the principal asset in her estate, namely her property at Hill Road, Belmont, not be sold until her youngest daughter Lee attained the age of 21 years, and the income it generated be used to meet all outgoings and thereafter for the benefit of her two youngest daughters, Lee and Zofia. The youngest daughter Lee attained the age of 21 years in June 1988. The property was then sold to one of the beneficiaries for the sum of \$140,000, part of that beneficiary's entitlement being credited to the purchase price.

At the time of the deceased's death she was separated. The two youngest girls needed to be cared for, in particular Lee. Zofia was married shortly after her mother's death and it seems required little care and support thereafter. Lee however stayed both with Mrs O'Sullivan, one of the trustees and the deceased's sister, and with Mrs Fennessy.

In February 1988, through solicitors, Mrs Fennessy made a claim for the cost of keep for Lee, saying that from September 1983 until February 1985 she and her husband looked after Lee without any financial assistance. However she acknowledged

that the child's father contributed \$20 per week and she received the Family Benefit of \$6 per week. She discovered at that time foster parents would have been paid \$57.60 per week for the proper care and support of Lee, and she sought a shortfall from those two payments of \$31.60 per week.

On 16 January 1989 in the course of administration Mr Killalea received a letter from Lee's father, saying that he had paid Mrs Fennessy in October 1983 \$1,000 for full board for one year, and a further \$300 for special expenses. I think on my reading of the affidavits Mrs Fennessy has taken this into account. Consequently she is left with a claim which is approximately 68 weeks on my calculation at a shortfall of \$31.60 or \$2,148. This of course is on the assumption that a member of the family should be paid at that full rate. The will makes no provision for it, nor was there any agreement with the trustees. I think it is probably fair to say that the trustees would have agreed to some arrangement formally and that would have cost the estate accordingly. The beneficiaries overall would have shared in those expenses by virtue of the charge such expenses had on the estate. In my view the trustees would be justified in meeting Mrs Fennessy's claim by a sum of \$1,000. I think had arrangements been negotiated at the time a lesser rate than that suggested would have been agreed.

I think Mrs O'Sullivan is entitled to something as well, although as one of the trustees it was her responsibility to get some agreement from the co-trustee. Not only that, but both girls apparently received an equal share of \$3,800, referred to later, and that could have been used for their maintenance and support. There is no information

as to what they did with that money. Lee remained with Mrs O'Sullivan longer than she did with Mrs Fennessy. The money that Lee received was in my view money which properly could have gone to her maintenance and support. For reasons I have mentioned in relation to Mrs Fennessy a conservative calculation should be made here also. I do not think Mr Killalea would have agreed to the full rate now suggested in this family situation. Doing the best I can I think the trustees would be justified in paying her the sum of \$2,500 to reflect all those factors.

Another source of discontent is the fact that apparently the deceased died with cash of \$3,800 which remains unaccounted for in the administration. Mr Killalea was unaware of this, but Mrs O'Sullivan knew about it. No evidence was given by either of the recipients of that money, namely Zofia and Lee, as to what became of it. Mrs O'Sullivan says it was money that the girls with their mother had saved to buy a car. Lee turned 21 in June 1988, so at her mother's death was 14, when it seems unlikely that such plans might have been made so far as she was concerned in any event. Mrs Fennessy says that the money was cash found in the house after death and she understood that the cash was attached to the lining of a black coat. She thought it not surprising that this might have happened, but she regarded it as part of the estate and not to go to the two younger girls. She points to the fact that some New Zealand Government Inflation Adjusted Savings Bonds in the name of Lee as at January 1984 suggest that is where the money went. As I said earlier it could well have been money that could have gone towards their maintenance and support.

Mr Fred Melgies confirms that it was likely the \$3,800 was cash in the possession of the deceased at the time of her death. Again doing the best I can I think it is plain the money ought to have come into the estate, and it was Mrs O'Sullivan's responsibility to see that it did rather than to give it directly to the beneficiaries, even though I have no doubt that was done with the best of intentions. The only satisfactory solution is to reduce the entitlements of Zofia and Lee by that sum of \$1,900 and treat that as an interim distribution which will compensate the other beneficiaries accordingly.

There was a muted complaint about the disappearance of certain encyclopaedias. I have read Mr Killalea's explanation for this and the general understanding I had from Mr Gibson at the hearing was that the likely loss of those in money terms is insignificant, and there is no material on which I can attach liability to any person in that regard.

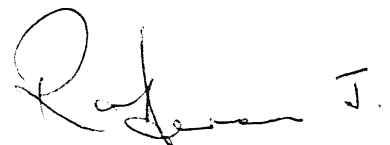
Finally there is a complaint that the house property was not let soon enough after the death of the deceased. The allegation is not specifically addressed by either trustee. The trust account records show rent was first received in November 1982 for a period commencing on my calculation in early September 1982. The rental appears to be at the rate of \$140 per month. The deceased died on 21 June 1981 and the property appears to have been let by September 1982. This suggests a rental of some \$32 per week based on the monthly rentals that followed of \$140. I have no details as to why there was a delay in the letting of the family home. The matter has been squarely raised by the beneficiaries and in my view not answered by the trustees, except in general terms giving

explanations that the income from the estate was required to meet mortgage arrears. It does appear that Mr Frank Melgies was called on to meet outgoings due to this lack of funds, and he has now been repaid.

Trustees must have some time to obtain probate and call in the assets. Unfortunately the house could not be immediately sold as the executrix had directed it not be sold until Lee attained the age of 21 years. There may be some significance in the fact the property was finally rented to a member of the family and not to a third party, suggesting it may have been difficult to let. To inquire into that matter some 13 years later is a virtual impossibility and I doubt if it would prove particularly fruitful. It appears in the order of \$1,000 in allegedly lost rental might be involved when one takes the necessary time for probate to be obtained before the trustees may deal with the estate, and the delays in finding a tenant and the like. I do not intend to attach any liability to the trustees on the information I have, nor necessarily to exonerate them. I simply review the information as I have it, and any distribution must be subject to that qualification.

In my view it would be in order for the trustees to finally distribute the estate in accordance with the will, making those allowances and adjustments I have referred to.

No interest is to be paid on any of the claims that have been acknowledged in this case.



Solicitors

Bate Hallett, Hastings for Mrs Fennessy

Robert Logan, Solicitor, Wellington for Mrs
Lepionka

T.J. Killalea, Solicitor, Waikanae for the Trustees

M.158/89
IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

UNDER Section 76 of the
Trustee Act 1956

IN THE MATTER of the Estate of
JANINA MELGIES late of
Lower Hutt, Widow
Deceased

BETWEEN TERRENCE JOSEPH
KILLALEA of Waikanae,
Solicitor and LEOKADI
O'SULLIVAN of Newland
Married Woman, the
executors and trustee
of the Estate of
JANINA MELGIES
Intended Plaintiffs/
Applicants

AND KRYSTINA FENESSY
STAN MELGIES
ZOFIA HEATH
HELENA LEPIONKA
ZBYS MELGIES
LEE MELGIES
Intending Defendants/
Respondents

JUDGMENT OF HERON J
