IN THE HIGH COURT OF NEW ZEALAND 2/7 M 61/91
WHANGAREI REGISTRY

IN THE ESTATE of **STANISLAW JAN MELGIES**

BETWEEN ZBIGNIEW FRANCISZEK MELGIES, KRYSTYNA JANINA FENNESSY, and ZOFIA MARIA HEATH

Plaintiffs

933

AND STANISLAW JANUSE MELGIES and STEVE ANTHONY WONG

Defendants

NOT RECOMMENDED

Hearing: 14 June 1993

Counsel: AP Walsh for Plaintiff
W Peters for SJ Melgies
BC Allen for SA Wong

Judgment: 14 June 1993

ORAL JUDGMENT OF FISHER J

This is a contest under the Family Protection Act between four of the deceased's six children. One child received virtually the whole of the estate. Three of the other children claim a greater share.

The deceased was married once and from that marriage had six children. The six children consisted of the three plaintiffs, Krystyna, Zbigniew and Zofia together with their principal competitor in these proceedings, Stanislaw, and two other children who have taken no part in the proceedings, Halina and Lee. Krystyna was born on 23 April 1948, Stanislaw on 28 July 1952, Zbigniew on 22 October 1954 and Zofia on 24 April 1963.

The deceased and his wife, the mother of those six children, separated in 1968 having raised their children to that point in Wellington. The deceased's wife stayed on in the

matrimonial home with the three youngest children while the deceased and Stanislaw moved to another part of Wellington. Stanislaw was then aged 16 years. He shared with the deceased some difficult times while the deceased re-established himself. That continued for a period of about three years and then Stanislaw left the deceased to make his own way in the world. Two years later Krystyna married and moved to a new home in Hastings where she has remained with her husband ever since. Over the next 10 years they had five children. During that period until 1973 Krystyna had minimal contact with the deceased. The same was largely true of the other children in the family apart from Stanislaw.

The deceased continued to work in Wellington until he retired in 1980. He then moved initially to Waitarere and then to Levin nearby. From about the time that Krystyna moved to Hastings, she began to have more contact with the deceased as was also the case with Zbigniew although not Zofia. Relations between the deceased and Stanislaw remained relatively close throughout. In particular Stanislaw assisted his father from time to time and visited him more regularly than the others.

Then in 1986 Stanislaw moved with his wife to Whangarei. He was followed there a couple of years later by the deceased. He was attracted by the warmer climate but was no doubt influenced also by the presence there of the child to whom he was closest in the family. Upon arrival in Whangarei the deceased spent about two months living in Stanislaw's home before acquiring his own home in Whangarei. Over the last two years of so of his life the deceased had regular contact in Whangarei with Stanislaw.

The deceased died on 22 May 1990. He left a net estate which, after allowance for a further modest deduction for costs and setting those off against some chattels, can be given the approximate net value of $74,000. By his will the deceased left all of this to his son Stanislaw except for a legacy of $100 each to his five remaining children. Proceedings are now brought by Zbigniew, Krystyna and Zofia claiming a greater share.

The principles upon which a Court determines a claim under the Family Protection Act are summarised in the judgment of the Court of Appeal delivered by Cook J as he then was in ***Little v Angus*** [1981] 1 NZLR 126 at 127 as follows:

> "The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and if so what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on existence and extent of moral duty. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death. But in deciding how a breach should be remedied regard is had to late events."

Applying that broad approach to this case it will be necessary to consider the position of each of the three claimants in turn, the competing moral claim of Stanislaw, the deceased's reasons, and other discretionary factors.

Beginning first with Zbigniew, he was 14 years of age when his father left home in what was evidently an embittered separation. There is ample evidence to demonstrate that the deceased's wife was strongly hostile towards the deceased for the remainder of her life and discouraged contact between her children and the deceased. The children left at home are not to be blamed for that. When Zbigniew left home and became independent it appears that he would visit the deceased at his home or in Wellington on average several times a year. When the deceased went to Whangarei for the last two years, Zbigniew had no real contact with the deceased at all. That was contributed to by Zbigniew's matrimonial problems and bearing in mind the preceding 14 years it must be viewed with a sense proportion. Zbigniew's personal circumstances as at the date of the deceased's death and now could appropriately be described as modestly comfortable. He and his wife own their own home in which they have an equity of $57,000. He has a successful taxi business and has the usual chattels and adequate income from that source. He has one child. He is therefore modestly situated but could not be described as wealthy.

The second plaintiff Krystyna had considerable contact with the deceased, especially after she moved to Hastings, with correspondence and visits in both directions. Given her young family of five children and modest circumstances, it is scarcely surprising that Krystyna was not in a position to visit the deceased in Whangarei but she did make the effort to keep up contact with gifts, cards, and letters.

In Krystyna's case it is plain that in 1988 the deceased saw her conduct in making a claim against her own mother's estate as reprehensible and as a justification for effectively shutting her out of his life and out of his will. Having examined the basis upon which she made this claim for additional reimbursement with respect to the support she provided for the youngest child Lee for a period, I consider that the deceased's attitude to this dispute was unjustified. He obviously misunderstood the basis upon which the claim was made. He thought it was unnecessary because of his own financial contribution but having examined the records I am satisfied that it was a perfectly legitimate claim for Krystyna to make. That is not intended as in any way binding upon the estate of Krystyna's mother, the personal representatives. They are not parties to these proceedings and therefore their side of that particular issue has not been heard before me. But for the purpose of this Family Protection claim I exonerate Krystyna from inappropriate conduct. In short Krystyna's relationship

with the deceased was one in which she did everything which could reasonably have been expected of her by way of maintaining contact and providing moral support.

Krystyna's personal circumstances are that she and her husband own their own matrimonial home in Hastings where they too have an equity of $50,000 in the property. They have some modest savings but it is obvious that all of that and more will be needed to raise and educate their five children. Her husband has a comfortable salary with fringe benefits but that is not to be automatically equated with the wealth of Krystyna herself. Her wage is only $100 per week gross for part time work as a typist. Overall I would describe her circumstances as a little more modest than those of Zbigniew bearing in mind especially her five children and their needs.

The third claimant is Zofia. She was only five years old when her parents separated and having regard to the attitude of her mother there could be no possible criticism of her lack of contact with the deceased until her mother died in 1981. Shortly after that the deceased made an overture to Zofia and her younger sister proposing that contact between them be renewed. It is unfortunate that Zofia spurned that overture and that over the next 12 years she made no attempt to contact the deceased other than on two purely formal or functional occasions. One was at her mother's funeral. The other was a visit when it was necessary for her to seek the deceased's consent to her marriage. I would not wish to be overly critical of Zofia bearing in mind the attitude which no doubt was inculcated by her mother but there is little doubt in my mind that she could have done a great deal more than she did to extend the olive branch to her father. Zofia's situation is that she is married and has one child. She and her husband have a more valuable house in Wellington with an equity of about $100,000 and the usual ancillary assets such as two motor vehicles and sundry chattels. She has full time work in a bank and her husband is a real estate salesman.

Those then are the three claims against this rather modest estate. One must then bear in mind that the small size of the estate meant that the deceased had to bear in mind the competing claims upon his bounty and did not have the luxury of making gifts to his children to whatever value he might have preferred. The claim of Stanislaw was undoubtedly a strong one. He lived for the first three years with the deceased and there is no evidence to gainsay his account in which from the age of 16 to 19 years he provided moral and physical support, and even to a degree financial support, for his father. He kept up some degree of contact with his father throughout the deceased's life and this was at its closest in the last two years in Whangarei. Stanislaw too owns a house along with his wife in Whangarei with an equity of about $33,000 and a motor car. He is unemployed. He has two children. So he

comes to the case not only with the benefit of the will in his favour but with a modestly stronger claim in any event against the deceased's bounty.

Ones turns then to the deceased's own reasons for effectively cutting out five of his six children from his estate. The starting point is to assume that the deceased is better placed than anybody to decide where his moral duty lies. Accordingly great weight must be given to his reasons unless they are shown to be inappropriate ones. Here the deceased said this in his will:

> "I direct that I have made no further provision for my children referred to in paragraph 3 of this my Will since I have had very little to do with them since their mother and I separated. I would further add that in that time they have made little or no effort to keep in contact with me."

The first observation one must make here is that of the two reasons given in the will itself the first could not possibly be a reason for disinheriting any of the children. The fact that he had had very little to do with them since the separation, at least in the sense that he had not chosen to insist upon legal access while they were children and social relationships while they were older, was to a large degree a voluntary act on his part. That could in no way disqualify any of the children.

The second reason judged from the children's point of view is more relevant. He alleges that they made little or no effort to keep in contact with him. I have little doubt that that comment is justified so far as Zofia is concerned. So far as Zbigniew and Krystyna are concerned it is a question of degree. My impression is that of those two, Krystyna had slightly more contact that Zbigniew, and notwithstanding unjustified hostility, she kept up her efforts while he was in Whangarei. Overall it would be wrong to say that either made little or no effort to keep in contact.

In fairness to all three claimants it must be reiterated that they should not be the scapegoats for the bitterness between the deceased and his former wife. One suspects that that has crept into his attitude towards them. For their part it may not always have been easy, particularly in the case of Zofia, to rid themselves of an image of the deceased which would have been created in their formative years by their mother.

That the deceased was less than fair and rational in his dealings with the children seems to be corroborated by his whole approach to wills. He had made numerous wills in the past in which his estate was to be divided in equal shares among all six. It was only his very last will, a year or two before he died, which substituted Stanislaw as effectively the sole beneficiary. I accept the submission of Mr Peters that to some extent that was logical

having regard to the greater contact he was receiving at that point but it is difficult to believe that there was such a dramatic change in circumstances, either in the form of extra assistance from Whangarei or lack of it from elsewhere, to justify such a volte face on his part.

That the deceased was easily offended, and that his approach to wills verged upon the capricious, seems to be reinforced by his rather dramatic final instructions to his solicitor a few days before he died. It emerges that a matter of days before the deceased's death he decided that Stanislaw too was to be totally excluded from his will. The deceased's grandchildren, being the children of Stanislaw, were to be substituted. As it happens, the deceased died before that could be implemented but it is ironic to speculate that had the deceased survived a week or two longer, Stanislaw would probably have joined his brother and sisters as a plaintiff under the Family Protection Act.

Accordingly I do not see this as a case where the deceased's reasons are sufficiently impressive that they should inhibit the Court from intervening under the Family Protection Act.

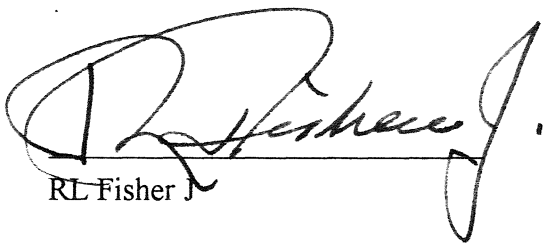
The final step is to compare the competing claims of the four children. I say the four children because although there are grandchildren with potential claims I am prepared to assume that the special circumstances justifying a claim by them in lieu of claims by their parents have not been made out in this case. While I am on that subject I must say that the directions for representation in this case were defective. Instead of ordering that each child of the deceased would represent the children of that child and that service upon the deceased's children would accordingly be sufficient, the directions in this case dealt exclusively with the subject of service. There is a difference between a direction that an adult represent others together with the ancillary direction that the adult receive service on their behalf, and a simple direction that an adult be served without any Court imposed obligations as to representation. The present direction is one to be avoided in future cases although it is not of sufficient moment to warrant deferring judgment in this case. I will assume that each of the adult children has discharged the representation obligations which ought to have been formally imposed by the Court at the time that directions were given as to service. This assumes that thought has been given to the circumstances in which a grandchild might have a direct claim of his or her own under the Act.

I return then to a comparison between the four children competing in this case. There remains the presumption against disturbing the will and that is strengthened by Stanislaw's greater contact with the deceased and contribution to his material and

psychological welfare. There are also the more necessitous circumstances of Stanislaw. All of that justifies retention of the lion's share in the estate by Stanislaw but it does not justify disinheriting the other three children entirely. In my view there was a breach of moral duty on the part of the testator.

As between the three plaintiffs, Krystyna made the slightly greater effort in maintaining contact with the deceased and had and has a slightly greater need than the other two. Zofia has the disadvantage that she made no real effort to respond to the deceased's own advances to her.

In the result there will be awarded to the three plaintiffs under the Family Protection Act in the case of Krystyna the sum of $12,000, in the case of Zbigniew $9,000 and in the case of Zofia $3,000 but each of the three plaintiffs, with one qualification, is to bear his or her own costs. The only costs to be paid from the residuary estate will be the full travel and witness expenses of Krystyna and Zbigniew in attending this hearing. The pecuniary awards which I have made will be in lieu of the existing bequests of $100 each plaintiff.



RL Fisher J

Solicitors for Plaintiffs: Bate Hallett, HASTINGS
Solicitors for Defendant Melgies: Thomson Wilson, WHANGAREI
Solicitors for Defendant Wong: Webb Ross Johnson, WHANGAREI