

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

**CIV 2009-441-0608**

BETWEEN	THE SOLICITOR-GENERAL OF NEW ZEALAND Applicant
AND	DELWYN ISMALIA KEEFE First Respondent
AND	THE EXECUTORS OF THE ESTATE OF JAN MIENSE MOLENAAR Second Respondent

Hearing: 14 December 2009

Counsel: I P Squire for First Respondent in support  
N M Graham for Applicant to oppose

Judgment: 18 December 2009

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**JUDGMENT OF WILD J**

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**Introduction**

[1] For decision are two applications, pursuant to s 42(2) Proceeds of Crime Act 1991, for variation of the restraining order made by Potter J on 24 September. The Judge ordered that the house property and cash comprising the estate of the late Mr Jan Molenaar are not to be disposed of or otherwise dealt with, and that the Official Assignee was to take custody and control of that property.

[2] Both applications are by the first respondent, Ms Keefe, who was Mr Molenaar's de facto partner. The first, dated 17 November but not filed until 27 November, applies for orders that:

- a) \$10,611.57 be paid to counsel for Ms Keefe, Mr J G Krebs, to cover fees he has charged Ms Keefe for his services as her counsel in respect of the restraining order, disputed facts hearing, and the scheduled Coroner's inquiry into Mr Molenaar's death.
- b) \$17,500 be reserved for payment of Mr Krebs' fees for the sentencing of Ms Keefe on 15 December, the Coroner's inquest hearing, and the Solicitor's foreshadowed application for confiscation pursuant to the Proceeds of Crime Act 1991.

[3] The second application, dated 23 November and filed the following day, seeks orders that:

- a) \$11,263.63 be paid to Gifford Devine, Solicitors, for fees they have charged. That sum comprises:
  - i) 24 September 2009: An account for \$3,931.53, addressed to "The Administrator of the Estate J M Molenaar", for "Estate Administration": ascertaining its assets and liabilities; search under the Status of Children Act 1969; search for a will; applying for letters of administration; dealing with a caveat entered by Maddison Molenaar etc.
  - ii) 25 September 2009: An account for \$2,591.57 addressed to Ms Keefe headed "Property Issues": for professional services between 3 July and 27 August 2009 relating to Ms Keefe's position in relation to Mr Molenaar's estate, in particular in relation to choosing her option under s 61 Property (Relationships) Act 1976.
  - iii) 20 November 2009. An account for \$4,740.53, also addressed to "The Administrator Estate, J. M. Molenaar", for "Estate Administration from 25 September 2009 to date (i.e. to 20 November); up-dating the Estate's assets and liabilities;

dealing further with the grant of letters of administration;  
dealing with Kiwibank over the late Mr Molenaar's bank  
accounts; preparing the application for variation of the  
restraining order etc.

b) The sum of \$7,143.20 be paid to Gifford Devine, "on account of  
accounts for payment for the Estate of J M Molenaar". That figure  
comprises:

- i) 1 June 2009. Clive Glass Ltd – re-glazing house at 41 Chaucer  
Road, Napier, \$3,272.95.
- ii) 28 May 2009. Terry Longley & Son – balance of funeral  
account, \$1,777.31\*.
- iii) 22 July 2009. Contact Electricity – electric power to 41  
Chaucer Road (period of supply not stated), \$152.05\*.
- iv) (Date obliterated). Napier City Council Rates instalment 1 –  
41 Chaucer Road, Napier, \$337.18\*.
- v) (Various dates). Ms Keefe - reimbursement of expenses paid  
by her in respect of the funeral of Mr Molenaar, and the wake,  
\$794.62\*.
- vi) 18 November 2009. NCC rates instalment 2 – 41 Chaucer  
Road, \$375.30.
- vii) 29 January 2010 (due date). Hawkes Bay Regional Council –  
rates – 41 Chaucer Road, \$97.38.
- viii) (Date not provided). Telecom – telephone at 41 Chaucer  
Road, \$336.41.

Total: \$7,143.20

- \* Indicates, by way of reimbursement to Ms Keefe, who has paid those amounts.

## **Background**

[4] Mr Molenaar died on 8 May. He shot himself dead inside his home at 41 Chaucer Road in Napier while it was surrounded by armed Police Officers, after he had shot dead Constable Snee, shot one of his neighbours injuring him, and fired a number of shots at neighbouring properties.

[5] Mr Molenaar died intestate.

[6] Mr Molenaar had, for the previous 11 years approximately, lived at 41 Chaucer Road in a de facto relationship with Ms Keefe.

[7] On 28 August Ms Keefe applied, pursuant to s 61 Administration Act 1969, for an order nisi for the grant of letters of administration of Mr Molenaar's estate.

[8] On 3 September, Mr Maddison Molenaar lodged a caveat against the grant to Ms Keefe of letters of administration of Mr Molenaar's estate. Mr Maddison Molenaar asserted he was Mr Jan Molenaar's son.

[9] On 30 September, Mr Registrar Bowles, acting under r 27.14 High Court Rules, ordered:

... unless the said caveator shows cause to the High Court at the sitting thereof to be held at the High Court at Napier on the 19<sup>th</sup> day of November 2009 at 2.15pm why this order should not be made absolute letters of administration of the estate of the deceased be granted to **DELWYN ISMALIA KEEFE** the surviving de facto partner of the deceased.

[10] On 19 November Andrews J heard the caveator's objection to the grant of letters of administration to Ms Keefe. The caveator was represented. My understanding is that the caveator's stance was that the Public Trustee should be appointed administrator, I assume on the ground that he is a neutral party who would fairly and objectively administer the Estate, as between himself and Ms Keefe. Ms

Keefe challenged Mr Maddison Molenaar's paternity. Counsel informed me that DNA blood tests based on samples of the blood of Mr Jan Molenaar (the Police took and are holding samples), Mr Maddison Molenaar, and Mr Maddison Molenaar's mother are in hand. Andrews J reserved her decision. Counsel told me (and I confess to finding this a little difficult to follow) that the Judge indicated her decision would not depend on the outcome of the paternity tests. I have ascertained from Andrews J that she will not be in a position to give her decision until next year.

### **Value of the Estate**

[11] The main assets of Mr Jan Molenaar's Estate comprise:

- a) His house property at 41 Chaucer Road, Napier, currently valued at \$215,000 (but which may fetch a lower price because of the events described in [4]).
- b) Bank accounts totalling approximately \$74,000.
- c) Cash located in his home: NZD10,000; AUD5,000.

In total approximately \$305,000.

### **Distribution upon an intestacy**

[12] The entitlement to Mr Molenaar's intestate Estate is as follows:

- a) Chattels to Ms Keefe.
- b) The sum of \$121,000 to Ms Keefe.
- c) Of the balance, two-thirds to Mr Maddison Molenaar; one-third to Ms Keefe. That entitlement reflects Ms Keefe's choice of option B pursuant to s 61 Property (Relationships) Act 1976 i.e. to take her entitlement on the intestacy of Mr Molenaar, and not whatever

entitlement she has under the Property (Relationships) Act. It assumes also that Mr Maddison Molenaar proves that he is Mr Molenaar's son.

### **Submissions for the Solicitor**

[13] The following summarises the Solicitor's attitude to the two variation applications, as Ms Graham outlined it:

- a) The fees claimed for administering the Estate, and the expenses incurred for the benefit of the Estate, are properly met out of the Estate. However, as no-one is yet entitled to administer the Estate, those fees and expenses cannot presently be properly claimed by or paid to the Estate. These fees and expenses comprise those listed in:
  - [3]a) i) and iii).
  - [3]b) i), ii), iv), v), vi) and vii).
- b) The fees claimed for legal services provided to Ms Keefe personally are not an Estate expense, and are not properly claimable by or payable to the Estate. These are the fees in [2] a) and b) and [3]a) ii).
- c) The expenses in respect of utility bills for electric power and telephone to 41 Chaucer Road are not a proper Estate expense. They should be paid by Ms Keefe, who used those services. In this category are the accounts in the [3]b) iii) and viii).
- d) Ms Keefe has not yet established any entitlement to the Estate, so her application for payment of the monies referred to in b) is premature.
- e) Ms Keefe anyway is not within s 42(2)(c) Proceeds of Crime Act ("the person's reasonable expenses in defending any criminal proceedings"), as she is not asserting her innocence. In *Solicitor-*

*General v Nathan* HC Auckland M483-IM99, 12 February 2001,  
Chambers J held:

[21] It is fundamental to the exercise of the discretion under s 42(2) that the offender is asserting ... her innocence and that the property in question belongs to ... her and was legitimately obtained. ...

Ms Keefe pleaded guilty to selling cannabis from the 41 Chaucer Road property over a period of five years. (I can now add that on 15 December I sentenced Ms Keefe to 2 years 3 months imprisonment.)

- f) Ms Keefe's claimed fees and expenses are anyway not within the s 42(2)(c) exception relied upon. Most of them were not incurred in the course of "defending any criminal proceedings". Ms Keefe pleaded guilty. She consented to the Solicitor's application for a restraining order. The Coroner's inquest is not a criminal proceeding which is being defended. The Gifford Devine invoice [3]a) ii) relates to civil matters.
- g) Ms Keefe's application for her fees and expenses is properly adjourned to be heard at the same time as the application for forfeiture the Solicitor will now be bringing pursuant to the Proceeds of Crime Act.

## **Decision**

[14] I accept some, but not all, of the Solicitor's points. As to a), I do not accept that Ms Keefe is not presently entitled to administer the Estate J M Molenaar. Section 61 Administration Act 1969 is opaque and bereft of helpful authority. I interpret the effect of "an order *nisi* for the grant of administration to the person applying" (s 61(a)(ii)) to be that that person is appointed administrator unless the order *nisi* is discharged or the Court orders that the application for administration be made in solemn form (s 61(d)(i) and (ii)). Bryan A Garner (ed) *Black's Law Dictionary* (9<sup>th</sup> ed, Thomas Reuters, St Paul, 2009) at 1144 contains this definition:

*nisi* (Of a court's ex parte ruling or grant of relief) having validity unless the adversely affected party appears and shows cause why it should be withdrawn ...

[15] That definition suggests the order *nisi* is effective unless it is set aside. That must mean, effective from the time it is made. If an order *nisi* is of no effect, it is difficult to see the point of making it. Why not leave the whole question of whether a grant of letters of administration should be made, and if so to whom, to (in this case) Andrews J on 19 November? Certainly, the order *nisi* is not an 'absolute' one at present. But, again, *Black's* definition of the word 'absolute' lends further support to the view that the order *nisi* was effective to grant letters of administration to Ms Keefe unless (in practical terms) Andrews J otherwise orders:

**absolute** 1. Free from restriction, qualification, or condition<absolute ownership>. 2. Conclusive and not liable to revision <absolute delivery>.  
...

Thus, unless Andrews J otherwise orders, Ms Keefe becomes 'absolutely' (i.e. free from the caveat) the administrator of Mr Molenaar's Estate.

[16] In practical terms, I consider Ms Keefe's duty since the order *nisi* was made has been to gather in and protect the Estate's assets. That task, of course, is subject to the restraining order which placed the Estate's assets under the control of the Official Assignee.

[17] I accept the Solicitor's points b) and c), but not his d). Subject to any order this Court may make confiscating the Estate's assets in whole or in part, there can be no sensible dispute as to Ms Keefe's entitlement to Mr Molenaar's intestate estate, as I have set it out in [12]. The position here is factually quite different from that in *Solicitor-General v De Bruin* HC Auckland, CIV 2002-404-3302, 22 July 2005, Venning J, which Ms Graham relied on.

[18] I accept the Solicitor's points e) and f), but I am prepared to entertain Ms Keefe's application as one brought under s 42(2)(a) (insofar as it applies) and (e):

(a) The reasonable living expenses of the person and the person's dependants, if any:

...



- (e) Any other expense allowed by the Court.

[19] In summary, my views are:

- a) Ms Keefe has properly incurred expense in applying for letters of administration of Mr Molenaar's Estate and she currently has powers of administration. The administration expenses, and the expenses incurred by the Estate, should be paid to her as administrator. Arguably, the Solicitor could not apply for confiscation (or at least could not have his application for confiscation heard), unless and until an administrator was appointed.
- b) Mr Molenaar's Estate is valued at approximately \$300,000. Subject to confiscation, Ms Keefe is entitled to approximately \$180,000 (\$121,000 + \$60,000). The payments Ms Keefe seeks in her personal capacity amount to approximately \$15,000. They are modest compared to her entitlement to the Estate. Further, with one exception, none of these personal expenses was other than appropriately incurred. The one exception is the legal expenditure she outlaid in disputing the facts for the purposes of sentencing. I made my views about that clear in what I said to Ms Keefe when I sentenced her on 15 December. However, I do not see that the lack of merit in disputing the facts in the way she did is a reason for disallowing her the legal expense she incurred.

[20] I give effect to my views by varying the restraining order by directing that the Official Assignee is to pay, as soon as practicable, the following amounts:

- a) \$10,611.57 to Mr J G Krebs. This is the sum referred to in [2]a). I allow this expense pursuant to s 42(2)(e). The disputed facts hearing arguably also comes within s 42(2)(c).
- b) The sum of \$11,263.63 to Gifford Devine. This is the sum mentioned in [3]a). Gifford Devine is to treat \$8,672.06 of this sum as expenses of the administration of the Estate J M Molenaar, and \$2,591.57 as a

sum to be debited to Ms Keefe, in her capacity as a person entitled to the intestate estate in accordance with the statutory trusts. I allow all these expenses pursuant to s 42(2)(e).

- c) The sum of \$7,143.20 to Gifford Devine. This is the sum detailed in [3]b). Gifford Devine is to treat \$6,654.74 of this sum as expenses incurred by the Estate J M Molenaar, and the balance of \$488.46 as expenses to be debited to Ms Keefe on the basis outlined in b). I allow this expense, also, pursuant to s 42(2)(e).

[21] I decline Ms Keefe's application for the reservation of \$17,500 to cover Mr Krebs' fees yet to be rendered to her, in respect of her sentencing on 15 December, the Coroner's inquest and the Solicitor's foreshadowed application for confiscation. I reserve leave to Ms Keefe to apply for a further variation(s) of the restraining order in respect of these matters. Payment of Mr Krebs' proper fees for representing Ms Keefe at her sentencing seems proper. So too does payment for proper representation of Ms Keefe (both qua administrator – if that is her status by then – and in her personal capacity) when the Solicitor's application for confiscation is heard. I am unsure as to the appropriateness of Ms Keefe incurring legal expense for representation at the Coroner's inquest hearing. I assume Mr Krebs has posed to himself the questions: is it necessary, or would it be helpful, for Ms Keefe to be represented at that hearing?

### **Costs**

[22] No costs were sought in respect of the applications, and I therefore make no order.

Solicitors:  
Crown Solicitor, Napier for the Applicant