Frances

A.12/76

IN THE SUPREME COURT OF NEW ZEALAND
MASTERTON REGISTRY

BETWEEN RHONA RENYL NGATIAWA FRASER of Kaitoke, Upper Hutt, Spinster

Plaintiff

AND SOUTH BRITISH GUARDIAN TRUST COMPANY LIMITED a duly incorporated company having its registered office at Auckland (as Administrator of the Estate of Elizabeth Isabel Fraser late of Carterton, Widow, Deceased)

Defendant

Action pursuant to The Law Reform (Testamentary Promises) Act 1949

Hearing: 31 May 1979

Counsel: K.R. Robinson for Plaintiff
D.L. Mathieson and G.A. Kilpatrick for John Alexander Fraser
R. Pitchforth for Defendant

Judgment: 12 July 1979

JUDGMENT OF O'REGAN J.

The defendant is the administrator of the estate of Elizabeth Isabel Fraser late of Carterton, Widow (hereinafter referred to as "the deceased") who died intestate on 21 December 1974. The nett value of her estate is $19,205. The deceased married the plaintiff's father in 1959. He died in 1967. He was a first cousin of the deceased. Accordingly, the plaintiff was both a blood relation and a step-child of the deceased.

At all times material to these proceedings the deceased lived at Carterton in a property belonging to her late husband's estate and in which she held a life interest. The home was set in some three acres of ground which were laid out in garden and orchard. After she married some members of the husband's family lived in the family home, but for the last few years of their lives together the deceased and her husband had the property to themselves.

In 1959, shortly before her father remarried, the plaintiff left the family home and settled at Kaitoke. She still lives there. She is in employment and also runs a small pony stud. She tends to the property herself and is obviously a resourceful woman. She has done fencing, scrub cutting, spraying and is adept with farm and other tools. She is a person who can put her hand to most things which require doing about a property.

On 7 July 1930, the deceased then a single woman, had a son John Robert. If he was living at the date of her death he takes the whole estate upon the intestacy. Little is known of him, save that at an early age he was placed in a foster home. There is nothing to show that there was any society between him and his mother during her lifetime. Despite considerable efforts by the defendant he cannot presently be traced. The defendant had recourse to s.76 of the Trustee Act 1956. In the first instance, it had recourse to subs.1 of that section. It gave the Court what information it had obtained concerning him and sought directions as towhat advertisements should be published. Directions were given and complied with but they were unavailing. It next sought an order under subs.3 but no order was made. Jeffries J. adjourned the appli-

cation to await the result of these proceedings.

Mr Pitchforth arranged to have that application called at the commencement of the hearing of this case and asked for an order. I now have had an opportunity of reading the several affidavits. The defendant has provided information that he was seen in Auckland since the date of death of the deceased by a daughter of his foster parents. For this and indeed other reasons I am not satisfied that an order should be made until certain further steps are taken and I have just given directions as to such.

Service upon the son was taken care of by an order made on 23 July 1976 directing service upon the defendant both as administrator of the estate of the deceased and as representing all persons beneficially interested in the estate. Subsequently on 7 February 1978 when an up-to-date affidavit as to the inquiries then made for the son showed that he had not been located, service was ordered upon John Alexander Fraser and Elsie Fraser, the surviving brother and sister of the deceased who take on the intestacy if the son was not living at the date of death of the deceased or an order in respect of him is ultimately made pursuant to subs.3 of s.76 of the Trustee Act 1956.

Both the brother and sister filed statements of defence. Miss Elsie Fraser did not appear. Her solicitors notified the plaintiff's solicitors in writing that because of her serious ill-health she had decided to take no further part in the proceedings. Mr J.A. Fraser was represented by counsel and himself gave evidence at the trial.

At the conclusion of the evidence, Mr Mathieson conceded - and I think rightly conceded - that the plaintiff had proved that a promise within the meaning of s.2 of the Act was made by the deceased to the plaintiff. Section 2 provides :

> " In this Act, unless the context otherwise requires, the term "promise" shall be deemed to include any statement or representation of fact or intention. "

The evidence of the plaintiff - and I say at once that I accept it - was that the relevant statement oft repeated; was that the plaintiff would take the whole estate of the deceased. - "What's mine is yours when I go," or words of a like import. That evidence was corroborated. The promise, then,was to her whole estate.

As to services, the plaintiff said after the marriage of the deceased to her father she visited them at least once a week. Such visits involved her travelling from Kaitoke to Carterton. From the outset, she was on good terms with the deceased. Her father was in hospital at Masterton for some five weeks prior to his death. The plaintiff took leave of absence from her employment and went to stay with the deceased during that period and apart from providing her with company during that period of anxiety she drove her to the Masterton hospital at least once and sometimes twice each day. She attended to the arrangements of her father's funeral and subsequently she accompanied the

deceased on several occasions to the office of the solicitors who were dealing with her father's affairs.

After the death of her father, her frequent visits to the deceased continued. She visited at least once a week. Sometimes she stayed overnight. She was welcomed and treated hospitably by the deceased who marked her appreciation with gifts of produce and preserves and occasionally with small amounts of money. The deceased was a keen gardener. Despite her advancing years, she was very active about her property and garden, so much so that there was little or no need for the plaintiff to assist her in these activities. Often and as occasion demanded the plaintiff, however, did odd repairs and maintenance jobs about the property.

In mid 1974, the deceased decided to vacate the family property and shift into a council flat. She was allocated the flat in October 1974 and was to take up occupancy in mid-January 1975. She apparently had possession around the beginning of December 1974 because she commenced shifting her belongings into it over a period of some three weeks prior to her sudden death on 21 December 1974. The plaintiff assisted her over that period. She provided transport and physical help. This involved many hours of work on some five or six separate days.

The deceased had but little society with her brother and sister. I accept that she did not get on with the sister and there was scarcely any communication between them. She corresponded regularly with her brother and his wife. They lived in Auckland. They were at all material times elderly

and of modest means. These factors coupled with the brother's ill-health made visiting Carterton to see the deceased out of the question. The brother, however, did attend the obsequies of the deceased's husband.

The deceased had some friends with mutual interests in the Carterton area. Two of them gave evidence before me. They are disinterested persons. Both told of the obvious affection with which the deceased spoke of the plaintiff and the pleasure her society gave her. The plaintiff, in addition to visiting the deceased regularly, telephoned her several times a week. It is quite clear that the plaintiff was the only person with ties of family to the deceased who displayed in a practical way solicitude for her welfare and I think that regard may be had to the factors to which I have just referred in making an appraisal of the services which the plaintiff unremittingly gave. I accept the plaintiff's evidence that she was unaware of the financial circumstances of the deceased and I hold that what she did for the deceased was completely altruistic.

Mr Mathieson submitted that the plaintiff's claim did not meet the provisions of s.3 of the Act which provides :

> " (1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime and

> the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant . . . . . then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant . . . . . be enforceable against the personal representatives of the deceased . . . . "

Mr Mathieson submitted that no plaintiff can succeed in a claim under the Act, unless she proves a link between the services performed or to be performed and the promise. He submitted that subs.1 of s.3 does not entitle a person to sue on a promise to make testamentary provision when the reason for the promise is merely affection or friendship; to succeed a claimant must establish an express or implied promise " . . . . to reward for the services or work . . . . . " He allowed that in the present case the plaintiff had proved a promise of testamentary provision but submitted that the inference to be drawn from the evidence was that the promise was not to reward for services but merely out of friendship and affection. He did not go as far as to suggest that the expressed promise should also contain a reference or allusion to services or work. Indeed he accepted and allowed that in appropriate circumstances the nexus between the promise on the one hand and the services or work on the other can be inferred. In my view that inference can clearly be drawn in this case. The promises were made on occasions when the plaintiff was the beneficiary of acts of kindness and consideration.

The promise made at Stratford to where the plaintiff had driven the deceased to enable her to uplift personal belongings and effects from her parents' home when the family estate was being wound up is an illustration of this. The bond of friendship and affection between the plaintiff and the deceased developed through their propinquity and association, which in turn had their genesis in the acts of kindness and dutiful consideration which the plaintiff showed to the deceased by visiting and phoning her frequently and assisting in the various ways which earlier I have detailed. The sort of considerations presently under discussion were adverted to by North P. in Jones v. The Public Trustee 1962 N.Z.L.R. 363 at p.376 where he said :

> " In dealing with the evidence, Henry J. said "But that evidence is also consistent with the view that there was not a promise to reward the plaintiff as that term is used in the legislation but that the deceased as a matter of gratitude intended to leave the property to the plaintiff." But surely a promise to reward past services must always be made as a matter of gratitude for the services a testator has enjoyed. On this finding alone we think the appellant should succeed in his action. The learned Judge appears to have accepted the view that there were discussions in which the deceased may have said that the property would ultimately go to the appellant or his wife, but he seems to recoil from the conclusion that what was said ever amounted to a promise expressed or implied to reward the appellant for services. "

In his submissions Mr Mathieson did not use the word "gratitude". He referred to friendship and affection and allowed that the inference could be drawn that those considerations gave rise to the promise. In my view the affection the deceased bore the plaintiff was born of gratitude for the plaintiff's high consideration of her not only in the various practical services she rendered but also in attending to her needs for companionship and friendship. Those considerations apart I think the inference can clearly be drawn that when the promise was given and repeated it was in reward of the plaintiff's services.

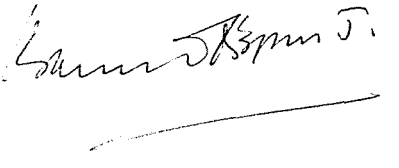
Accordingly I hold that the plaintiff is entitled to succeed.

In fixing the amount in which the plaintiff's claim should be marked I am required to fix . . . . . "such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made, and the services were rendered or the work was performed, the value of the services or the work, the value of the testamentary provision promised, the amount of the estate and the nature and amount of the claims of other persons in respect of the estate whether as creditors, beneficiaries, wife, husband, children, next of kin or otherwise. "

Dealing with the nature and amount of the claims of personsother than the plaintiff, the Court is, in the circumstances, left in limbo. As matters presently stand the prime beneficiary under the intestacy has not been traced. Little is known of his circumstances save that when last heard of he was the recipient of the charity of persons and organisations in Auckland devoted to helping the least of the brethren. If he did not

survive the deceased or ultimately his claim is barred, the elderly brother and sister of the deceased will take. There is no material before me of the financial circumstances of the sister, but I do know that her health is precarious. The brother is of advanced years and he is in modest circumstances. The estate of the deceased is worth some $19,000 and the promise was to the whole estate. The practical services rendered by the plaintiff did not entail a very great deal but the society and friendship she gave involved a great deal of travel and an erosion into the time she could well have used in purely selfish pursuits and interests. All in all, having regard to all the circumstances of the case I think the award should be $8000. The plaintiff is to have judgment accordingly with costs on that amount, with witnesses' expenses and disbursements as settled by the Registrar.

The brother and the sister of the deceased were ordered to be served and in the circumstances I think they should also have costs which I fix at $350 for Mr J.A. Fraser and $150 for Miss Elsie Fraser, in each instance with disbursements as settled by the Registrar.



Solicitors:
McGrath Vickerman Brill & Partners, Wellington, for Plaintiff
Goldwater Marshall White & White, Auckland, for John Alexander Fraser
Taverner Keys & Pitchforth, Carterton, for Defendant