C 5/4/82

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A 34/81

No Special Consideration

IN THE MATTER of The Law Reform (Testamentary Promises) Act 1949

A N D

IN THE MATTER of an action

BETWEEN NGARO EXCELL of Wellington, Married Woman

Plaintiff

A N D THE PUBLIC TRUSTEE a Corporation sole under and by virtue of the Public Trust Office Act 1957 as Administrator of the Estate of JOHN FRANCIS CHAPMAN late of Wellington, Railway Employee, deceased

Defendant

Hearing: 25 and 26 March 1982

Counsel: R D Guy for the plaintiff
R A Heron and J S Beattie for the defendant
J C D Corry for the infant children

Judgment: 20/4/82

RESERVED JUDGMENT OF GREIG J

The plaintiff makes a claim under the Act against the estate of her grand-nephew who died at Wellington on 11 August 1980 leaving no will. The deceased was then almost 21 years of age, was unmarried but has surviving him two children born out of wedlock to two different women, one of these born posthumously. They are the only persons who are entitled to share in his estate in terms of the law as to intestacy. The estate at the date of the hearing amounts to almost $102,000 and comprises in substance a number of insurance policies which had been taken out by the deceased some little time before his death.

The plaintiff, whose name aptly describes a number of her qualities, particularly her maternal qualities, was born in the Cook Islands and came to New Zealand as a widow with her two daughters. Some seven years later her brother's daughter came to New Zealand and lived with the plaintiff. That niece gave birth to the deceased out of wedlock and it appears that the father is not known. The plaintiff was at that time supporting her family working at two jobs and for about a year the deceased was given a foster home. At about one year old the child was brought to the plaintiff's house and from then until his death was in effect brought up maintained and supported by the plaintiff. The mother of the child married when the deceased was about two years old and thereafter she had little, if anything, to do with the child. The plaintiff took the place of the child's mother and thereafter did everything for him. She was treated as a grandmother and was called "Nanna" by the deceased. The plaintiff did have some assistance in the general maintenance of the family home from her daughters while they lived with her and these daughters had a close relationship with the deceased, the elder being known as "Mummy" to the deceased.

The deceased could not be said to have been a model child and was in trouble with the police on more than one occasion. After he left school he left home on more than one occasion but always returned to the home of the plaintiff and was living there as a member of the family at the time of his death. There can be no doubt, and the defendant and counsel for the two children expressly conceded, that the plaintiff had rendered services in terms of the Act to the deceased during his life. There can be no doubt that those services were far beyond the services which would normally be given by a grandmother, and certainly those that might be given by a great-aunt, to this deceased.

The promise which was made, it is alleged, to the plaintiff was made some few weeks before the deceased's death and arose out of his desire to buy a motor -car. He did not have enough money to buy the motor-car and on

a number of occasions he had spoken to the plaintiff seeking her assistance in that purchase. On the particular occasion the deceased had returned to the topic again and apparently suggested that if the plaintiff would be willing to sign some document he would be able to buy a car. Just what that document was was never made clear but it appears that it was probably a guarantee by the plaintiff in respect of a loan against which the insurance policies, or some of them, might have been used as security. The plaintiff's evidence-in-chief described this conversation as follows:

> "Well this time he asked me to sign a paper. I turned around and talked to him again. I said to him, 'You know Johnnie in October I will be 60. I am scared if I sign the paper and anything happened to you out there, I can't afford to pay for the car.' So he said to me, 'Oh Nanna if I died to-morrow you would get $37,000 on your hands. I said 'Stop it'. He said 'You have looked after me.' I said 'Stop it John.' He said to me 'It's true. All these years you have looked after me. Now I am 20. I have to pay you somehow and I will.' And I said 'Stop it. I don't want the money, I want you.' I never think about it because I thought I would die before him."

One of the principal purposes of the Act under which the plaintiff makes her claim is to enable the Court to enforce moral obligations apart from strictly contractual obligations and to enforce a promise of testamentary provision which might not be enforceable otherwise. The authorities make it plain that the Act is to be construed liberally and this is reinforced by the wide definition of 'promise' under the Act. Two passages from judgments in the Court of Appeal in New Zealand are pertinent in the circumstances of this case. The first is from Jones v Public Trustee (1962) NZLR 363, at p 374, where North J, giving the judgment of the Court of Appeal, said:

> "In short, the intention of the Legislature, as expressed in the present Act is that in such

circumstances, the deceased person is required to keep his word where that word may be taken to relate expressly or by implication to services given or to be given. It does not matter whether the 'promise' is made before or after services have been performed. The important question in every case, is whether the claimant has satisfactorily proved that the deceased person did make a 'promise' to him of a testamentary provision as a reward for services rendered or to be rendered to the deceased. Each case, of course, must be decided on its own facts. But, particularly in the case of near relatives who have rendered valuable services to a deceased person, we do not consider that the claimant should be refused relief simply on the ground that he may have been influenced in part by more laudable considerations than purely mercenary ones."

The second passage is from Public Trustee v Bick (1973) 1 NZLR 301, from the judgment of McCarthy and Richmond JJ, at p 305:

"The purpose, then, is to enable the enforcement of promises to make testamentary provision which might or might not be enforceable under the law of contract, if those promises were made as a reward for the rendering of services or the performance of work by the claimant. In this way the categories of promise which the Courts can enforce were widened. But a concept inherent in contract - a promise in return for something done - is still very much at the heart of the new enforceable promise; a claimant must prove a promise to make testamentary provision in return for, or, to use the words of the section, as a reward for, services or work. So the relationship with contract is very strong."

It is to be noted that the latter case is concerned with the question of the capacity of the promisor and the observations of their Honours are related particularly to

that. But they do, in my view, go beyond that and describe the principles to be applied.

In both the cases that I have referred to the Court referred to and followed in particular the views of Kennedy J and Gresson J in Nealon v Public Trustee (1949) NZLR 148. A passage from Kennedy J's judgment in that case, at p 158, particularly referred to in Jones' case, is of particular relevance when he said:

> "But the promise need not amount to a contractual undertaking to be within the section. The promise referred to, I think, merely means an assurance or undertaking to make 'some testamentary provision' in reward for the services rendered or work done communicated to the person who has rendered those services or done that work, and likely to create an expectation by him of testamentary provision."

What is important in reference to this case is that there must be a link between the promise and the service even taking into account the wide definition of 'promise' so that there is a contractual ring in the tenor of the claim made, at least to the extent that there is an expectation of the promise to be kept and that, looked at from the point of view of the promisor, there is some intention that he will keep his word. The provision of services from moral or familial motives will not debar the plaintiff nor will the fact that the plaintiff may have had some misgivings as to the promisor's bona fides - see, for example, Edwards v New Zealand Insurance Co Ltd (1971) NZLR 113.

In this case it is clear from the evidence that the plaintiff rendered the services to the deceased without any mercenary motive at all. She was impelled by a high sense of family duty and tradition which she seems to have applied not only to the deceased but to other members of her wider family. Although the deceased in making the statement to her was not merely indulging in "sweet talk", as the plaintiff indicated he had done on previous occasions, but was being more serious, it is

plain to me that she did not put any weight on his promise or intention. It was not just a matter of her desire to avoid talk of death of her great-nephew or merely a question of her lack of belief in the truth of such a statement of promise, though these are of some relevance, but what is more important is that she did not have any real knowledge of the possibility of insurance of any substance and that such a promise or statement was quite the opposite to anything which the deceased had said or done at any time during his life before.

The deceased had never given any previous gift to the plaintiff or any acknowledgment of her services; indeed he seems to have accepted what he could obtain which was freely given without any thought of any reward for the future or for the past. The statement made was, therefore, totally out of character for the deceased and could have raised no real expectation in the mind of the plaintiff. Any expectation of testamentary provision by either the deceased or the plaintiff would have arisen merely from the normal expectation that she would benefit from his estate.

In my view the deceased was not giving his word about any testamentary provision and was not making any statement of fact or intention about any testamentary provision which was in any way linked to the services performed. In my view the deceased was not considering the statement in any way as a reward for services rendered but merely as a ground for obtaining a further service, by way of guarantee, from his great-aunt for the purchase of a car. The reference to the past services, though no doubt made in solemn tone, was not the purpose or the foundation of the statement but merely the excuse or embroidery to persuade his great-aunt to provide the means for the purchase.

In these circumstances I must find that there was not a promise within the meaning of the Act which supports the plaintiff's claim. I should say that I have no doubt that the plaintiff was truthful in her evidence and indeed her truthfulness as to the surrounding circumstances has

reinforced my view that neither she nor the deceased intended the statement to be a promise of testamentary provision in return for past services. It is well recognised that in cases such as this the alleged promise is to be scrutinised and indeed considered with suspicion and to that end corroboration is sought. While there is no direct corroboration of the statement there is, in my view, sufficient corroboration from other witnesses but in any event even without that I accept the plaintiff's evidence as to the conversation in question. It does not, however, take the matter far enough, in my view, even with the most liberal construction of the Act to allow me in terms of the Act to make provision for the plaintiff. The plaintiff's claim, therefore, fails and there will be judgment for the defendant. In the circumstances of this case, however, I think it is appropriate that all the costs should be met out of the estate and, if necessary, I will hear counsel as to that.

Solicitors for the plaintiff: Perry, Wylie, Pope & Page (Wellington)

Solicitors for the defendant: Young, Swan, McKay & Co (Wellington)

Solicitors for the infant children: J C Corry (Wellington)

Butterworths (2).

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