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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY A.1059/81

No Special Consideration

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

A N D

IN THE MATTER of the Estate of IRIS EVELYN NELLIE McLEOD late of Auckland, Widow, Deceased

BETWEEN RICHARD SAMUEL GOULD of Auckland, Security Officer

Plaintiff

A N D BARRIE CHARLES SPRING as executor and trustee of the estate of IRIS EVELYN McLEOD

Defendant

Hearing : 2nd, 3rd February 1983

Counsel : J. Haigh and P.J. Sara for Plaintiff
W.A. Sandston for Defendant
E.J.M. Rawnsley for beneficiaries A.G. Gould and E.L. Mortimer
R.W. Holmes for beneficiary S.G. Roberts

Judgment : 9th March 1983

JUDGMENT OF BARKER J

This action is brought under the provisions of the Law Reform (Testamentary Promises) Act 1949 ("the Act") in the estate of the late Iris Evelyn Nellie McLeod, late of Auckland, widow, deceased ("the deceased"). She died at Auckland on 16th August 1981 at the age of 85.

Under her will, apart from minor bequests which are not in issue, she left the residue of her large estate to be divided

equally amongst her grand-niece, Mrs Erin Lesley Mortimer, her grand-nephew, Mr Anthony George Gould and Mr Stuart George Roberts, the (now) 19-year-old grandson of a deceased friend.

The will was made on 12th August 1966. There was a codicil to the will, dated 29th March 1972; this merely revoked the appointment of a previous executor and substituted a new one.

The estate is substantial; it has been realised by the defendant trustee; the present balance is of the order of $350,000.

The plaintiff is a nephew of the deceased, a son of her brother. He sought in the statement of claim, an order vesting in him the deceased's house property at 23 Patterson Ave, Mission Bay, Auckland. By agreement with all concerned, this house has been sold by the defendant at public auction. It realised $185,000 which sum is included in the total held by the trustee. These proceeds of sale comprise rather more than half the net residual estate.

At a hearing extending over two days, I heard numerous witnesses. There was little real conflict in the evidence. I make my material findings of fact as follows.

The plaintiff is now aged 58. From his earliest memories, his aunt, the deceased, played a part in his life. The plaintiff was at birth given her name, Evelyn, in addition to the names Richard Samuel; in 1963, he dispensed with the name "Evelyn" on the grounds of certain embarrassment caused by having a female name.

The deceased died a widow. Her husband was a

successful plumbing contractor who died in 1951. A proportion of her estate was inherited from him, although she seems to have been a competent businessperson in her own right. She lived in Auckland - certainly for so long as the plaintiff can recall, although she was born in the South Island and orphaned at an early age.

Her only other close relative in Auckland was another nephew, the plaintiff's brother, Mr Reginald Gould; there were two nephews in the South Island with whom she enjoyed little contact.

The deceased had no children of her own; according to the plaintiff, she regarded him as a son in her early years. He can recall staying with her when he was 5 and 6. He agreed that she would then have shown similar affection to his brother.

She encouraged the plaintiff at an early age to join the Navy; she gave him what was for those days a large sum of money prior to his departure for duty overseas. The plaintiff married in 1946. His wife and the deceased got on well; until the death of the deceased's husband in 1951, the plaintiff and his wife and the deceased and her husband used to see each other regularly. In 1951, the plaintiff purchased a butcher's shop in Newmarket; his bank account was then guaranteed by the deceased's husband. Later in that year, a rift occurred between the plaintiff's mother on the one hand and the deceased on the other. After this lapse of time, nobody is too clear on the cause of this rift; it did mean that the plaintiff and the deceased had relatively little contact for about 19 years.

The rift appears to have healed in 1972; the plaintiff's father died; the deceased appeared at his funeral; a family re-unification ensued. Between 1972 and 1975, the

deceased, despite her age, was quite able to handle her own affairs; she enjoyed good health. During this period, the plaintiff acted in an advisory capacity. The deceased always needed someone to talk to and she would discuss with the plaintiff problems over her properties. At this time too, she still had an interest in her late husband's plumbing business.

Some time in 1975, when the plaintiff was engaged in laying some carpet for the deceased, she said to him:

> "You better make a good job of it, dear, because one day you will be living here."

In 1976, whilst scrubbing moss off her drive and front steps, a job which he says took most of a weekend, she said to him:

> "You won't regret doing this job for me because the house will be yours one day."

In 1978, she wanted to have her house painted; she discussed this suggestion with the plaintiff who was of the view that the house did not require painting; the deceased then said:

> "I want to have it looking nice for you, dear."

There were later comments to the plaintiff in similar vein. He received from these comments the clear inference that she wished him to succeed to her house property. She made veiled hints to the plaintiff's daughter along the same lines. The deceased commented to the plaintiff and to his wife about the proximity of her house to the sea, knowing that the plaintiff was a keen fisherman; to his wife she commented about the proximity of a tennis court, knowing of her interest in tennis.

Even when in hospital in her last months, the deceased complained to the plaintiff about the cost of the hospital care; when he remonstrated with her, she said "The more I spend here, the less you will get".

After 1975, the deceased showe d signs of slowing down. She suffered from angina and lacked mobility. The services performed for by the plaintiff, which are the subject of his claim, are concentrated into the last 5 years of her life.

In the first 3 years or so of this period, he would communicate with her most days - often by means of the telephone; he assisted her to select a new car; he did such jobs as cleaning out her freezer and refrigerator, tidying the garage, carting away rubbish, cleaning out the attic.

My abiding impression from hearing the plaintiff and his witnesses, is that he was her chief emotional support, the person always on call on whom the deceased could rely. She described him to her good neighbour, Mr Organ, as her favourite nephew. She appears to have been a demanding woman. Virtually every witness described her as "difficult"; although some witnesses, in their amplification of this description, exercised greater restraint and charity towards the deceased than others. One may say, with the objectivity and lack of charity of a disinterested bystander, that she was of the demanding kind who sought to achieve the maximum from her relatives and friends, especially the plaintiff and his wife. She would ring them frequently; her calls were often of a duration that would do credit to a teenager. It would be unrealistic to say that the plaintiff was always the willing recipient of these calls; often it was highly inconvenient to him to accede to her varied requests or even spend a long time on the telephone. Yet the plaintiff and his wife humoured the deceased and put themselves out for her on many occasions.

It is mainly over the last 2 years or so of the deceased's life that the plaintiff's "services" for her increased. He and his wife were on call constantly; whenever they left Auckland, they arranged for their married daughter to be on call. In the latter stages of her life, the deceased was unable to drive her car; she was admitted twice to a private hospital. The plaintiff's wife would take her meals; she would transport her to a hairdresser at Pt Chevalier, some distance away from the deceased's home.

Being a woman of considerable means, the deceased had most work around the home performed by tradesmen; yet it was the plaintiff who usually made the arrangements for her. Whilst she was in the hospital, the plaintiff and/or his wife visited her every day. Mrs Gould collected her national superannuation and checked on the house.

The plaintiff admitted quite candidly that he felt it was his duty to help his aunt; he considered nobody else was helping her; he would probably have done the work without the promises. However, that altruistic attitude is not a reason for denying him relief under the Act.

Other people certainly helped the deceased. She appears to have made demands on her neighbours, Mr and Mrs Organ, and her friends. No doubt some of these people did quite a lot for her. Likewise, prior to the last two years of the deceased's life, Mr and Mrs Reginald Gould were good to her also.

The plaintiff's wife gave evidence; I accept her as a witness of truth. She amplified the plaintiff's evidence; she spoke of the many occasions when she had taken the deceased shopping and out to dinner; the deceased enjoyed dining out; several witnesses remarked upon her notable rudeness to waiters.

Because the plaintiff was working as a security officer on shift work, the plaintiff's wife had frequently herself to do the running around demanded by the deceased. She too received numerous phone calls; the constant demand provoked considerable strain.

The plaintiff's daughter, Mrs Taylor, spoke of conversations with the deceased wherein it was implied by the deceased that the plaintiff would be living in the house after her death. She spoke of the strain on her parents caused by the deceased's demands on them. She described her father as doing anything the deceased ever wanted doing.

Frequently in claims of this nature, there is little or no corroborative evidence from sources outside the plaintiff's family. This case is unusual in that the deceased apparently made no secret of her wish for the plaintiff to have her house on her death; moreover, she was highly appreciative of his efforts in her conversations with others. A number of wholly reliable witnesses gave evidence to this end which can be summarised as follows.

Mr Lyall, a plumbing contractor, was a lifelong friend of the plaintiff and of the deceased and her husband. She used to employ him to do any plumbing work on her house after her husband died. He remembered an occasion about 1976/77 quite clearly; the deceased told him that he had better make a good job of what he was doing because "Mook would give it (i.e. the plumbing work) to you later" and that "one day, all of this would be Mook's". (It should be noted that the deceased usually referred to the plaintiff by the nickname of "Mook"). Mr Lyall noticed a close relationship between the plaintiff and the deceased.

The deceased's next-door neighbour, Mr Organ, whom I suspect was a very kind and tolerant neighbour to the deceased, spoke of the deceased's frequent complimentary remarks to him about the plaintiff.

Mr Barling, the plaintiff's brother-in-law, whom I accept as a witness of credit, knew the deceased well; in the last 5 years of her lifetime, he would have seen her about twice a year. He confirmed the close relationship between the deceased and the plaintiff. She had told him that the plaintiff would be the beneficiary in her estate; on another occasion, that the plaintiff and his wife would have her place after her death. She told him too that whenever she required help or had some problem, that the plaintiff would always provide that help.

Mrs Stewart, the deceased's friend of 40 years' standing, told of how the deceased used to constantly talk about the plaintiff. From these many conversations, she took it for granted, although she was unable to point to any specific statement, that the plaintiff would receive the deceased's property on her death. She confirmed what she had seen of the various tasks that the plaintiff performed for the deceased. He seemed in the main, from this witnesses's observation, to be tending to business matters for her.

Mrs Courtenay, another old friend, was on the list of those frequently telephoned by the deceased. According to her, the deceased's only real topic of conversation was the plaintiff and the things he did for her, such as cleaning freezers and refrigerators and laying floors. The deceased told this witness that she was leaving the plaintiff her house.

Mr Goodwin, a painting contractor, in 1976/77 performed work for the deceased at her house. On one occasion, he

remarked to her what a nice home and furniture she had; she, referring to the plaintiff as Mook, said that the house would never be the way it was if it had not been for Mook; all of it belonged to him when she went. According to this witness, the deceased gave him Mook's life history, and claimed that all the upkeep and plumbing work was done through him and that this was the only way she could keep the house up to standard. Mr Goodwin's impression was that the plaintiff was "her life". On another occasion, she said to him she was going to leave the house to Mook because he had done everything for her, cared for her and maintained the house for her.

Against this background of evidence, mindful of the need for corroboration and heeding the warning of the authority about treating claims of this nature with suspicion, I have no doubt, having seen and heard the witnesses:

(a) That the deceased did promise to leave the plaintiff her house;

(b) That the plaintiff performed "services" for her; and

(c) The promise was on account of the services performed.

It does not matter that the promise was in respect of past services or that the plaintiff would have done the work regardless of the promise.

Evidence was given by Mr Spring, the defendant trustee; he commenced to act for the deceased in 1973. She asked him to call at her home in January 1978 concerning her will. She spoke to him, as she did to most other people, at great length. She gave him the names of the plaintiff and her children, of Mr Reginald Gould and his children, and of Stuart Roberts. When pressed by Mr Spring to define her testamentary wishes, she

"dithered". He felt she could not then make up her mind; she was unable then or later to give him a note of her wishes. When next Mr Spring called on her, about 12 months later, he took with him a photocopy of her existing will; her comment to him was "that will is no good, I want to make a new one". On this second occasion she again was advised by Mr Spring to write out what she wanted to do.

Mr Spring would have seen the deceased on about four occasions in relation to her estate. She had intended to make for him a list of persons who were to receive individual items of china; however, despite his best endeavours, he was never able to pin her wishes down. On the last occasion he saw her (i.e. shortly before her death in hospital) no instructions were forthcoming.

By consent, there was produced a prior will by the deceased dated 1st November 1951. In this document, the home at 23 Patterson Avenue and its contents are devised and bequeathed to the plaintiff; the residue of the estate went to charities.

Two of the residuary beneficiaries are the children of the plaintiff's brother Mr Reginald Gould. Both of them gave evidence. Their contact with the deceased was fairly slight; she showed interest in their respective careers; there is no evidence that either of them did anything out of the ordinary for the deceased.

Their counsel submitted that work done for the deceased by the parents of these beneficiaries could be taken into account when weighing the strength of their claims against the plaintiff's just as the work done by the plaintiff's wife for the deceased could form part of his "services" for the deceased.

Evidence was given by the plaintiff's brother, Mr Reginald Gould, and his wife; they did keep in touch with the deceased over the years. Mr Reginald Gould is some 6½ years older than his brother the plaintiff. He suffers from a physical handicap and on that account has been unable to perform many of the same manual tasks for the deceased as did his brother. It is clear that the deceased always took an interest in his career and was proud of the fact that he had become a successful musician and music teacher despite his disability.

During his childhood, Mr Reginald Gould, like the plaintiff, would see the deceased frequently until that family rift between 1951 and 1972. He and his wife often used to take the deceased to social functions and meals; she would like to attend concerts where Mr Reginald Gould was playing.

He too found her "difficult"; she was wont to telephone him at inauspicious moments such as when he was giving music lessons; she would take offence when he was unable to continue the conversation. His wife, Mrs Lauris Gould, used in the early 1970s to do dressmaking for her and perform occasional other tasks for her.

In 1979, Mr and Mrs Reginald Gould fell out with the deceased. From what Mrs Lauris Gould said in evidence, it would be hard to criticise them for this; the deceased must have tried their patience considerably. For the last 2 years of her life, they had little contact with her. The plaintiff did telephone his brother at the deceased's request some time during the last 2 years. She had wanted to speak to Mr Reginald Gould, but he told his brother - and this was not denied in his evidence - "I'm sorry, I have made the break from her, I am not going to ring her up".

The third beneficiary, Mr Stuart Roberts, was born on 5th December 1963. His father, George Sidney Roberts, died on 5th November 1978. The family lived in Lower Hutt; Stuart and his mother moved to Auckland in December 1980, some months before the deceased died. There had been some distant relationship by marriage between Stuart Roberts' great-uncle and the deceased. The deceased was very fond of the late Mr G.S. Roberts; she kept a photograph of him in naval uniform in her sitting room. The Roberts family travelled frequently to Auckland to see the deceased when Mr G.S. Roberts was alive; because of his employment, he was able to enjoy free air travel. The deceased kept in telephone contact with the Roberts family and was greatly upset when Mr G.S. Roberts died.

Stuart Roberts kept in frequent touch with the deceased; he used to notify her of his progress at school; she gave him $100 on one occasion. He last saw the deceased in 1980, although he claims he was in frequent telephone contact with her. After he moved to Auckland in December 1980, he did not visit the deceased; his mother was suffering from a breakdown as a result of her husband's death. He claims that the deceased discouraged him from visiting her, asserting that Stuart's first duty was to his mother.

At the conclusion of the evidence, Mr Holmes for the beneficiary Roberts, submitted very properly that the plaintiff had made out a case for further provision under the Act; he restricted his submissions to the question of quantum, submitting that a proper award to the plaintiff was of the order of $20,000.

Despite the strength of the evidence - unusual in a case of this nature - Mr Rawnsley in his final submissions nevertheless submitted that there had not been proof of the deceased's intention to reward the plaintiff for the services.

Counsel acknowledged that such an intention could be implicit. I find, particularly from the evidence of Mr Goodwin, that there had been an express linking of the services and the promises by the deceased; moreover, the whole circumstances of this case show an implicit intention on the part of the deceased to reward the plaintiff by means of the promises for services rendered. The word "promise" is broadly defined in the Act as including any statement or representation of fact or intention.

Under Section 3(1) of the Act, there are a number of statutory criteria which must be considered on a claim of this nature. I have considered also the decisions of the Court of Appeal in Jones v. Public Trustee, (1962) N.Z.L.R. 363 and Public Trustee v. Bick, (1973) 1 N.Z.L.R. 301. I therefore mention the statutory requirements:

(A) CIRCUMSTANCES IN WHICH THE PROMISES WERE MADE AND THE SERVICES RENDERED:

The services were performed largely out of the plaintiff's feeling of responsibility for his elderly aunt, which feeling she played upon. The difficulty was compounded by her demanding nature.

The various "promises" to the plaintiff were made without any prompting from the plaintiff or his wife. Her desire for him to have her house became something of a talking point with the deceased; she let many people know about it. This is not the frequently encountered case of the "promise" being a throwaway line uttered but once. Moreover, when confronted by Mr Spring with her will, she expressed dissatisfaction with it. Her previous will had honoured the promise.

(B) THE VALUE OF THE SERVICES OR WORK:

The value of the services does not need to be

quantified in money terms. Because the deceased was well off, she was in the habit of employing tradesmen; the value in money terms of the plaintiff's services may not be particularly high. He was not much out of pocket other than for travelling expenses - a not inconsiderable item, considering his and his wife's frequent trips from Mt Roskill to Kohimarama.

It is difficult to put a money value on the plaintiff's constant availability to the deceased, on his receiving numerous lengthy telephone calls from a garrulous and lonely elderly lady, and on his generally acting as her emotional back-up. In quantifying the value of the services, a generous allowance has to be made for "general damages" type items - i.e. the strain on the plaintiff and his wife and the inconvenience to their lives in fulfilling the deceased's many demands.

Moreover, the deceased's own estimation of the value of the plaintiff's services is very relevant; see Bennett v. Kirk, (1946) N.Z.L.R. 580, 584.

(C) THE VALUE OF THE TESTAMENTARY PROVISION:

The promise was clearly for the house. A special Government valuation of the house, as at the date of death, obtained for duty purposes, was $130,000. A valuation as at May 1982 obtained by the Trustee was $175,000. It was sold by public auction for $185,000.

(D) THE AMOUNT OF THE ESTATE:

Unlike in many claims of this nature, the estate is very large, about $350,000 net.

(E) THE NATURE AND AMOUNTS OF THE CLAIMS OF OTHER PERSONS:

The deceased had no children of her own. She treated the plaintiff and, in the earlier years, his brother, as her close relatives. The Act speaks of the Court having to consider the claims of, inter alios, next-of-kin and beneficiaries.

The moral claim of the brother's children on their own account is slight. The brother does not seem to have done as much for the deceased as did the plaintiff; this statement is not intended to be a criticism of him. In the last two years, when the deceased's need was probably at its greatest, he had no contact with her and refused an invitation to resume the relationship.

The grand-niece, Mrs Mortimer, is in a very comfortable financial position for one of her years. Her brother, Mr Anthony George Gould, whilst not so well off, is in good employment. He has lived in Australia for some years; he did not see the deceased at all in the last 5 years of her life.

Stuart Roberts is an apprentice electrician; he owns his own car and Laser yacht; he appears a thrifty young man. He is in no particular need. His claim for so large a share of the deceased's bounty is tenuous.

(F) OTHER RELEVANT CIRCUMSTANCES:

The deceased did not update her will to provide for the person who had been of most assistance to her. When asked by her solicitor to state her testamentary wishes, she was unable to face up to the desirability of making a more realistic will; she did say to her solicitor that her present will needed revision.

The financial situation of the plaintiff is of limited relevance; he has worked all his life, first in the armed forced, then as a self-employed butcher, and, more recently, as a security officer. He is aged 58. He has two adult children who are not dependent on him. He and his wife are in comfortable but not affluent circumstances.

The extent of a claimant's financial situation is not as relevant to a claim under this Act as to one under the Family Protection Act; it does receive passing mention in some of the cases. It is probably of greater relevance when a claimant is in necessitous circumstances.

A most useful authority on quantum in claims of this nature is the as yet unreported Court of Appeal decision in Re Townley (Judgment 29th November 1982).

There, the deceased was an elderly bachelor; he owned two small farms in Southland. He had lived as something of a hermi He was a less than efficient farmer and was much dependent on help from others in managing his farms and his life generally. He had no next of kin; the plaintiff was a distant relative.

The plaintiff helped the deceased with advice in his farming and business affairs. The plaintiff's wife often cooked for him and did washing and sewing. The deceased visited their home occasionally for meals.

Apart from a nominal legacy to the plaintiff and his wife, the bulk of the estate was left to a stranger with an expression of wish that the beneficiary would pass the land on to his son, a boy for whom the testator had grandfatherly affection. The testator and the beneficiary were members of the Open Brethren Church; the plaintiff and his wife were not.

Cook, J. at first instance found an oral promise by the deceased to leave one small farm to the plaintiff in return for his services, that the plaintiff had acted on his promise and that he had rendered substantial services to the deceased for 9 years. The learned Judge found the plaintiff had tended to exaggerate the extent of his services and that others had helped the deceased as well.

His award of $10,000 was the subject of the appeal as to quantum only. The value of the farm, promised to the plaintiff, was $33,000 at death and $80,000 at the date of hearing. The claimant was a busy and, at the time of rendering the services, a prosperous farmer. The Court of Appeal increased his award to $25,000, noting that the Judge was entitled to hold that the plaintiff had magnified the extent of the services provided. Despite the dicta quoted below, the award was of only a third of the value of the farm at the date of hearing.

To the contrary, in the present case, having seen and heard the plaintiff and the witnesses, I consider that the plaintiff was one who tended to under-estimate the services.

Another analagous factor with the Townley case: The Court of Appeal considered that "services" performed by a claimant's wife, although she may have done work for the deceased out of the goodness of her heart, was a circumstance to which regard could be had by the Court in the plaintiff's favour.

Section 3(3) of the Act is as follows:

> "(3) Where the promise relates to any real or personal property which forms part of the estate of the deceased on his death, the Court may in its discretion, instead of awarding to the claimant a reasonable sum as aforesaid -

(a) Make an order vesting the property in the claimant or directing any person to transfer or assign the property to him; or

(b) Make an order vesting any part of the property in the claimant or directing any person to transfer or assign any part of the property to him, and awarding to the claimant such amount (if any) as in its opinion is reasonable in the circumstances."

Cooke, J. in the Court of Appeal said that there was nothing in the wording of that subsection to suggest that the Legislature meant it to be used only exceptionally or sparingly and said:

> "In inflationary times I think that when a promise relates to real property the Court should normally consider carefully whether the fairest order may not be to vest the specific property at least in part in the claimant."

McMullin, J. emphasised that the Act contemplates the making of an award which is reasonable having regard to all the circumstances of the case, including the matters to which particular reference is made in the subsection. He went on to say:

> "The subsection does not provide that the award shall make good in full the deceased's default in honouring his promise. It recognises the weight of other factors including competing interests. It provides that the promisee's claim shall be enforceable "in the same manner and to the same extent as if the promise of the deceased were a promise for payment by him in his lifetime of such amount as may be reasonable having regard to all the circumstances of the case" including in particular the several matters mentioned at the end of the subsection. But in giving proper weight to those circumstances regard must still be had to the promise which the deceased has failed to make good; this is what s.3(1) makes enforceable. For these reasons I do not think that an award to a claimant can be quantified merely by assessing the value of the promisee's services in a money equivalent expressed as

> either a saving to the deceased or a loss to the promisee. Their value is only one factor which must be weighed along with other relevant considerations. Nor is the amount of the award to be measured solely by reference to the value of the property promised at the date of death. It is true that had the promise made to the appellant been fulfilled by the making of a testamentary disposition the value of the property passing to him would have been its value at the date of death. In that event the appellant would have taken it with the benefit or burden of such increase or decreases in value as may have subsequently occurred. But the value of the property at the date of death may not be its value at the date of hearing. It is the latter which may be more important in a claim under this legislation which has its genesis in the failure of the deceased to make good his inter vivos promise leaving it for the promisee to resort to the Court for enforcement of the promise "in the same manner and to the same extent" as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable in all the circumstances of the case. To fix the value of the property claimed as its value at the date of death, ignoring fluctuation between that date and the date of hearing, may lead to a quite unreasonable award - too high or too low, as the case may be, when the value of the estate and other claims are considered. And there is a risk that an award based on property values no longer current will not be reasonable. While there may be certain similarities between claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, there are also differences. Under the former the claim is for such sum as is necessary to remedy the breach of moral duty; under the latter the claim is to remedy the breach of a specific promise. On a claim made under the Law Reform (Testamentary Promises) Act 1949 in the case of a sizeable estate with little in the way of competing claims there is no reason why an award should be pitched at a level which will do no more than equate the value of the promisee's services."

The judgments in the Court of Appeal emphasise the absence of competing claims, the fact that a specific asset was promised, and the fact that the deceased relied generally on the claimant.

In the present case, because of the large amount available for distribution and the relative weakness of the competing claims, I consider that the plaintiff is entitled to a substantial award, one far in excess of the monetary value of his services. It is not possible to vest the house in him now that it has been sold.

Any assessment must be arbitrary as Somers, J. noted in the Townley case. I consider that in all the circumstances of the case, the proper award to the plaintiff is $90,000 - rather more than quarter of the estate and about half the value of the house.

I have given some consideration to whether this award should be borne equally by the residuary beneficiaries since two were related to her and one was not. On reflection, I consider that the award to the plaintiff is to be borne equally by all three. I find little to distinguish the relative strengths of their moral claims.

The plaintiff is entitled to costs as per scale. I certify for one extra day and for junior counsel for one day.

Under the Act, the award to the plaintiff is to be treated as a legacy; it will accordingly bear interest at 5% from the first anniversary of the death of the deceased.

The costs of Mr Holmes, appointed to represent the infant beneficiary, are to be borne out of that beneficiary's share in the residue. Costs shall be on a solicitor-and-client basis, as approved by the trustee, with liberty to apply to the Court in case agreement cannot be reached.

R.D. Barker J.

SOLICITORS:

Haigh, Lyon & Co., Auckland, for Plaintiff.
Chapman, Tripp & Co., Auckland, for Defendant.
Wood, Ruck, Gibbs & Co., Otahuhu, for A.G. Gould and E.L. Mortimer.
Turner, Hopkins & Partners, Auckland, for S.G. Roberts.