

WELLINGTON REGISTRY

Law Reports X

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No LABEL ?

IN THE MATTER

of "The Law Reform
(Testamentary Promises)
Act 1949"

AND

IN THE MATTER

of the Estate of A
MITCHELL of Lower Hutt,
Labourer

BETWEEN

F LUKE of Lower Hutt,
Clerk and H LUKE
his wife

Plaintiffs

AND

THE PUBLIC TRUSTEE
of Administrator of the
Estate of the late
A MITCHELL of
Lower Hutt, Labourer

Defendant

Hearing: 10 June 1983

Counsel: J J Cleary for Plaintiffs
J M Morrison for Defendant

Judgment: 16 June 1983

JUDGMENT OF JEFFRIES J

F Mitchell was born on He
had siblings who were of full and half blood. He
himself was raised not by his parents but by a close relation
in the Taranaki district where apparently most of his family
reside. He was a very faithful employee of a company
operating at Petone and for which he worked in one capacity
or another for about 32 years until near his death on

1977. He was a bachelor and had no children. He died intestate and the assets in his estate comprise a bank account worth about \$1,000; a car valued at date of death at \$5,500; Maori land interests to the value of approximately \$21,000. There were also wages of \$781.95. There had been expenses in administration of the estate which was taken up by the Public Trustee some 2½ years after death, and it now holds assets to the value of about \$22,000. The car, valued as stated, is still in the possession of the plaintiffs. If the estate were to pass on intestacy it would be divided into nine parts and there would be further sub-division of some of those nine parts because of deaths among that group. The exact details are not known and because of this judgment not required.

The plaintiffs are a married couple and the husband, R , is a nephew of the deceased. The Lukes themselves have eight children and that is important in assessing the extent of their services to the deceased. The plaintiff Richard commenced working with his Uncle at New Zealand at Petone at about the beginning of 1970. At that time the plaintiffs were living with their family in Porirua East and the deceased was a frequent visitor to their home. In about 1971 the plaintiff shifted to a house in which is part of a marae. It was arranged the deceased would live with the plaintiffs as a boarder. Apparently about this time he ended a de facto relationship which had existed for some few years prior, but little detail was given to the court about this and it had no significance. The plaintiff, R said that the deceased was very welcome to live in his home as he was a close relation being a brother of his father. I gathered from his evidence, and that of his wife's, by virtue of the heritage of the Maori

race they felt obliged also to show respect to an elder. For a short period after he came to live with them deceased shared a bedroom with some children but this proved impossible and he was given a bedroom of his own, I am certain at no little inconvenience to all members of the family. I was very impressed with the fair, balanced evidence given by both plaintiffs concerning their relationship with the deceased. They uttered no complaints about him at all, but I am also satisfied that by virtue of his lifelong bachelorhood, and set ways, they would always have been aware of his presence in the family. He never paid board in excess of \$50 per month throughout the years he lived with the family until his death, also did not make a noticeable contribution to family life but accepted the benefits of living with a family. He had all his meals with the family and to an extent could accurately be described as mildly demanding in this sphere. Evidence was given that he exercised the prerogative of age and status by occupying the bathroom first for a not inconsiderable period each morning. With such a large family and Mrs Luke a working wife and mother the effect of that needs no emphasis. Overall he led a relatively simple life as a responsible, attentive employee of his company and most nights after work he would attend a local hotel, have his meal at home, and retire early. This required a growing family to exercise restraint on noise levels which again needs no elaboration. Over the last three years of his life his health deteriorated and this necessitated hospitalisation and increased care and attention by Mrs Luke. Throughout she had attended to all his washing and other services he required in that department. They increased as his medical condition worsened. He finally died in Wellington hospital.

Evidence of the promise was given by both Mr and Mrs Luke and I am certain the deceased did appreciate what was being done for him by his nephew and wife. He constantly referred to the fact that he would leave all his estate to the Lukes. The evidence of the promise was corroborated by his own brother, that is the father of R. who even went so far as to say that in recognition of the services his son had given to his brother during the latter part of his life he would forego his share to his son should that have been the result. There was also confirmatory evidence from a daughter-in-law of the Lukes'.

The evidence given by the plaintiffs and their witnesses was gently probed in cross examination by Mr Morrison for the defendant, who elected not to call evidence but made submissions. He reminded the court very properly that such actions based on a testamentary promise should be examined with care and caution. He conceded he was not in a position to call evidence to contradict that given by the plaintiffs and their witnesses. He also conceded it was essentially an all or nothing claim and his enquiries had not revealed any contrary intention such as sometimes is found in a prior will. None of the interests consulted by the Public Trustee enabled it to advance any evidence contrary to that given by the plaintiffs. Any one of the nine siblings, eight of whom had been served, could have been separately represented at the hearing but those consulted had declined that course.

Mr Cleary for the plaintiffs submitted that on the evidence the case came squarely within the Court of Appeal decision in Jones v Public Trustee [1962] NZLR 363 at page 374, line 46. He submitted that there were no competing

claims and that the plaintiffs were the deceased's real family for many years prior to his death. Apparently he also treated them as such before he actually went to live with them in 1971.

I have little hesitation in finding that there was a testamentary promise and it was given for services truly rendered to the deceased in his lifetime and for those services he promised to leave the plaintiffs his entire estate. I therefore make that order accordingly.



Solicitors for Plaintiffs: Lee & Boyer, Lower Hutt

Solicitors for Defendant: Rainey Collins Armour & Boock