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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A No 361/82

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

AND

IN THE MATTER of the estate of A VEVERIS (deceased)

BETWEEN M ELERTS
Plaintiff

AND G PHILLIPS
Defendant

Hearing: 15 September 1983
Counsel: D R Trounson for Plaintiff
R J B Fowler for Defendant and (by order of Court) for beneficiaries
Judgment: 20/9/83

JUDGMENT OF EICHELBAUM J

The deceased, A Veveris, emigrated from his homeland to New Zealand 1944. The plaintiff, Mrs Elerts, was also a native of . Her husband was deported early in World War II and she has not heard from him since. After living in for some years she immigrated to New Zealand with her daughter in 1949. In the 1950s she met Mr Veveris.

In 1967 Mrs Elerts who had been living with her daughter moved to Mr Veveris's house in Street. At the time Mr Veveris was lonely and depressed following the death of a previous companion. The plaintiff and Mr Veveris commenced to live as man and wife, sharing all household expenses. Their

relationship continued until Mr Veveris's death in 1980. At the inception both were working fulltime. Mrs Elerts said that she ceased working in about 1974. She was uncertain when Mr Veveris stopped work but thought it was when he reached which on the information before me would also have been around

Towards the end of his life Mr Veveris suffered a number of episodes of ill health. He had several operations following which Mrs Elerts nursed him as well as looking after the household. In 1980 he suffered a stroke. After this they moved to a different house, in Street. In 1982 Mr Veveris suffered a further stroke which led to a period in hospital and ultimately, as I understood the evidence, his death. At that stage it was discovered that by a will made in 1964 the entire estate passed to two nephews living in now under rule.

On liability the case did not raise any novel question relating to the application of the Law Reform (Testamentary Promises) Act 1949. In the circumstances I need not lengthen this judgment by detailed references to section 3 of the Act, the onus of proof (e.g. Hawkins v Public Trustee 1960 NZLR 305, 310) or the general principles applicable (e.g. Jones v Public Trustee 1962 NZLR 363). I accept the evidence of the plaintiff and her supporting witnesses as truthful, and as giving a generally correct account of events. I have no doubt that the deceased made a number of statements to Mrs Elerts that amounted to promises within the meaning of section 3. The earliest was on an occasion when Mr Veveris asked the plaintiff to marry him, a request that she declined because of uncertainty as to the fate of her husband. On that occasion Mr Veveris made comments to the effect that the house, which at that stage I think must have been the Street property, was hers. Then when he was contemplating selling that property he said that if anything happened to him before the transaction was finalised, he wanted it understood that the house should go to her. It is evident that whether because of loneliness, appreciation of

the household services provided by Mrs Elerts, or affection for her, or a combination of all three, he was anxious that their relationship should continue on a permanent basis. On an occasion when the plaintiff's daughter and her husband discussed the possibility of buying a property which would include a flat in which Mrs Elerts could live, he became upset and said that were she to leave he would not be interested in continuing to live.

Mrs Elerts became aware that there was a will in which the nephews were the beneficiaries. Mr Veveris said that he would change it in Mrs Elerts' favour. Then when they were looking for the new house Mr Veveris said that he wanted Mrs Elerts to be pleased about the property because he said that the new place would be "ours" and he wanted her to be happy with it. Not long after they had moved to I Street there was an occasion when Mr Veveris said it was a "special day" because he had altered his will and had left everything to the plaintiff. He offered to show her the will but she said that was unnecessary. He also said, whether on the same or another occasion is not clear, that she would not have to worry about the future, he had made provision for it, while another time when there was talk about some old suitcases he said that she could burn those because she would never have to move from that place again. There was ample corroboration from other witnesses that some at least of the foregoing statements were made as well as evidence that concerned the degree of the deceased's dependence on the plaintiff. In particular the plaintiff's daughter, Mrs Salem, said that Mr Veveris frequently made remarks to the effect that the house and everything in it would be the plaintiff's should Mr Veveris die.

Evidence was given by a solicitor who was consulted by Mr Veveris at a time that corresponds fairly well to the "special day". He said that the deceased had told him that he was considering making a new will with provision for a friend called Mrs Elerts. His concern was to see that she would be

able to stay in the house in which they were living. The solicitor discussed a life interest with the deceased, but the latter was uncertain how to deal the question of outgoings and Mr Veveris terminated the discussion by saying that he would need to think about the situation, and would come back. On a later occasion he said that he was still considering the matter. When the deceased was in hospital following his final stroke the solicitor received a message from the nursing staff saying that the deceased had been asking for him. There was other evidence that at this time the deceased was trying to write instructions. It is apparent that he was agitated about his omission to finalise his new will. However his medical condition was such that nothing could be done before his death.

I conclude that at the point when the deceased consulted solicitors about a new will, about 18 months before his death, the deceased had not made any firm decision to leave his house property, let alone his whole estate, to the plaintiff, although I am sure that he intended to make substantial provision for her in a form that would include at least a life interest in respect of the house. In light of that, I have of course carefully considered the evidence of the statements made by Mr Veveris in regard to his intentions concerning the house. The evidence about the language used was not very precise - one would not expect it to be - and in such a situation one has to have regard to the prospect that the listeners read more into the remarks than was intended. In retrospect it is apparent that Mr Veveris did not open his affairs completely to Mrs Elerts' scrutiny. The origin of his cash resources of approximately $50,000 remains a mystery. One possible inference is that he and the plaintiff primarily used Mrs Elerts' earnings for their day to day needs and that Mr Veveris made substantial savings from his own earnings. However it has to be remembered that Mrs Elerts had a detailed knowledge of the deceased only for the last 16 years of his life. He may have had significant

savings previously, or there may have been some windfall of which Mrs Elerts did not learn. At any rate I find it credible that on the one hand he should make statements to the effect that the house property would go to Mrs Elerts at a time when he had neither made any such arrangement nor, when it came to the point, felt able to give firm instructions to his solicitors on the topic. My conclusion is that whatever private reservations he retained, Mr Veveris in fact made promises to the effect that he would leave the house to Mrs Elerts outright.

In addition, I find that on occasions he made more expansive statements. Mrs Elerts and her daughter interpreted these to mean that everything he had would go to the plaintiff but I am not satisfied that he said or meant literally that. I bear in mind that until after his death neither Mrs Elerts nor any of her family knew or, so far as I can tell, even suspected that Mr Veveris had other assets of the extent that proved to be the case. I believe that the deceased intended to make provision for the plaintiff in addition to the house property and I find that he said as much but never in precise terms. In my view the general tenor of the deceased's promises was that he would make reasonable provision for the plaintiff, including leaving her the house property he owned at the time. I reject the possibility that the true import of his statements was merely that he would provide Mrs Elerts with a life interest.

Being satisfied then that services were rendered, and that promises were made to make testamentary provision in return for or as a reward for services or work (Public Trustee v Bick 1973 1 NZLR 301, 305) I turn to the question of quantum. I have sufficiently dealt with the circumstances in which the promises were made and the services rendered. As to the value of the services, they comprised housekeeping over a period of 15 or 16 years, companionship over the same period (as to the separate value of this element, see Chambers v Weston 1982 1 NZFLR 377, 381) the plaintiff's gardening, the nursing services which I am satisfied were substantial in the deceased's last

years, and the monetary assistance that the plaintiff provided in connection with furniture and furnishings when they moved into the house. It is impossible to estimate their total value in any accurate way but if one proceeded on the basis of what they would have cost had the deceased had to pay for them (not that I suggest that this is in any way decisive) clearly it would not be difficult to arrive at a figure that would approximate to the total value of the estate.

Then as to the value of the testamentary provision promised, putting aside the house property, it is impossible to be precise. The deceased did not nominate any figure or basis. The most one could say was that his remarks should be interpreted as meaning something reasonable, consonant with the modest circumstances in which they lived; a provision that would enable the plaintiff to continue a similar lifestyle after his death. As to the amount of the estate, the evidence shows that apart from the house, the cash balance available, after making allowance for the defendant's legal costs in respect of the present proceedings, would be between $45-46,000.

Finally there is the question of other claims on the estate. Here the only persons requiring consideration are the nephews. They were born after Mr Veveris left Europe and so far as was known he had never met them. However it is clear that at the stage when Mrs Elerts first came to know the deceased he was still keeping in touch with members of his family living in his homeland. A record which he kept indicates that in the period 1957 to 1968 he regularly sent parcels with gifts of generous proportions to his mother and sister, the latter being the mother of the nephews. It was said that he also sent money. However when his relatives failed or ceased to respond he lost interest in maintaining contact. So far as is known there had been none during the last 14 or so years of Mr Veveris's life.

The order for service included an order that the executor defendant represent the beneficiaries. I was informed that the defendant's solicitors had communicated with the nephews, although indirectly, through the medium of a state agency. It had not been possible to obtain any explicit instructions. However the solicitors had ascertained that the nephews were in regular employment. Although because of differenc in living standards, it was difficult to obtain any confident picture of their circumstances, there was no suggestion that they were in any situation of hardship.

The position of the nephews merits some consideration because it seems likely that they are the only surviving relatives of the deceased; further, because of his reaction when he discussed the possible ways of changing his will with his solicitor, I infer that notwithstanding the lapse of years and the absence of contact, Mr Veveris still at least wished to consider making a significant provision for them in his will. Overall however, for purposes of the element to be taken into account in terms of section 3 of the Act, the claim of the nephews cannot be described as a strong one.

Nevertheless - and notwithstanding the broad discretionary nature of the jurisdiction - the Court should not be beguiled into dispensing palm tree justice. Just as in cases under the Family Protection Act the Court's jurisdiction is limited to repairing the breach, here the prescribed function is to determine what amount is reasonable, not on the basis of some notion of how a reasonable testator might have disposed of his estate, but according to all the circumstances and in particular, the statutory criteria set out in section 3, bearing in mind that the claim is enforceable only to the extent that the deceased has failed to make the promised provision or otherwise remunerate the claimant.

Before I can turn directly to an assessment of the award, two matters of principle require mention. Mr Fowler submitted

that as a general proposition, the amount of an award could not exceed the amount promised. He did so in the context of a submission that the deceased never promised more than the house. As to that, I have already found otherwise, on the facts. I need not therefore discuss the legal proposition further, beyond noting that as a foundation for any claim, there must have been a failure by the deceased to make the promised testamentary provision, or otherwise remunerate the claimant.

The second matter is the issue of how "services" performed in the course of a de facto relationship are to be weighed for purposes of an award. I use the word in quotations to indicate the broad interpretation given to it by case law, see e.g. Tucker v Guardian Trust 1961 NZLR 773, 776. It is of the essence of a relationship such as the one between the plaintiff and Mr Veveris that it is founded upon mutual affection and support; essentially a situation of separate contributions, monetary and otherwise, to a joint enterprise for the benefit of both parties. In litigation such as the present attention naturally focuses on the advantages obtained by the deceased but it is obvious that if for some reason their positions had been reversed Mr Veveris could easily have given evidence about benefits obtained by Mrs Elerts. The one most obvious and, in monetary terms, of greatest value is that for all those years of their relationship he provided her with the free use of an adequate home.

In Bennett v Kirk 1946 NZLR 580 the facts in favour of the plaintiff were somewhat stronger than the present. The deceased specifically requested the plaintiff to live with and look after him and promised that if she did he would leave her all that he possessed should he die. The plaintiff lived with the defendant as his housekeeper for 23 years. The report does not suggest any closer relationship. However it is clear that as in the present case the parties each made their own contributions to a joint household. In those circumstances it

might be argued that although the deceased had failed to make the testamentary provision he had promised he had, in terms of section 3 (which in this respect read the same when Bennett v Kirk was decided) "otherwise remunerated" the claimant so that in effect there was no residual obligation in respect of which any claim lay - a point to which I will return. Fair J said:

> "But the defendants further say that the plaintiff did not provide valuable services or any services calling for recognition: and in fact her association with the deceased was much more advantageous to her than to him. That appears on strict interpretation of evidence to be a possible argument, and, on material considerations, perhaps, strictly correct; but when one considers it in a broader or more practical way, that does not appear to be sound. The deceased had the company and assistance of Mrs Bennett for some twenty-five years. They lived together for those years, apparently quite happily, with her acting as housekeeper. The convenience of a home where he was content to live, and the company of someone with whom he got along smoothly, are themselves of value. Even if his statement that he would leave her everything after his death was a loose expression, and not intended to be literally carried out, his estimation of her services to him should be considered by the Court....." (pp.583-4)

In the event the Court awarded the plaintiff virtually the whole estate.

I have considered two relatively recent judgments dealing with claims by parties to former de facto relationships. In Wright v Slane and Ors A 937/75 Auckland Registry, judgment 4 September 1978 unreported, the plaintiff had lived with the deceased for 10 years up to his death. Chilwell J said he was not persuaded that the services and work relied on were any more than would have been the case had the parties been married. However, in the opinion of the learned Judge, that did not disqualify the claim. He referred to Bennett v Kirk and posed the question - a very pertinent one, in my respectful opinion - whether the law should view the provision of similar services any differently where the parties have improved their position by allowing the relationship to develop on more affectionate terms. And he commented that it would be a strange law which recognised the ties and bonds of human affection but only in the married state. The mere existence of a de facto relationship did not give rise to any claim under the Act; but -

> ".....once a promise of reward is made for the rendering of services or the performance of work the foundation for a claim begins to emerge. The fact that the services and/or work equate that which would normally form part of the concept of consortium ought not to bar the claim but a claim so founded may well be limited, even to the point of exclusion, if the claimant has been otherwise properly remunerated by the receipt of a sufficient quid pro quo." (p.12)

The plaintiff succeeded.

In Chambers v Weston to which I have already referred Cook J was faced with a factual situation closely similar to the present. Cook J encapsulated the factual elements that have led me to the point under discussion:

> "It must have been an entirely happy relationship, not only to their mutual advantage materially, but bringing to each a companionship which cannot have been an element in Mrs Chambers marriage or previously known to (the deceased)." (p.379)

Cook J quoted the same passage from Bennett v Kirk which I have already set out and referred also to the judgment of Chilwell J in Wright v Slane including the portion which I have quoted. He accepted that as the proper basis upon which to approach such a claim. He continued:

> "....I am satisfied that , while no doubt there were substantial mutual benefits which may have been in balance, all that her companionship must have meant to him and the benefit he thereby derived, especially when one remembers that he was a man more than twenty years her senior, can rightly be regarded as over and above that and coming within the meaning of the expression 'services', as used in the section." (p.383)

It might be said that to an extent, similar considerations apply here. However, I do not consider it necessary to examine closely the respective contributions of the parties, with a view to deciding whether there is some balance in favour of the plaintiff. The question merits some brief exposition. The starting point is that the Act creates an enforceable claim "to the extent to which the deceased has failed to make (the) testamentary provision or otherwise remunerate the claimant". Where mutual benefits have been bestowed, is any claim limited to the balance, as it were, for which the claimant has not been "remunerated"? Such a submission was made to Chilwell J in Wright v Slane; he described it as the "quid pro quo" argument. His Honour dismissed it on the facts. A telling point against it was that at the end of the relationship, one party was found to hold virtually all the assets. The same factor is present here: on the death of Mr Veveris, the plaintiff's assets, apart I presume from personal effects,

consisted of savings of $800. But I would go further and say that the phrase "or otherwise remunerate" does not refer to such a situation as this. "Remunerate" I consider is used in its primary meaning to repay; to make some return for services (Shorter Oxford). The nub of the statutory requirement is that following a testamentary promise, and the rendering of services or performance of work, the deceased has failed to honour the promise, nor made any substitutionary provision, for example an inter vivos settlement or gift. And while "otherwise" no doubt permits wide connotations, "remunerate" as stated requires certain specifics. Here, at the stage when the promises were made the deceased was well aware that over the years he had provided benefits for Mrs Elerts. In such a case it cannot be suggested that the deceased's actions in providing mutual support and affection, and a roof over Mrs Elerts' head,were in any realistic sense the provision of a substitute for his testamentary promises. If one approaches the matter from the point of view of the deceased's own assessment of the value of his promise, he was making a promise of reward for the whole of the plaintiff's services, and not merely for that portion which was in excess of mutual benefits that might otherwise have been in balance. My conclusions on this aspect are consonant with the views expressed by Fair J in Kirk v Bennett in the passage quoted earlier.

I can now deal with the quantum of the award relatively briefly. Where there is a promise to leave specific property it does not follow that there should be a vesting order as of right, a point discussed in Perkins v Townley, CA 115/81, judgment 29 November 1982 unreported. However, as Cooke J stated in that case, there is nothing in the Act to suggest that the power conferred by section 3(3) should be exercised exceptionally or sparingly. In the present circumstances I consider that substantial weight should be given to the deceased's own evaluation of the plaintiff's services. Accordingly I am satisfied that in the first place there should be an order as claimed, vesting in the plaintiff the property at Newtown, Wellington previously owned by the deceased. Nothing was said as to chattels in it; possibly

they have been regarded largely as the plaintiff's property in any event. I am however prepared to consider any further application that may be made for a vesting order in that respect and I will reserve leave to the plaintiff to apply accordingly. I have no doubt that the plaintiff will make some suitable provision to meet the nephews' request for some personal mementos from the effects of their late uncle, and that no formal order will be required in this respect but the leave reserved will include this topic also.

As to monetary remuneration, the plaintiff's attitude was that whatever view the Court might take of her entitlement, the nephews should retain some significant portion of the estate. That was a very fair and reasonable concession on her part and accords with my own view of the matter. As stated earlier I proceed on the view that apart from the house property and possibly its contents, the deceased's promises should be construed as meaning he would make adequate provision for her. Taking into account the considerations specified in section 3, the matters discussed earlier in this judgment, and of course the substantial award already made to the plaintiff in the shape of the house property, I consider that a monetary payment of $20,000 would be appropriate and I give judgment for the plaintiff accordingly.

The plaintiff is entitled to costs out of the estate which I fix in the sum of $2,000 together with disbursements and witness expenses to be settled by the Registrar. If the plaintiff desires a further hearing on the question of the chattels a memorandum may be filed and served to that effect within 14 days of this judgment. Otherwise a formal order may be sealed in accordance with the award I have made.

[redacted]

SOLICITORS:
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