3/10/84

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.1260/81

NZLR.

84/1176

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

BETWEEN STELLA AVIS KEARNEY of Auckland, Civil Servant

Plaintiff

A N D GERALD KEVIN MAHONEY of Wanganui, School Teacher and JOHN RAE WEIR of Auckland, Clothing Manufacturer as Executor and Trustees in the Estate of WILLIAM GERALD STROUD MAHONEY deceased

Defendants

Hearing: 7, 8 June, 1984.

Counsel: P.J. Edwards for Plaintiff
A.J.H. Witten-Hannah for trustee Mr Weir
R. Bell for Defendants
J.M. Priestley for residuary beneficiaries

Judgment: 1984

JUDGMENT OF VAUTIER, J.

This claim under the Law Reform (Testamentary Promises) Act 1949 was brought by the plaintiff against the defendants as executors of the estate of William Gerald Stroud Mahoney, deceased, to whom I will refer hereafter as "the deceased". The deceased died on 27 January, 1981 aged 53 survived by his widow and three sons, all adult. The deceased and his wife had lived separate from each other since the year 1975. By his last will dated 12 July,

1978 the deceased made various provisions of which it is necessary to refer only to the following:

(a) To his widow, a legacy of $10,000 and in addition the testator provided for the payment from his estate of the amount owing under any mortgage on the property occupied by the widow this being a property owned by the deceased and his wife on a joint tenancy so that she obtained the whole property on his death by survivorship.

(b) A legacy of $10,000 to the plaintiff.

(c) Legacies of $1,000 to his brother, the first-named defendant and a like amount to a former employee.

(d) The residue to his three sons abovementioned.

There were no other relatives of the deceased able to advance any claim against his estate. The widow herself was served but subsequently granted leave to withdraw from the proceedings. She instructed Mr Bell, however, to advise the Court formally that she wished to take no part in the proceedings before the Court and she has not advanced any claim in terms of the Family Protection Act.

The estate left by the deceased was substantial. Its nett value for death duty purposes was finally assessed at $174,779.23. Actual realisations and income accruals have resulted in the total yield to date from the estate plue the value of unrealised assets as shown by a memorandum of counsel for the defendants filed in Court at the hearing being, in all, $217,476.00. Taxes and expenses and liabilities

yet to be paid or discharged may reduce this amount to approximately $197,000. The legacies have all been paid and the estate has been, to a substantial extent, distributed leaving, however, a residential unit at Mokoia Road, Birkenhead, in which the plaintiff is now residing, a debt owing to the estate of $2,500 and $33,451 in cash and deposits out of which the liabilities previously mentioned will have to be met.

The plaintiff's claim is concerned with the residential unit to which I have referred which was valued for estate duty purposes at the sum of $45,000 and was subsequently in a valuation produced by consent and made by a registered valuer on 14 October, 1982 valued at the sum of $60,500. The valuer assessed the fair market rental of the unit at the date of death as between $55-60 per week and at the date of valuation as between $95-100 per week. The unit was one owned by the deceased at the time of his death under the cross lease system and was then subject to a mortgage which has been repaid by the defendants. The plaintiff's claim is for an order giving to her a life tenancy in this unit. The rental assessment and an actuarial valuation of such a life tenancy based thereon also produced by consent indicates a valuation of life tenancy to the plaintiff as at the date of death of $35,000 to $40,000 and as at 14 October, 1982 (the date of the assessment) of between $40,000 and $60,000.

The evidence of the plaintiff showed that she was, at the date of the hearing, aged 59 and that she had

since the year 1967 been employed in the office of a government department and was currently in receipt of earnings of $389.16 nett per fortnight. She is due for retirement on her 60th birthday. She had previously been married but she and her husband separated in August, 1975 and her marriage was dissolved in 1977. She referred to receiving, as part of a settlement entered into by her with her former husband on their divorce, a section of land with a then government valuation of $9,000 and some furniture and effects. She and her husband had been friendly with the deceased and his wife. The latter also separated from his wife in the year 1975 and the deceased lived thereafter in a unit in Church Street, Northcote. Thereafter the plaintiff and the deceased at first met on a few occasions but in 1976 a close association started to develop between them. The plaintiff at this time was living in Glenfield. There were mutual visits to the respective homes of the parties which gradually developed into the situation wherein, the plaintiff said, the deceased was calling on Friday nights and Monday nights each week to have his evening meal with her and she was going to his place on one night a week on which occasions she would carry out such tasks as washing the breakfast dishes, vacuum cleaning and tidying the flat and preparing the vegetables for the evening meal. There were at this stage also occasional outings to films or a concert and the time spent together increased to the point where sexual intimacy developed. The deceased and the plaintiff went on three trips overseas together the main expenses of these trips being met by the deceased.

The plaintiff related a discussion in the year 1978 regarding her own living arrangements, this being at the time when the deceased made his will. The deceased, she said, wished her then to accept from him a life tenancy of his Church Street unit and he wished to include a provision to this effect in his will. The plaintiff said that she did not consider she should agree to this and gave as her reasons that she "felt I may not get this flat and felt perhaps I hadn't known him very long and I was not his wife ... I felt that wills are sometimes upset and you don't get what the person wanted you to have." The subsequent outcome of this discussion, she said, was that the deceased said "I have left something in my will for you, I don't want to upset you so I have not left the flat as a life tenancy for you." The reference to provision in the will was not amplified and there was no further discussion about the matter following this.

The situation as to the association between the parties continued on much the same basis except that the plaintiff, she said, had by this time commenced to stay regularly with the deceased in the Church Street unit every weekend and the work she did extended to polishing, cleaning stainless steel, washing windows, curtains and woodwork and generally keeping the unit tidy and in order. She also, she said, carried out the deceased's mending.

By 1979 the plaintiff herself had moved into a house in Northcote and the situation then developed that she had only one child at home and she was paying a

high rent. This led to a discussion with the deceased concerning her accommodation and ultimately to his purchase in March, 1980 of the unit at Mokoia Road, Birkenhead which, the plaintiff said, she was told by the deceased was purchased so that she could move into it. This she duly did and it was the mutual intention, she said, that when her youngest daughter left home the deceased would move into this unit with her. At this time, she said, the deceased mentioned that he had discussed with two of his sons the question of a life tenancy for her in this property and told her that he would arrange in his will for this. Thereafter, he made passing references to his intention to get this matter dealt with by his will and finally a few days before his death, the plaintiff said, he discussed what he was about to do by way of drafting instructions for his will and said that he wanted her to have a life tenancy in the flat and she was to treat the home as her own so that she would be paying the rates, insurance and maintenance. The payment of the mortgage on the property, he said, would be covered by the sale of his Church Street property. He further said, according to the plaintiff, that he was satisfied that he had adequately provided for his sons and his separated wife. He also added, she said, "and I have a legacy there for you and a like legacy for (his separated wife). At this time and indeed throughout her occupation of the unit during the lifetime of the deceased the plaintiff was, by agreement with him, she said, paying the sum of $55 per week in respect of her occupation of the Mokoia Road property. This amount, she said, was described to her by the deceased as being for

part of the interest on the mortgage.

The evidence of the plaintiff regarding the extent of the association was supported to some degree by that of her daughter who continued to live with the plaintiff until after the death of the deceased. She confirmed the plaintiff's regular visits to the deceased's flat in Church Street and to having seen her preparing meals and tidying up the premises and to the fondness of the deceased and the plaintiff for each other.

The former employee previously mentioned, Mr Lindsay, also confirmed that there was a close relationship between the plaintiff and the deceased and that the plaintiff to his knowledge carried out various tasks such as ironing and washing and that the deceased had told him that he was buying the Mokoia Road unit for the plaintiff and her daughter to live in and that he intended to make a will giving her a life tenancy of this property. It was his understanding, however, that the deceased did not really want to reside continuously with the plaintiff or that they actually intended to get married.

The plaintiff's son also confirmed the existence of a close relationship between the plaintiff and the deceased and spoke of a conversation with one of the sons, Mr Grant Mahoney, immediately after the deceased's death in which the latter had said, according to the plaintiff's son, that he should not worry about his mother's position because he knew it was his father's wish that his mother should stay

on there and also that he understood there was some form of financial settlement as well for the plaintiff.

The second-named of the defendants, Mr Weir, although he had joined in the filing of a joint defence on behalf of both defendants was, by consent of all parties, permitted to be separately represented by Mr Witten-Hannah at the hearing and he was called by Mr Witten-Hannah to give evidence which, in a measure, supported the plaintiff's claim. He confirmed the close association of the parties and the fact that they lived together at weekends and that housework was done by the plaintiff at Church Street. He recalled that the deceased, on an occasion three days before his death had said: "I have asked her (the plaintiff) to come here to live with me but she has declined because the space is inadequate." He had never, he said, been a party to any discussion in which there had been mention by the deceased of an offer of or any intentions concerning a life tenancy for the plaintiff in any property.

The only other evidence was that of Mr Grant Mahoney who confirmed the fact of the association having developed between the deceased and the plaintiff. The terms of his discussions with his father, he said, led him to believe that the Mokoia Road property was purchased as an investment but also with the idea that the plaintiff would make an ideal tenant for the property. He said that his father later told him that as an investment proposition the property at Mokoia Road was not working out satisfactorily in terms of the rental being received and that in the

event of his death provision was to be made for the plaintiff to go to reside in his Church Street property. He also confirmed, however, that his father had a great affection for the plaintiff and wished to make sure that she had some security of tenure but this was in relation to the Church Street property. He did not recall the conversation deposed to by the plaintiff's son but mentioned that on the occasion referred to he was in an emotional state, his father having just died.

It is of course necessary as Mr Priestley submitted for the Court to approach the task of adjudicating upon this claim with caution and a degree of suspicion. There has been consistent acceptance of what was said in this regard in McAllister v. Public Trustee and Another [1947] NZLR 334 in the judgment of Smith, J. at p.338:

> "In determining the facts, the evidence should be viewed, I think, in the same way as in a claim against the estate of a deceased person. The claim will be examined with care and even with suspicion. Corroboration will usually be required, but that rule is one of practice rather than of law, and where uncorroborated evidence, examined with care and even with suspicion, brings conviction to the mind of the tribunal, it may be acted upon:"

There has been like acceptance of what was said by Fair, J. in Bennett v. Kirk [1946] NZLR 580 in relation to the construction of the original section in the Law Reform Act 1944:

> "The Court has to be satisfied on satisfactory evidence that the promise was made, was relied on by the plaintiff, and that it resulted in benefits to the deceased or detriment to the plaintiff: on the other hand, it is not to ask for a standard of proof that is impossible to satisfy."

It is accepted on behalf of the plaintiff that her claim is founded solely upon the statutory provision. The "promise" in terms of s.3 of the Act which is pleaded in the statement of claim is that the deceased, about seven to ten days before he died, confirmed earlier assurances given to her that she was to have a life tenancy of the Mokoia Road unit by saying "that he would be changing his will so that I would have a life tenancy in the property". In the course of her evidence the plaintiff, as earlier mentioned, amplified this by saying that at the same time in the course of discussion about the new will he intended to make the deceased told her that she would be able to "treat the home as her own" but that she would pay rates, insurance and maintenance but the mortgage repayments would be covered by the sale of the property in Church Street. She added the reference to the deceased, in addition, saying "I have a legacy there for you and a like legacy for Barbara." Her evidence thus went beyond the specific promise pleaded in the statement of claim.

Taking due account of the submissions made on behalf of the residuary beneficiaries and of the need for caution and the desirability of looking for corroboration as already mentioned, my conclusion is that the plaintiff

has established that an assurance was given to her by the deceased that she would be given on his death a life tenancy in the Mokoia Road flat by means of a testamentary provision to that effect. The plaintiff's evidence as to this aspect impressed me as being reliable and convincing. In addition, of course, there was the independent evidence of the deceased's former employee Mr Lindsay which was corroborative of such an intention being present in the mind of the deceased and of his proposal to put this into effect by means of a provision in his will.

In the presentation of the case on behalf of the plaintiff, however, it was contended that the promise of the deceased extended to the life tenancy in addition to the legacy of $10,000 actually given to the plaintiff in terms of the will. This I find myself unable to accept. As I view the evidence there is no corroboration at all as to this point. I cannot accept as corroborative the evidence of the son John Alfred Kearney as to a conversation which he deposed had taken place between him and the deceased's son Mr Grant Mahoney immediately after the death of the deceased in which Mr Grant Mahoney was said to have stated that he understood there was "some form of financial settlement as well" for the plaintiff in addition to the matter of her being permitted to stay on in the Mokoia Road unit. This evidence had been objected to as hearsay and of course could in any event be explained simply by the fact that the son was aware of the legacy to the plaintiff in his father's existing will. I also think that it is

certainly necessary, as Mr Priestly submitted, to take into account in this regard that the plaintiff's evidence in the way in which she actually expressed the matter is more consistent with some reference by the deceased to his existing will which he was proposing to change in order to make the provision for a life tenancy in the Mokoia Road unit to the plaintiff. Furthermore, the plaintiff's reference to the earlier discussion in the year 1978 when the last will of the deceased was actually made and to which I have already referred shows quite clearly, to my mind, as Mr Priestley submitted, that the $10,000 as included by way of legacy was intended then as a substitution for a life tenancy in a residential unit, i.e. the Church Street unit and the almost inescapable inference from the evidence as a whole is, in my view, that if the deceased had indeed changed his will as the plaintiff said he was about to do he would not have included the legacy as well as the life tenancy. I can find no sufficient evidence of any promise to leave to the plaintiff both a life tenancy and a substantial legacy.

On behalf of the residuary beneficiaries it was not in any way strenuously contended that the deceased had not expressed any intention to give the plaintiff a life tenancy in the unit which he had bought for her to occupy. The main thrust of the submissions advanced in opposition to the claim was directed to the point that the plaintiff had failed altogether to make out any case in terms of the statute because this required proof of an express or implied

promise to reward for the rendering of services to or the performance of work performed for the deceased in his lifetime. Reference was made to the long title of the Act, "An Act to make better provision for the enforcement of promises to make testamentary provision in return for services rendered". It was argued that here there was nothing whatever in the evidence of the plaintiff or witnesses called on her behalf to indicate that the provision by the deceased of accommodation for the plaintiff either during his lifetime or after his death was in any respect by way of a reward for services rendered or work done by the plaintiff. Reference was made to the need for caution and the desirability of corroboration as to this aspect of the matter as well as the matter of the making of the promise. It was submitted, in other words, that this was a case in which there was no evidence of any connection between the promise and what had been done by the plaintiff. Reference was made to the fact that initially when the unit was acquired the deceased was said to have spoken only of his intention to buy this flat so that the plaintiff could move into it. The evidence of the plaintiff was as follows:

> "Q. Tell us why the deceased was concerned about securing your accommodation.
>
> A. Probably because he knew I didn't have a lot to come and go on and he knew the facts. Also I think he did love me very much."

This is indeed an aspect of this case which has troubled me and which undoubtedly called for close consideration. The terms in which s.3 of the Act is expressed certainly make it abundantly plain that the statute is directed to

the question of the enforcement of undertakings given to reward by testamentary provision persons who have rendered services to the testator in his or her lifetime so that those services should not go unrewarded as had often proved to be the case under the law as it stood prior to the enactment of this statute. That clearly was the mischief which the statute was designed to remedy. It certainly cannot be regarded as providing a mode for enforcement of every clearly established promise to leave money or property by will to the plaintiff. The reported decisions relating to the statute consistently recognise this. In Tucker v. Guardian Trust and Executors Company of New Zealand Limited and Others [1961] NZLR 773, McCarthy, J. at p.775 said:

> "...it is said that the household work and similar services rendered by the plaintiff to the deceased over the latter years of the deceased's life were performed pursuant to the promise to leave the home to the plaintiff, and that consequently a claim based on them falls within the provisions of s.3 of the Act. I am satisfied, however, on the evidence, that there is no sufficient connection established between the promise to leave the property and the giving of the assistance which the plaintiff asserts he rendered in that way to enable the claim to be supported by those serivces alone."

In Jones v. Public Trustee [1962] NZLR 363 it was said in the judgment of the Court of Appeal at p.374:

> "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."

Not without some hesitation I have finally come to the conclusion that there is, however, indeed, here, sufficient connection between the promise and the services

which the plaintiff did provide to bring the promise within the terms of the section.

Mr Priestley submitted that it had to be remembered that in this case the evidence showed that the parties had not set up a home together at any stage in the usual way nor was it the kind of case in which an "establishment" was provided for a woman and she undertook to be there and available wherever required. The plaintiff here, of course, was in employment and was able to and did in fact maintain her own home throughout. It was suggested that the services which were in fact provided by the plaintiff were simply a natural part of the sort of relationship which came into being between these two people and it was not just a question of her providing companionship and assistance to the deceased. He likewise provided her with companionship and indeed the benefits of overseas trips paid for by him and accommodation for her in a home unit for herself and her daughter at a very reasonable rental. It was accordingly submitted that these were not such services as the section contemplates and that the promise of the life tenancy could be just as easily regarded as attributable to the deceased's high regard and affection for the plaintiff as for any services which she performed for him. I think, however, that this question must be approached, first of all, with due regard for the fact that it has from the inception of the operation of the statute been accepted that s.3 in itself and in particular the word "services" should be interpreted in a liberal way. In <u>Tucker v. Guardian Trust</u> (supra) McCarthy, J. at p.776 said:

> "...the word 'services', notwithstanding its descent from its Latin origin, can and often does embrace in ordinary speech something more than those acts which are performed under a master's contract of service with his servant or of services with a professional man. One finds that the Courts, too, have been prepared to give to the word an interpretation embracing more matters than physical acts where the context of the legislation under consideration justifies it. One finds this, for example, in the construction of railway legislation where the provision of sidings and the like are said to be services: see Hall and Co. v. The London, Brighton and South Coast Railway Co. [1885] 15 QBD 505. Another example may be found in the case of Dwyer v. Hunter [1951] NZLR 177; [1951] GLR 20 where the provision of a room in a hotel was held to be a service. In tenancy legislation there is such a case as R. v. Paddington North and St. Marylebone Rent Tribunal, ex parte Perry [1955] 1 QB 229; [1955] 3 All ER 391. These are perhaps obvious extensions of the use of the word. Other extensions could be quoted. The word 'service' then, if the context calls for it, may receive a wide meaning. How should it be construed in the particular legislation under consideration? It is important, I think, in answering that question, to remember the remedial purposes of the Act and the necessity to give it a large and liberal construction in order to attain its objectives: Nealon v. Public Trustee [1949] NZLR 148. In Hawkins v. Public Trustee [1960] NZLR 305, Shorland, J. applied that approach and took the view that the mere fact that what was rendered to the deceased was intangible and of a value incapable of precise monetary assessment, did not prevent it being a service."

This, of course, is exemplified in various decisions. In Hawkins v. Public Trustee, the case last mentioned, Shorland, J. included among the matters which could be considered to be "services" within the meaning of the section, the actions of a grandson in taking his grandfather's name and giving him the filial affection and companionship of a son.

As Miss Newton for the plaintiff pointed out a very wide variety of actions have been brought within the ambit of the word "services". In Edwards v. New Zealand Insurance Company Limited [1971] NZLR 113 the term was held

to be wide enough to embrace the purchase by a son of shares in a company controlled by his father thereby enabling the father to make other provisions which he sought to do. Again, in the case already cited, Tucker v. Guardian Trust (supra) the claim was upheld on the alternative basis of there being services provided by reason of the fact of the plaintiff having disclaimed his half interest in a house property thereby enabling the deceased to continue to live in it.

In the first of the reported cases under the original statute, Bennett v. Kirk (supra) it was contended, just as here, that the plaintiff's association with the deceased was much more advantageous to her than to the deceased. It was, nevertheless, accepted that the fact that the deceased had the company and the assistance of the plaintiff during many years living together apparently happily with her acting as housekeeper and he having the company of someone with whom he got on well were all accepted as of value and as matters coming within the ambit of the section. I am in the end satisfied that this should be accepted as being the position here also, as regards the plaintiff's association with the deceased. She may well have gained more benefit than he did from it in a material way. It has to be remembered, however, that it is not always easy for a man such as the deceased approaching the age of 50 to find a compatible member of the opposite sex with whom to establish a permanent association. The fact that the plaintiff was in an established employment and with a home and family of her own and that the deceased himself

had apparently no desire to remarry, left him always in the position, which he might have considered as being a vulnerable one, of the plaintiff forming an attachment for somebody else and his thereby being deprived of the compatible companionship, affection and other of the usual marital comforts unless he made the plaintiff feel secure as to her future.

In Jones v. Public Trustee (supra) there is the reference in the judgment of the Court of Appeal at p.375 to it being unreasonable to conclude that the promisee would not be encouraged and comforted in the knowledge that it was the intention of the deceased that the services would not go unrewarded.

It is of importance for the purposes of this case to note that by the amending provision introduced in s.3 of the Act of 1949 the term "promise" is deemed to include any statement or representation of fact or intention.

The references which the plaintiff made to various discussions concerning the plaintiff's accommodation, particularly those in relation to the making of testamentary provision for her to secure her future in this regard lead me to conclude that this was a case where it would be only reasonable to conclude that there must have been some hope or expectation raised for the plaintiff and that she may well therefore have been, to some small degree at all events, induced to continue the association and provide the services by way of looking after the deceased's flat as well as her own, as well as acting as his companion in a general way.

The case admittedly is not as strong for the plaintiff as was that under consideration in the decision of Chilwell, J. in Wright v. Slane and Others A.937/75 Auckland Registry, judgment 4 September, 1978 upon which the plaintiff's counsel relied. That case, however, certainly has a number of points of similarity. Chilwell, J. found that the housekeeping services which the plaintiff provided in the course of a long-standing de facto relationship were no more than those which would have been provided by a wife in an ordinary marriage relationship. At p.13 he said that it was not his judgment that services and work involved in consensual cohabitation per se give rise to a claim under the Act but that the fact that the work and services were what might be regarded as normal in that relationship was not a bar to a claim. He went on to hold that there were in the particular case some services provided beyond those of such a relationship.

I think there is also here to be taken into account the element referred to by Northcroft, J. in Smith v. Malley and Another [1950] NZLR 145 as to the deceased feeling "a sense of obligation" to the plaintiff. Again, there has to be taken into account here, also, the reference in the decision of the Court of Appeal in Nealon v. Public Trustee [1949] NZLR 148 where it was said in the judgment of Kennedy, J. at p.158:

> "...the section requires that a number of circumstances be taken into consideration by the Court, and some of these considerations are a measure of moral obligation and appropriate to a claim sounding in bounty as well as in legal right."

The case of Jones v. Public Trustee (supra) of course also established a claimant was not to be refused relief simply on the grounds that he may have been influenced in part by more laudable considerations than mere mercenary ones. In Smith v. Malley (supra) the services were rendered without any expectation at all by the plaintiff of any reward or remuneration and the claim nevertheless succeeded. Northcroft, J. in so holding placed considerable reliance upon the widened scope of the action by reason of the provisions introduced by s.3 already referred to. I accordingly conclude that the evidence here is just, but only just sufficient to establish the necessary connection between the services provided and the promise alleged.

It next becomes necessary to consider the question of the quantum of the claim. It is, of course, now very clearly recognised that the fact that a promise has been made to leave specific property, as I have found to be the case here, does not mean that the Court in terms of the section should simply make an order that the plaintiff be awarded such property. It is necessary for it to be clearly recognised that the statute is not one designed, as I have earlier mentioned, to enable every promise of benefit by way of testamentary disposition to be enforced against the testator's estate. The decision of the Court of Appeal, Public Trustee v. Bick [1973] 1 NZLR 301 forcibly illustrates the point. There, the Judge at first instance found that a promise had been made to leave to the plaintiff, in consideration of services rendered by him to the deceased, a certain residential property. He made an order vesting in the

plaintiff the property in question but the decision was set aside on appeal upon the grounds that the Judge had placed predominant weight on the circumstances of the property itself having been promised and had accordingly failed to pay sufficient regard to the other matters to which in terms of the section, the Court is obliged to have regard. In the joint judgment of McCarthy and Richmond, JJ (at p.306) there is the following passage:

> "Subsection (1) of s.3 as amended in 1961 requires that the award be 'such amount as may be reasonable, having regard to all the circumstances of the case.' The subsection then lists a number of matters which are included specifically in those circumstances. They are:
>
> (a) the circumstances in which the promise was made and the services were rendered or the work was performed;
>
> (b) the value of the services or work;
>
> (c) the value of the testamentary provision promised;
>
> (d) the amount of the estate;
>
> (e) the nature and amounts of the claims of other persons in respect of whose estate, whether as creditors, beneficiaries, wife husband, children, next-of-kin, or otherwise.
>
> Subsection (1) is the first and dominant subsection in s.3. As we have indicated it equates all forms of testamentary promise to a promise for payment of such amount as may be reasonable having regard to all the circumstnaces of the case. Later subs (3) confers on the Court 'in its discretion, instead of awarding to the claimant a reasonable sum as aforesaid' power to vest specific property in the claimant where the promise relied on relates to any real or personal property which forms part of the estate. This subsection was first enacted in the Act of 1949, very probably because the Court in Nealon v. Public Trustee (supra) had drawn attention to the lack of any such power in s.3 of the Law Reform Act 1944. Doubtless the Court, when deciding whether or not to vest property in a claimant instead of awarding a reasonable sum of money may be guided by questions of convenience and by the consideration that the

> specific property may have a special value to the claimant which could not be fairly recognised by the award of money. Nevertheless, it must be emphasised that the decision to vest specific property in a claimant should only be made after a consideration of all the various circumstances which are relevant in determining a reasonable amount under subs (1). The Court should not treat the circumstance that the property was promised as the only consideration, or necessarily as the all-important one."

As regards the first of the circumstances to which the Court is thus specifically required to have regard, it is at the outset necessary to take into account here the particular and rather unusual circumstances pertaining in this case and in particular of course some of the matters to which I have already referred such as the very real advantages which the plaintiff herself obtained in the course of her relationship with the deceased. What I have said as to his desire for companionship clearly does, I agree, apply to her also. She being several years older than the deceased might well herself have had even more difficulty in finding another congenial companion.

The second matter, the value of the services or work, clearly in my view has to be the subject of some real evaluation by the Court. It is true that there are various dicta in which reference is made to the necessity to give proper weight to intangible matters as was done in the case of Hawkins and that it has been frequently said as it was in that case that no meticulous calculation is required and that a liberal approach should be adopted. Gartery and Others v. Smith and Others [1951] NZLR 105 shows that the assessment of the quantum is not to be conducted as a mere

matter of accounting on the basis of the commercial or market value of the work done or the services rendered and that case shows also that the plaintiff may have some claim on the generosity of the deceased beyond mere commercial considerations.

With regard to the value of the services in this case, however, it is inescapable that regard must be had to the quite short period of the association, only six years overall with the first year or two, it seems a period when the relationship was little more than a friendly social one.

The next matter, that of the value of the provision actually promised to the plaintiff, must clearly here, I think, be recognised as a matter which operates strongly in the plaintiff's favour as regards the question of overall assessment. There is the evidence to which I have referred as regards the substantial actuarial value of the unit in question. It has been said from the outset of the inception of this legislation that the valuation placed by the deceased upon the services in question is a matter of importance to which the Court should have regard. (See, for example, Bennett v. Kirk (supra) at p.584 and Hawkins v. Public Trustee (supra) at p.314). Regard, however, must clearly also be had to the value of the provision which the testator has in fact made in his will for the claimant. In Gartery v. Smith (supra) in the judgment of the Court of Appeal delivered by Hutchison, J. (at p.119) reference is made to the fact that the section gives a right to claim "only

to the extent to which the deceased has failed ... otherwise (to) remunerate the claimant". This makes it essential for the Court to pay regard to what "other remuneration" has in fact been given. Here, of course, there is the substantial legacy of $10,000 to be taken into account.

The other factors to which the Court specifically is required to pay regard mainly operate here in my view in favour of the plaintiff. The estate is a very substantial one and it is not shown that there are any other persons in the categories to which the section refers who are in any real need for provision from the estate and there are, of course, no competing claims outstanding in terms of the Family Protection Act. Overall, nevertheless, it is very clear in my view that the Court in this case would not be justified in placing as high a value upon the plaintiff's services to the deceased and the work done by her for him as would be represented by the award to her of the life interest in the unit which life interest is valued as at the date of the death of the testator at between $35,000 to $40,000 and is now of a substantially higher value still. To do so would in my view be to ignore totally the clear intention of the statute which is limited to securing that those who have performed work or services for another person because of an assurance of, or in the expectation of, receiving a benefit from the estate of that person should not be deprived of that benefit. The statute evidences no intention that such persons should be enabled to enforce a promise which, while having a connection with such services is as regards the amount completely out of proportion

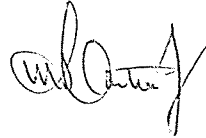
to the value of these. In the cases to which I have earlier referred where promises to leave specific property by will to the plaintiff have been upheld the value of the services has actually been equated with the value of the property in question. The cases where one finds that this has happened seem in the main to be cases in which the amount involved was in any case quite small. Thus, in Hawkins the value of the property promised was $11,185 and the award was $5,500. In Tucker the amount awarded was substantially less than the value of the house held to have been promised. Bick, of course, as I have already mentioned, was a case where a specific property was promised. Its value was $7,000 and the Court of Appeal held that a proper award in that case was $3,000.

Taking into account all these factors and giving such weight to each of them as I consider it reasonable to do and to put them in balance I conclude that a proper award to the plaintiff in this case is the sum of $15,000 which will be in addition, of course, to the $10,000 to which she is entitled under the will of the deceased. I do not think this is a case where the Court could properly in the exercise of its discretion make an order vesting in the plaintiff a life tenancy of the unit in Mokoia Road.

I am not overlooking that Mr Priestley in his closing submissions informed the Court that if it should be held that a promise within the terms of s.3 had been established a vesting order of this kind and not a monetary award was what he was specifically instructed to ask the

Court to make. I am not able to accede to that request; it is in the nature of a compromise into which the residuary beneficiaries can enter if they wish. The Court must have regard to the specific requirements of the statute and to the precedent which any decision of the Court creates.

The plaintiff is entitled to her costs If any specific order is required or any other orders are sought as to costs I will hear counsel further or consider written submissions.



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