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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.54/81

715

BETWEEN K A (also known as K F of Mongonui, Retired

First Plaintiff

AND: D R (formerly D P) of Auckland, Married Woman

Second Plaintiff

A N D: R F of Manurewa, Freezing Worker, as Executor and Trustee of the Estate of W F of Wnangamata, now deceased

Defendant

Hearing: 7th June 1984

Oral Judgment: 7th June 1984

Counsel: A G Stuart for plaintiffs
Miss M B Sharp for defendant
Miss A J Budge for Estate

(ORAL) JUDGMENT OF HENRY J.

The Statement of Claim pleads four causes of action. Because of the death of the First

Plaintiff, Mrs P three of those are not now being pursued, and the one remaining is that brought on behalf of the Second Plaintiff, now Mrs R it being a claim under the Law Reform (Testamentary Promises) Act 1949.

The deceased, W F died intestate on the 1978. Letters of Administration of his estate were granted to his only son, R F . The estate consists now only of a house property at Whangamata which has a present market value of $35,600.00. There are, according to the evidence, no liabilities so that figure represents the now net value of the estate.

The Second Plaintiff, Mrs R although not blood-related to the deceased and although not having been formally adopted by him at any time, was clearly on the evidence brought up by him as a daughter from babyhood. She lived with the deceased and with his de facto wife, Mrs A and it is apparent from the evidence that that relationship should be regarded as a normal mother/father/daughter relationship.

Mrs R first married at the age of and following her marriage retained - with one exception which occurred when that marriage of hers

failed and which I regard of no real significance in these proceedings - that father/daughter relationship with the deceased right through to his death in 1978. I am satisfied that the relationship which I have discussed should be regarded as a normal family one, despite the lack of formality. The Whangamata property appears to have been purchased at a time when Mrs R was still very young, with the house now existing on it being built approximately at a time when she was years of age.

To establish a claim under the Act, a plaintiff must first prove a promise as defined in s.2, to which reference has been made by counsel. That section defines 'promise' as being deemed to include any statement or representation of fact or intention. On the evidence which I accept, there were clearly statements of intention made by the deceased to leave this Whangamata property to Mrs R . That, in my view, is confirmed by the evidence given by her former husband Mr P and again confirmed, although to a limited extent for the reasons detailed by Miss Sharp in the course of her submissions, in the instructions given to the Public Trustee in the will prepared for the deceased but never signed by him before his death.

In my view, the evidence does establish a promise as defined in s.2 and as has been discussed in

the case law, in particular by the Court of Appeal in Jones v Public Trustee (1962) NZLR 363. I therefore find that there was a promise, within the meaning of the Act, to leave the Whangamata property, and that that promise was made by the deceased in favour of the Second Plaintiff, Mrs R

I am also satisfied on the evidence that that promise was made to reward Mrs R for services or work, as that phrase is used in s.3 of the Act. Those words are to be construed widely, as is made clear by a number of decisions both of this Court and of the Court of Appeal. As examples, I refer to Re Oliver (1968) NZLR 168; Edwards v New Zealand Insurance Company Limited (1971) NZLR 114; Jones v Public Trustee, and Hawkins v Public Trustee (1960) NZLR 305. The services or work here are said to consist, first, of living with the deceased as a daughter, providing what would be companionship and, by inference, a degree of physical help which that relationship entails, and of the sort referred to by McCarthy J. in Tucker v Guardian Trust & Executors Company of New Zealand Limited (1961) NZLR 773. Also of relevance on this aspect are the decisions of Re Oliver and Edwards v New Zealand Insurance Company Limited. It is clear from the discussion in those cases that a wide interpretation is to be given to the phrase, and that it would cover the sort of matters to which I have referred.

Second, there was evidence, which I accept, of physical assistance being provided in respect of the Whangamata property both by Mrs R first husband Mr P when their marriage still subsisted, and by her, herself, during her times at the property. This consisted of carrying out items of maintenance, painting, and such like. As well as those, there would be the maintaining of the relationship with the deceased whom she described and knew as her father, which in my view would be of undoubted benefit to him, providing the comfort and general assistance which would go with it, particularly on occasions such as when he would be going to stay with her at her own home.

Having said that, I accept at once that there is nothing exceptional put forward on behalf of the Second Plaintiff in this regard, and I note also that there was no suggestion that there was any attempt in her evidence to exaggerate the situation or what she had done.

I find, therefore, that a claim has been established. The fact that the plaintiff's conduct may have been influenced by considerations other than hope of monetary reward in the ultimate does not matter, and clear authority for that is found in Jones v Public Trustee at p.374. I also find, on the evidence, that the Second Plaintiff Mrs R had not been remunerated

for those services during the lifetime of the deceased. In my judgment those services, in the context of the promise which I find was made, require something over and above the provision of a house and an upbringing, albeit as a daughter, and one who was obviously well thought of and reasonably well cared for within the capabilities of the deceased.

Having reached that stage, I now turn to quantification of the claim. Section 3 of the Act states that the promise of the deceased is to be treated as if it 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 circuimstances in which the promise wasd made, and the services rendered or work performed, the value of the services so worked, the value of the testamentary provision promised, the amount of the estate and the nature and amounts of the claims of other persons on the estate.

I have already referred to the general circumstances and also to those relating to the preomise and the rendering of services or work. The value of services of such a kind is, of course, always difficult to assess. But here they were carried out over a reasonably lengthy period of years and in my judgment, on the evidence and the inferences which can properly

come from it, were of reasonably substantial benefit to the deceased. The value of the promise, relating as it does to the Whangamata property, can now be quantified at $35,000 and that, of course, represents the total net value of the estate.

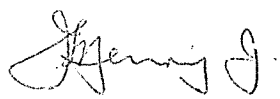
The only other claim by another person is that which is properly put forward on behalf of the defendant, a natural son of the deceased. He is now 50 years of age, a man obviously in good health, with his own family. He has, unfortunately, had little contact with his father. It seems clear his upbringing was left to his mother, and there was a complete lack of contact between father and son at least between the son's ages of . It would seem that there was some spasmodic contact thereafter, but nothing approaching a father/son relationship as there was a father/daughter relationship between the deceased and Mrs R . For that situation no blame whatever can be attached to Mr F . The circumstances which led to it were certainly not of his making, and nobody could be critical of his filial conduct. Nevertheless, one is left with the situation where there was in fact no real tie between father and son. It is pertinent also to observe that it was not a situation which gave rise to an opportunity to Mr F to in any way assist his father, to provide services for him, nor to contribute to the present estate.

In this situation, the Court can only make an arbitrary assessment of what is thought to be reasonable in the particular case. Taking into account all the circumstances, and in particular those which are specifically set out in s.3, I have reached the conclusion that an appropriate award here would be a total sum of $20,000.00. There will accordingly be judgment in favour of the Second Plaintiff for that amount.

I do, however, recognize that the estate consists only of the property, and that some arrangements will need to be made for payment. I therefore further order that that sum be not payable until the 30th September 1984, and that it will not carry interest meantime.

In the circumstances, some allowance towards costs should be made in favour of the Second Plaintiff, and in that regard I make an award of $750.00 together with disbursements and witnesses expenses to be fixed by the Registrar.

There will be judgment in those terms.



Solicitors:

Webster Malcolm & Kilpatrick, Auckland, for plaintiffs

Berman Burton & Parton, Auckland, for defendant