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NZLR X

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.206/83

BETWEEN R BREE
of Otorohanga, Farmer
Plaintiff

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A N D THE PUBLIC TRUSTEE
as Executor and Trustee of the Estate of H BREE late of Te Kuiti, Retired, deceased
Defendant

Counsel:

Hearing and Judgment: 11 December 1984

ORAL JUDGMENT OF GALLEN J.

The late H. Bree died on 1983 aged years. By his last Will and testament, he made provision for legacies to various children; for a specific legacy of $10,000 to the New Plymouth Boys' High School and an additional legacy of $5,000 to the North Shore Bowling Sub-centre at Auckland. He left the residue of his estate to

the New Plymouth Boys' High School. The Public Trustee, the executor, indicates that the present balance of the estate is in the vicinity of $79,000.

The plaintiff claims under the provisions of the Law Reform (Testamentary Promises) Act and initially claimed also under the provisions of the Family Protection Act. The background of the claim is unusual. The plaintiff's mother married the deceased in the thirties when the plaintiff was 11 years of age. It was believed until quite recently, that he had been formally adopted, but investigations have shown that that is not so and the plaintiff has therefore been unable to proceed with the claim under the Family Protection Act.

The deceased served during the Second World War, as did the plaintiff, who seems to have enrolled at a very early age in the Navy. On their return from the War, the deceased was fortunate enough to draw a rehabilitation farm but he was not in sufficient funds to provide all of the stock that he considered necessary and he in fact borrowed from the plaintiff the whole of the plaintiff's War gratuity which amounted to 700 pounds or $1,400 approximately. In addition to that, the plaintiff who on his return from the War had obtained employment as a rigger, was persuaded to work on the deceased's farm which he did for a period of 2 years without receiving wages during that time. The reason why he did not receive

wages was that the deceased apparently did not consider that his financial resources permitted the payment of wages. During this time, the plaintiff was able to obtain some employment during the winter months and the funds which he accumulated from this source were all he had for personal expenses. He did however receive board and lodging from the deceased.

Subsequently the plaintiff has testified to the effect that he assisted the deceased on a number of occasions in connection with the farm and had never been paid for any of the work which he did. There is clear evidence that the services upon which the plaintiff relies were performed.

There is clear evidence that the deceased accepted an obligation in respect of the funds which he had borrowed and I accept what the plaintiff has said, that the deceased also accepted an obligation to make some recompense for the work which the plaintiff had done for the deceased without any remuneration.

In the early years it seems clear that the deceased contemplated, as did the plaintiff and other members of the family, that the funds which had been advanced by the plaintiff would be returned to the plaintiff by the deceased. This never in fact occurred and it is clear from the evidence which I accept, that there were times when that money would have been of considerable assistance to the plaintiff. In due course he

also drew a rehabilitation farm and it was necessary for him to provide the initial deposit. He was unable to do this and sought the funds from the deceased, specifically requesting that the gratuity which he had loaned to the deceased should be made available. The deceased however claimed to be in no position to refund this money or any part of it and as a result, it was necessary for the plaintiff to borrow that money from his wife's parents. There were other occasions when it seems clear that the plaintiff would have benefited greatly from money being made available to him but it never was.

While initially it was accepted that the deceased would meet the obligation which was encumbent upon him by repaying money to the plaintiff, it seems to have gradually been accepted that he would meet the obligations which he recognised, by making testamentary provision for the plaintiff.

The plaintiff has given evidence that on a number of occasions over a period of years, statements were made to him by the deceased which I accept would have been sufficient to satisfy the criteria of the section and amounted to promises for the purposes of that section. Mr Laurenson has quite properly pointed out that the deceased had obligations to his wife, the plaintiff's mother and that the extent of the promises to which the plaintiff has testified - that is that the farm or the whole of the estate would be left to him - were inconsistent with the obligations which the deceased had to his

wife and which it is accepted that he realised because it seems to have been understood within the family that he had made provision for his wife to the exclusion of other persons. However that may be, I think it was open to the deceased to accept that his wife clearly intended to ensure that the plaintiff was recompensed for what he had done and it may be that although he himself indicated his intention to make some provision for the plaintiff, that he considered the possibility that this obligation would be met if he made some provision for his wife which could have been a life interest or may even have considered it was enough to assume that she would herself in due course make proper provision. Whether that is so or not and I accept that some rather difficult questions might be raised in respect of it, the fact is that the plaintiff's mother died before the deceased. Following her funeral, the deceased indicated to the plaintiff that he was in no position to meet the funeral expenses which had been incurred and he obtained from the plaintiff, half the cost of those expenses. The plaintiff has testified that on that occasion promises to make provision for him by Will were renewed.

I accept that such promises were made and I accept that the plaintiff understood by the wording which was used, that it was the intention of the deceased to leave substantially the whole of his estate to him, but it must have been clear that he did not intend to leave the whole estate

because the conversation on that occasion included reference to the children of the plaintiff and some suggestion that the deceased would make provision for them. I think that this is a case where there is clear evidence that the services which the plaintiff claims to have made were made; that they were substantial in nature; that they were recognised by the deceased and that promises were made to recompense him by way of testamentary provision. I think that although initially it may have been accepted that the funds would have been repaid to the plaintiff, it was likely accepted by all concerned, which included other interested members of the family, that recompense would come by way of testamentary provision. In fact the deceased has not honoured those obligations.

I believe that this is a case where the plaintiff has made out a proper case for provision under the section and is entitled to judgment.

That leads me to the question of the assessment of the appropriate amount. That is a matter in the discretion of the Court. There is authority to the effect that it should bear some relation to the value of the services. In this case, Mr Garbett has pointed out that the evidence called establishes that the value of the funds initially made available, including what should have been paid by way of wages, if it were translated into terms of today's values, would be in the

vicinity of $30,000. That particular figure is further corroborated by the fact that the purchase of the number of cows which was undertaken by the initial advance, would in today's terms, be a similar amount, but I do not think that that is a total assessment of the amount to which the plaintiff is entitled. He has in fact been without his funds for practically the whole of his working life. He made available moneys which were intended to set him up after War service. There is clear evidence that there have been times during his life and one might well accept this, when that money would have been more than welcome. I think he is entitled to additional sums to make up for the fact that those moneys have not been available to him.

Mr Garbett suggests that an appropriate order is to recognise the substantial bequests which were made by the deceased and to order that the residue of the estate be paid to the plaintiff instead of the residuary legatee named, the New Plymouth Boys' High School. There is nothing in the evidence to suggest that the deceased had any particular obligation towards his old school. His interest seems to have been re-kindled by attendance at a reunion at a comparatively late stage in his life.

Under those circumstances, I think the order proposed by Mr Garbett is reasonable and realistic and in my view, the plaintiff is entitled to judgment in those terms.

That leaves the question of costs. I think however that it may be reasonable if Mr Laurenson were to receive some award for costs. Counsel may submit a memorandum as to costs. I express my view that Mr Laurenson's client is entitled to some costs in these circumstances.

Solicitors for Plaintiff:	Messrs McKinnon, Garbett and Company, Hamilton
Solicitor for Defendant:	Public Trust Office, Hamilton
Solicitors for New Plymouth Boys' High School Board of Governors:	Messrs Govett, Quilliam and Company New Plymouth