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NZLR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP 36/86

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

BETWEEN ARMSTRONG of Dunedin, Retired

Plaintiff

A N D ROSS of Dunedin Solicitor, WILLIAMSON of Dunedin, Widow, and KERR of Dunedin, Retired as Executors and Trustees of the will of WILLIAMSON of Dunedin, Retired Company Director, Deceased

Defendants

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Hearing: 28th March 1990

Counsel: K. Kendall for Plaintiff
A.J. Logan for Defendants
W.J. Wright for St John Ambulance Association, Dunedin Returned Services Association (Inc.), Society for the Prevention of Cruelty to Animals, New Zealand Foundation for the Blind
Kathleen Weatherall for Royal Forest and Bird Protection Society (Otago Branch)
Carla Papahadjis for New Zealand Crippled Children Society (Incorporated) Otago Branch
S.M. McLeod for Union Rugby Football Club
J. La Hood for New Zealand Red Cross Society Inc., Dunedin Branch

Judgment Delivered 28.3.90.

ORAL JUDGMENT OF WILLIAMSON J.

The Plaintiff, Armstrong, was disappointed when he learnt that he was to receive a bequest of only $5,000 from the estate of Williamson, who was his uncle by marriage. To some degree his disappointment was related to his expectation that, as a constant and caring

relative of the deceased, he would have received more than a comparatively small legacy of $5,000 out of a very substantial estate of $2,318,557. The other part of his disappointment related to his view that the deceased had failed to keep promises which he had made concerning his will.

THE FACTS

Williamson died at Dunedin on the 24th January 1986. His first wife, I who died in February 1975, was the Plaintiff's mother's sister. As a child the Plaintiff, together with other members of his family, had a close association with the deceased and his aunt I . There was an affectionate relationship between the deceased and the Plaintiff and his family in that they shared all of the normal events associated with family life. There were constant visits between the families, shared picnics and other outings and the deceased, with his wife, was one of the few relatives to attend at the weddings of the Plaintiff and of his sisters.

After the Plaintiff's marriage in 1951 he lived at Waverley in Dunedin. At all times the deceased was living at Highgate, Maori Hill, Dunedin. During this period when the eldest three of the Plaintiff's children were born, the Plaintiff and his wife, B , visited the deceased and I on a regular basis and from time to time carried out some tasks for them.

In 1957 the Plaintiff and his family moved to an address in Lynn Street, which was just around the corner from

the deceased's property in Highgate. As the deceased and his wife, I , grew older there were occasions when the Plaintiff was required to assist them with various household tasks. In particular he assisted his aunt I with movements around the house, that is in and out of chairs and upstairs to her bedroom. On occasions he also assisted the deceased when he was temporarily unwell.

Following the shift to Lynn Street the Plaintiff called at the deceased's home when asked to and at least once a week by way of a social visit. When the deceased's wife I died suddenly it was the Plaintiff who was called for, along with the doctor and funeral director. Prior to her death I had explained to the Plaintiff that she was giving personal effects, including jewellery, to the Plaintiff's sisters and that she did so making the remark "H will look after you R ". It was in February 1975 that Isobel died. The relationship between the Plaintiff and deceased, involving regular, at least weekly, visits, continued. Gifts were exchanged between the two men and their families, including, in 1979, the gift of a television set by the deceased to the Plaintiff.

In 1975, i.e. later in the year after the death of I , L , the deceased's second wife, came to live at his house as a housekeeper. In 1981 the deceased and L were married. At no time did the deceased have any children of his own.

Following the marriage the Plaintiff continued his regular visits and on occasions took the deceased, who was by then retired, on day trips or away on more extensive business trips on two occasions. The Plaintiff was involved in doing odd jobs about the house and garden at Highgate. Towards the later portion of the deceased's life, and at a time after which the Plaintiff had retired, the Plaintiff made regular weekly shopping trips for the deceased and his wife to the supermarket. He also carried out jobs around their home and garden.

In either 1982 or 1983 the deceased had a stroke and was in Wakari Hospital. On some occasions, said to be six or seven, the Plaintiff took L to visit the deceased. Following that period he was also involved in taking her to town on occasions for visits to the dentist or shopping, and in staying with and keeping the deceased company. The Plaintiff was involved in regularly running the cars owned by the deceased and his second wife so that they could be maintained in reasonable order. In addition the Plaintiff's family carried out some tasks for the deceased. The Plaintiff's wife regularly visited, bringing baking and magazines and providing some companionship.

The deceased had more than one stroke and shortly before his death he became unsteady on his feet and required assistance around his two storey home, and in particular up and down stairs. The Plaintiff was involved in relation to a special bed which had to be arranged for him. He was also

involved in other activities, such as the provision of a leaf gatherer and in carrying out messages for the deceased and his second wife. On many of the occasions when he called to see the deceased he was involved only in talking to and providing companionship for the deceased. On some occasions when these discussions were being held, the deceased made remarks to the Plaintiff indicating that he was going to make significant provision for him in his will.

THE WILLS

The last will of the deceased was made on the 19th January 1984; a codicil made on 25th September 1984, that is some 17 months before his death; and a final codicil on the 12th June 1985, that is some 7 months before his death. In his last will the deceased bequeathed the sum of $20,000 to his second wife, together with his personal property and the freehold home situated at 531 Highgate, Dunedin. He also forgave moneys owing to him by his wife. Other specific legacies were made to a number of persons, including $5,000 to the Plaintiff, and $2,500 to each of the Plaintiff's sisters, and to each of their children. Two of the Plaintiff's sisters had two children, so that in effect that sister and her family obtained $7,500 in total. No legacies of similar amounts, that is $2,500, were left to the Plaintiff's five children.

In previous wills made by the deceased he had provided for legacies to the Plaintiff. In wills made in 1965, 1975 and 1977 the legacy for the Plaintiff was $10,000. There were also other provisions in some of those wills concerning

children of the Plaintiff and his sisters. In the will made in 1980 the legacy to the Plaintiff was reduced to $5,000, as were other legacies contained in the deceased's will. At that stage the deceased told his solicitor, Mr Ross, that he was reducing these legacies because all of the persons involved were "comfortably off". At no stage did he ever indicate, in giving will instructions to Mr Ross, that he had made any promise or commitment to the Plaintiff.

THE ESTATE

As at the date of his death the deceased had assets and liabilities resulting in a nett dutiable estate of $2,318,557. This did not include the property at 531 Highgate, Dunedin, bequeathed to his widow, Mrs L or the personal chattels which were bequeathed to her. The estate duty and liabilities of the estate have been paid. Also the legacies bequeathed in terms of the will have been paid. The Court was advised that at present the nett value of the estate is $1,321,320.83 plus unrealised Lloyd's Bank shares of a value of approximately $14,000.

THE CLAIM

This claim is made under the provisions of s.3(1) of the Law Reform (Testamentary Promises) Act 1949. As Counsel have been at pains to point out, such a claim is different in nature from claims made under the Family Protection Act 1955. I am conscious of the differences between such claims and of the helpful description given to such differences in the case

of McCormack v Foley [1983] NZLR 57, and in particular the passage in the judgment of Richardson J. at page 68:

> " Family protection legislation and testamentary promises legislation operate in the same social area. Both statutes are concerned with the distribution of property on death of the deceased. Both impose restraints on the freedom of testamentary disposition. Both are concerned to ameliorate the position of those who have moral as distinct from legal, claims to share in the estate of the deceased. At the same time each statute is unique legislation. The underlying concepts are different. The family protection legislation is concerned with the discharge of familial responsibilities. The obligations with which the testamentary promises legislation is concerned are of a promissory nature and so 'the relationship with contract is very strong': Public Trustee v Bick [1973] 1 NZLR 301, 305 per McCarthy and Richmond JJ. The object of the family protection legislation is to protect family dependants where the person on whom they were dependent dies possessed of sufficient estate to provide or contribute to their maintenance: Schaefer per Lord Simon of Glaisdale at p.596. The purpose of the testamentary promises legislation is to protect persons who have performed work for decedents in their lifetime in reliance on a promise on their part which has not been honoured to leave them benefits by will: Schaefer per Lord Cross at p.592. there is also a flavour of unjust enrichment of the estate at the expense of the promisee if services performed in return for a testamentary promise are not rewarded."

It is important then for the Court to be careful in applying s.3(1) of the Law Reform (Testamentary Promises) Act 1949 to the facts of this case. That section reads as follows:

> " 3. Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision -
>
> (1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express

> or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have bveen enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise."

Stated shortly, the section requires proof:

1. That the claimant rendered services to or performed work for the deceased in his lifetime.

2. Either that the deceased made an express promise to reward him for such services or work, or that such a promise may be implied.

3. The circumstances relevant to an assessment by the Court of what amount is reasonable.

THE PROMISES

The promise relied upon in this case consists of four specific statements made by the deceased to the Plaintiff when

viewed in the context of all of the surrounding circumstances, including other similar statements made to the Plaintiff's wife. Specifically the promises relied upon are these:

1. A promise made shortly after the death of the deceased's first wife, I . At that time the Plaintiff says the deceased, during a conversation in the sun porch, said: "I want you to know R , that you feature in my will prominently." He said the deceased stressed the word "prominently".

2. A year or so later the deceased said: "I have made provision for the girls and all the children" and then: "Something substantial for you R , you've had a hard time".

3. On another occasion the deceased looked at the Plaintiff and said: "You stick close to me R , you won't regret it."

4. On the fourth occasion, at a time when the Plaintiff had assisted the deceased out of bed and downstairs to put him in a wheelchair, the deceased said: "You've been very good to me and you're well provided for in my will."

There was no other person present during any of these alleged oral promises. On one occasion the Plaintiff's wife, B , had a conversation with the deceased during a New Year's

Eve party at which the deceased, after discussing assistance given by the Plaintiff to his own mother, aunts and the deceased, said to the Plaintiff's wife in a pointed way about the Plaintiff: "I'll see him right." On other occasions he had commented on the Plaintiff's goodness to him and said to the Plaintiff's wife: "I won't forget it."

In considering the alleged promise I am conscious that the onus of proof is upon the Plaintiff and that some caution has to be exercised in accepting the evidence of a person supporting his own case when the other party involved in the conversation is deceased and consequently unable to comment. It must also be borne in mind that, in a situation where there is a wealthy testator and an expectant relative, the relative may read more into what has been said than was actually ever meant. While such evidence must be scrutinised with care, as indicated in such decisions as Ace v Guardian Assurance Company Ltd [1948] NZLR 103, the stringency of that test has been lessened by the approach to such claims in more recent years. There is no doubt though that a Court still must be careful in dealing with such a claim.

The only evidence here is that of the Plaintiff and his wife. I have listened and observed them giving evidence. In particular I have listened to them being cross-examined. I am satisfied that their evidence is honest and reliable evidence and I accept it as truthful.

THE CONNECTION OF PROMISES AND SERVICES

Both Counsel for the Defendants, and persons directed to be served, have submitted that in this case the evidence falls short of establishing a connection or nexus between the promise and the services which the Plaintiff gave to the deceased. They have analysed the specific words used in the promises set out above. With the exception of the last of those promises, it has been submitted the words are no more than statements of fact or intent which are not related in their terms to any services or work to be performed by the Plaintiff.

The necessity for a nexus between the promise and the services is clear. See Public Trustee v Jones [1962] NZLR 363 and Tucker v Guardian Trust [1961] NZLR 773.

In this case I am satisfied that in the context of the overall situation between the parties, which applied at the time when the statements were made by the deceased to the Plaintiff, that they were statements of fact or intention connected with services being rendered. There is, of course, no requirement for the words to expressly follow s.3 of the Act. Indeed there is, under the section, no need for any express words of promise. Such a promise may be implied from all the circumstances.

In this situation where the deceased was obviously a wealthy man requiring assistance with various simple day to day tasks in the home and in obtaining provisions for the home

which the Plaintiff was supplying by his constant attention, the implication that the promises or statements were made relative to those services is an obvious and reasonable one.

THE SERVICES

The services carried out by the Plaintiff for the deceased have already been dealt with in this judgment in my recital of the facts. Indeed many of them are not disputed by the Defendants, who have made formal admissions of some services in the statement of defence. The services that are relevant in this case include not only the specific detailed tasks set out in this judgment and admitted to some degree, but also include what the Plaintiff's wife described as a reliance or deep family commitment made by the Plaintiff to the deceased. That commitment meant that the Plaintiff's help was available to the deceased and his second wife at any time, and particularly in cases of emergency. Such help just around the corner, and the awareness that that help was available, is in itself a service of significant value to an elderly or infirm person.

QUANTUM

In arriving at a quantum for any award in this case it is necessary to have regard to those factors which are set out in the section. In particular the Court is obliged to have regard to all the circumstances of the case, including the circumstances in which the promise was made and the services were rendered or the work performed, the value of the services

or work, the value of the testamentary provision promised, the amount of the estate and the nature and amounts of the claims of other persons in respect of the estate.

No specific property or sum was promised. The services which were given were not of a dramatic nature but rather were of the constant, regular, dependable, caring type. They are not the sort of services which are easy to value in that in themselves they are not services which, at least in New Zealand, are frequently paid for by elderly persons. Those who are very wealthy, however, may often employ persons in the role of chauffeurs, companions, housekeepers and general custodians. The availability of the Plaintiff meant that the deceased and his second wife did not have to consider such options, or indeed consider whether approaches had to be made to others outside the immediate family to provide such services.

One difficult aspect in a case such as this is the assessment of the value of services given a relationship between the deceased and Plaintiff. It is submitted by the Defendants that in this case the services involved did not extend beyond the ordinary give and take of friendship and family and they were what would normally have been expected between an uncle and a nephew by marriage.

The issue of evaluation in this respect has been the subject of decision by the Court of Appeal in the case of Re Welsh [1989] 2 NZLR 1 at page 8. In that case the Court of

Appeal reduced the amount of the award, saying that the Judge had paid too little regard to a deceased's motive in saying that he would leave an estate, "which in all probability must be due simply to natural love and affection the deceased felt for the Plaintiff". Reference was made in that decision to burdens and obligations extending well beyond the ordinary give and take of family life. It is not clear from their decision whether the Court envisaged that in cases where services were established that were within the compass of the normal family services that a discount should be applied against a Plaintiff who carried out such services. There is, of course, nothing in s.3 which makes any distinction between services of different types. Indeed it is somewhat difficult to see why, once a promise has been established and relative services established, that a reduction should be made when the services are rendered partly as a result of the promise and partly as a result of love and affection. One could say that lovingly given services are worth more than those given as a matter only of contract.

In the case of Welsh the Court was concerned, at least to some degree, with the intangible consideration of a stepson providing for a deceased the comfort and experience of a family, stepdaughter and grandchildren. In this case the Plaintiff's relationship with the deceased was more remote. While, because of the closeness of association with the deceased, the Plaintiff did carry out a number of tasks, it could hardly be said those were the normal tasks between a nephew towards an uncle, particularly when there were others

who were in a very similar degree of relationship with the deceased.

The value of the legacy provided for the Plaintiff of $5,000 must be viewed firstly in relationship to the size of the estate; and secondly, in relationship to the number of years over which the Plaintiff rendered services of a growing degree to the deceased. The law is that the motives of a claimant in providing services are immaterial. See Jones v Public Trustee [1962] NZLR 363. Based no doubt on Welsh's case, Counsel here have argued that the deceased's motive in making the statements as pleaded and proved in this case may have been more on the basis of ties of family and friendship and sympathy for the Plaintiff, rather than to reward him for his services.

As in so many other family matters, it is difficult to divide up the emotions or motives which may have given rise to statements of this type. Certainly the deceased may have felt some sympathy for the Plaintiff, because he referred to him as "having a hard time". Equally he may have felt that the Plaintiff had relieved him of some of the obligations he may have had to his first wife's sisters, being sisters of his by marriage, when they were infirm. An amalgam of various motives is a likely answer. Certainly, given all of the circumstances and the points of time at which the statements were made, I accept that they were substantially ones made by the deceased in a conscious awareness that the Plaintiff was providing help

and assistance to him. The amount of the estate and the nature of the competing claims are not matters which limit the Court's consideration of this matter.

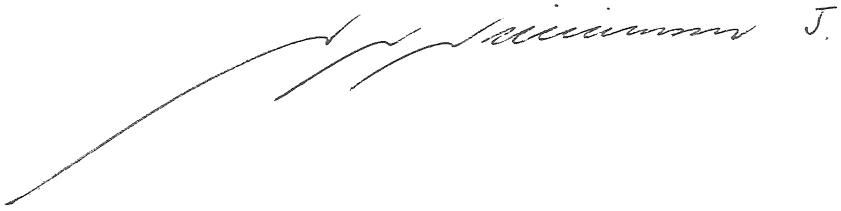
Counsel for the Plaintiff has submitted that a sum of $100,000 would be an appropriate award in this case, while Counsel for the Defendants has submitted that the amount of $5,000 already provided is sufficient. Clearly it is just not possible for any Court to make a precise calculation of what sum is due by the deceased's estate to the Plaintiff. The considerations which a Court must apply are helpfully set out in the judgment of McMullin J. in the case of Re Townley [1982] 2 NZLR 87 at page 94. Weight has to be given to all of the factors mentioned in the evidence and in particular things to which I have already referred as relevant by virtue of s.3(1) of the Act. It must also be borne in mind that in a case of a sizeable estate with little in the way of competing claims, the restrictions which might otherwise be on a Court do not apply to the same degree. (See Gartery v Smith [1951] NZLR 105.)

CONCLUSION

Weighing all of these matters up as best I am able to, I have reached the conclusion that a proper award in this case is one of $65,000. I give judgment accordingly.

So far as costs are concerned, the Plaintiff and Counsel appearing for residuary beneficiaries are entitled to reasonable costs from the estate. If there is any difficulty

between Counsel in agreeing as to the amount of those costs, then I will fix them. Memoranda could be filed if that is necessary.



Solicitors:
Hanan, De Courcy & Kendall, Dunedin, for Plaintiff
Ross Dowling Marquet & Griffin, Dunedin, for Defendants