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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 127/89

929

UNDER The Law Reform (Testamentary Promises) Act 1949

IN THE MATTER of the ESTATE OF JAMES ACLAND WILLIAMS late of Wellington, Retired Carpenter, Deceased

BETWEEN WILHELMINA FLORENCE KYDD of 17 Greenock St, Christchurch, Married Woman

Plaintiff

A N D THE PUBLIC TRUSTEE OF NEW ZEALAND a corporation sole under the Public Trust Office Act 1957 as Executor of the Will and Trustee of the ESTATE OF JAMES ACLAND WILLIAMS late of Wellington, Retired Carpenter, Deceased

Defendant

Hearing: 31 May 1990

Counsel: A C Hughes-Johnston for plaintiff
J O Upton for defendant
S L Rees-Thomas for residuary beneficiary

Judgment: 31 May 1990

ORAL JUDGMENT OF EICHELBAUM CJ

This is a claim under the Law Reform (Testamentary Promises) Act 1949 against the estate of James Acland Williams who died on 28 August 1988. The deceased was born in 1897 and

was thus 91 at the date of his death. The residuary beneficiary under his estate, The Little Company of Mary Trust Board, did not oppose the claim and its counsel sought and was granted leave to withdraw. The Public Trustee as executor and trustee of the deceased's estate properly put the claimant to proof, but did not mount any real attack upon the merits of the claim.

The plaintiff, Mrs Kydd, was a niece of the deceased and her parents' family and the deceased originally lived in close proximity so that she grew up as a child attending primary school in close contact with the deceased. In that period she spent much time with him, seeing him almost daily, and they developed a close relationship, that being aided no doubt, or encouraged by the fact that the deceased and his wife had no children.

In 1942 the deceased and his wife moved to Wellington while the plaintiff's family continued to live in Oamaru. However, in 1952 Mrs Kydd moved with her parents to Christchurch. For purposes of giving her evidence Mrs Kydd divided the period during which she gave assistance to the deceased into four. The first commenced when the deceased's wife died in 1962 at which stage Mrs Kydd was aged 31. During this first period Mrs Kydd went to Wellington twice a year, cleaned up the house for the deceased, mended his clothes, and as she put it, generally got him tidy again. She carried out what she described as a spring clean every six months, staying with the deceased 10 days or a fortnight. In addition, each year at Christmas the deceased came to stay with Mrs Kydd and her family in Christchurch, usually for a period of 3 to 4 weeks.

This pattern continued until the commencement of the second period in 1971 or 1972 when the deceased was taken ill with a variety of complaints which resulted in his being hospitalised and undergoing surgery. Following this the plaintiff took the deceased back to Christchurch with her in order to nurse him

back to health. Thereafter for the balance of the second period which continued until 1979, the pattern was that on a number of occasions each year, varying between two and five, and averaging perhaps two to three per annum, the plaintiff visited the deceased in Wellington, staying with him for up to two or three weeks, nursing him and generally caring for him, and on three occasions taking him back to Christchurch for lengthy periods of up to 6 months at a time. While the deceased was in Christchurch the plaintiff looked after him, took him out, got him to the doctor and generally cared for him. In the plaintiff's estimation, in aggregate all the periods she spent either looking after the deceased in Wellington or having him stay with her and her family in Christchurch, aggregated something like 2½ to 3 years, the plaintiff's husband giving a slightly more conservative estimate. The deceased did not on any occasion reimburse the plaintiff for expenses that she incurred during these first two periods, or offer to do so. Nor did he pay any board while he was staying with her in Christchurch. When the plaintiff stayed with the deceased in Wellington she had to pay her own expenses. During the second period the deceased, who had had a deteriorating arthritic hip, had a hip replacement operation. These events led to some discussion about the deceased moving to Christchurch, but in the event after his operation he returned to live by himself in his own home at Island Bay in Wellington as he had done previously.

The plaintiff and her husband had two children, a daughter born in about 1958 and a son in about 1961. During her many absences from Christchurch in the course of her caring for the deceased, the plaintiff's husband, who was in business in Christchurch, had to look after the household and the children.

The second period came to a conclusion in 1979 through a disagreement for some cause that the plaintiff was unable to discern but which she thought might have related to jealousy on the deceased's part in regard to her caring for her own mother.

In the result there was little contact between the plaintiff and the deceased from 1979 until late 1981 or early 1982. However, at that stage the breach was healed, and so far as their general relationship was concerned the parties resumed their previous close and amiable relationship. However, from this point onwards there was less contact between them. In the third period which was from late 1981 or early 1982 until the deceased went into care in 1986, although the plaintiff visited him on a couple of occasions, she did not stay with him. During this period the deceased's health and memory slipped until in 1986 he became subject to an order under the Aged and Infirm Persons Act. He had to leave his own home in 1986, and from then until his death two years later (the fourth period) was in care.

Turning to the question of a promise within the meaning of the Act, the plaintiff's evidence was that during the second period, when from time to time she asked the deceased whether she could have some board from him, he habitually replied, as I understood her evidence, to the effect that "you don't need it now, you'll get it later", or "you'll get it all back one day". These discussions took place when the deceased was staying with the plaintiff and her family in Christchurch. There were no subsequent discussions of this kind, and no person was present when the remarks were made. The plaintiff did not tell her husband, that until after the deceased had died, he did not pay board on the occasions when he stayed with them in Christchurch. At times she had to borrow from her mother on these occasions. She incurred expenses by way of air and ferry fares for visiting the deceased, but except on the occasions at or close to his death, was never repaid. She purchased clothing for the deceased for which she was sometimes reimbursed. While the deceased's wife was alive, but not subsequently, the plaintiff received birthday gifts from him. The only object of value, and its value was doubtful, that the plaintiff received from the deceased, except as mentioned, was a car no longer capable of attaining warrant of fitness

standard. While the plaintiff did not criticise the deceased at all in her evidence, clearly the overall impression from the evidence was that he was not a generous man, and indeed in Mr Kydd's view a slightly cantankerous one.

In the last period of the deceased's life the plaintiff visited him on three or four occasions. She received reimbursement from the Public Trustee in respect of one such trip made during the deceased's lifetime, and also for her airfares and sundry other expenses in relation to attending the funeral. She produced a letter written by the deceased in 1985 in which he asked the plaintiff and her husband to come and stay with him. This provides some confirmation of the reliance the deceased placed on the plaintiff for assistance. I should say now that I accept both the plaintiff and her husband as credible witnesses.

Evidence was given that the deceased had made three prior wills, all brief. In the will made in 1961 the entire estate was left to the deceased's wife, then alive. Until a will made in 1962, no doubt shortly after her death, his estate was left in equal shares to the plaintiff and to three cousins of the deceased's wife. The third will, made on 3 May 1963, left the entire estate to the plaintiff, and if she should predecease the testator to such of her children as were living at the testator's death, and if more than one in equal shares. The fourth will (the final one) has not been produced, but it is admitted in the pleadings that the entire estate was bequeathed to the Little Company of Mary Trust Board. That will was made on 20 October 1982, which although on the evidence was after the reconciliation, was, it should be observed, not long so.

In turning to consider whether and to what extent the plaintiff has proved her claim, I bear in mind the burden resting on claimants under the Law Reform (Testamentary Promises) Act and the statements made in early cases under the Act as to the need for the Court to scrutinise with care, and

even suspicion, evidence which those now representing the deceased of necessity are unable to check and answer. See the authorities collected and applied in Hawkins v Public Trustee [1960] NZLR 305, 310-311. In argument reference has been made to more recent authorities suggesting that the approach has been relaxed somewhat in cases decided since. In any event, that aspect does not here cause some of the difficulties encountered in the older cases, because of the quality of the evidence given on behalf of the plaintiff.

There is clear and convincing proof that the plaintiff rendered to the deceased in his lifetime services of the kind to which the statute applies. Secondly, the plaintiff has to establish an express or implied promise made to her by the deceased to reward her for the services or work by making some testamentary provision. I accept the plaintiff's evidence as to the statements made and am satisfied that they were promises within the scope of the Act. In particular the references to "later" and "one day" in the evidence already quoted give the remarks the necessary testamentary flavour. The fact that at that time a will was current in which the plaintiff was the beneficiary lend probability to the view that the remarks were made with testamentary intent, that being the way in which the plaintiff interpreted them herself. The remaining matter, so far as liability is concerned, is that the plaintiff has to establish the required nexus to the effect that the work and services prompted the promise. So far as the law on this aspect is concerned the well known passage in the judgment of North J in Jones v Public Trustee [1962] NZLR 363, 374, which it is unnecessary to repeat, is apposite. The remarks then made have recently been adopted by the Court of Appeal in Leach & Booth v Perpetual Trustees Estate & Agency Company of NZ Ltd CA 48/88 judgment 20 March 1990.

Being satisfied that the plaintiff is entitled to succeed, I turn then to the five specific factors to which S 3 of the Act directs attention in determining, in the language of the

section, what amount may be reasonable. The circumstances in which the promises were made have already been detailed sufficiently, as have those in which the services were rendered and the work performed. As to the value of the services or work, this can be summarised under a few main headings. There were the trips to Wellington and the time spent there in helping the deceased and caring for him. Then there were the three lengthy periods which the deceased spent with the plaintiff and her family in Christchurch and the several earlier shorter stays during the first period. These stays with the plaintiff encompassed a number of services, in the provision of meals, accommodation and general care. There is the disruption of the ordinary family life sustained by the plaintiff and her family, and the additional burden that fell on her husband on the occasion of the deceased's stays with the family in Christchurch, and the many absences of the plaintiff in Wellington. There is the emotional support which the plaintiff gave to the deceased throughout, and particularly in the first and second periods during which it is clear that the plaintiff gave unselfishly of her time and efforts.

Further matters to be taken into consideration are the out of pocket expenses incurred by the plaintiff in travelling to Wellington, the expenses she incurred in Wellington, and the expenditure she laid out for food and clothing for the deceased. I am unable to give any detail of these. I do not criticise the absence of detail because in the spirit in which the assistance was given it is entirely understandable that no records should have been kept. Over the years the out of pocket expenditure must have come to a significant sum in total.

The next aspect to which the statute directs attention is the value of the testamentary provision promised. No specific amount was referred to, nor was the promise couched in terms that had relevance to any particular asset of the deceased's estate. It is clear that it was made in terms that had regard

to the services rendered, by which term I include the out of pocket expenses incurred. As to the amount of the estate, the evidence is that the estate has a net value of $113,724.

Finally, there is the nature and amounts of the claims of other persons in respect of the estate. So far as family is concerned there was none, outside of the plaintiff and her own family. The only competing claim is that of the residuary beneficiary. That is not to be ignored, as clearly the deceased felt an obligation towards the beneficiary in whose hospital it appears that the deceased's wife had been nursed. However, it is not a claim that can be regarded as having any significant impact in fixing the amount which the plaintiff should reasonably recover.

In making submissions in respect of quantum, plaintiff's counsel did not suggest that there was any claim to the full amount of the estate. That was a proper concession. While counsel referred to the remarks of McMullin J in Re Townley [1982] 2 NZLR 87, 94 to the effect that in the case of a sizeable estate with little in the way of competing claims there was no reason why an award should be pitched at a level which would do no more than equate the value of the promisee's services, I accept the submission made on behalf of the defendant that even in those circumstances an award must bear some relativity to the value of the services rendered.

It is always difficult to equate services rendered over a period of time, perhaps especially so where the period is now long past, to some monetary value. One can only do one's best in a global way, having regard to the monetary value which the services would bear in terms of today's currency, and bearing in mind all the other factors to which the statute directs attention and to which I have referred in the course of my judgment. The proper figure in my judgment is the sum of $40,00. The plaintiff will have judgment in that amount, together with interest at 11%, such interest however to

commence running on a date one year from the death of the deceased. In respect of costs I propose to deal with these by way of a lump sum covering both preliminary matters and the hearing itself. In this respect the allowance I award is $4,000. In addition the plaintiff will be entitled to disbursements and witness's expenses as approved by the Registrar.

Solicitors:

Dougall Stringer, Christchurch for plaintiff
Office Solicitor, Public Trust Office, Wellington for defendant
Shanahan Partners, Wellington for residuary beneficiary