

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 862/89

1632

UNDER

The Law Reform
(Testamentary Promises Act)
1949

IN THE MATTER

of the estate of KENNETH JOHN GOODWIN late of Wellington, Carpenter, deceased

BETWEEN

ELSIE RHONDA THE GOODWIN (also known as TUI GOODWIN) of 91A Duncan Terrace, Kilbirnie, Wellington, Receptionist

Plaintiff

AND

THE PUBLIC TRUSTEE
a corporation sole constituted under s 5 of the Public Trust Office Act 1957 being, and being sued as, the administrator of the estate of KENNETH JOHN GOODWIN late of Wellington, Carpenter, deceased

Defendant

**NOT
RECOMMENDED**

Date of Hearing: 6-8 September 1993

Date of Judgment:

Counsel: P.A. Morten for Plaintiff
R.W. Edgley QC for Defendant

JUDGMENT OF NEAZOR J

This is a claim brought under the Law Reform Testamentary Promises Act 1949 against the estate of the deceased by his former wife. The estate has passed as on intestacy to the deceased's brother Mr L.W. Goodwin.

The important assets of the estate were two house properties at 15 and 31 Mount Pleasant Road, Wellington, which were sold by the Public Trustee in the course of administration. The property 15 Mount Pleasant Road realised \$84,500.00 gross and the property at 31 Mount Pleasant Road \$71,500.00.

A third house property also featured in the evidence, 104 Inglis Street, Seatoun.

At the date of death in addition to the house properties (which were in poor order) the deceased had cash assets of \$3,846.00 and personal property and effects valued at \$3,316.00, giving a total gross estate value of \$163,162.66. The net value of the estate at the end of the first year of administration was \$139,230.54 and as at 2 September 1993 \$125,335.10, of which \$87,079.72 is capital and the balance income.

The deceased and the plaintiff were married on 12 May 1956. They entered into a written separation and matrimonial property agreement dated 8 July 1975 and separated at that time. The plaintiff petitioned for divorce on 29 September 1977 and obtained a decree nisi on the basis of the separation on 3 March 1978. The decree became absolute on 19 February 1979. At the time of the separation the deceased had a short will, made on 18 June 1971, leaving his estate to his wife and appointing her executrix. That was the only will known to exist at the time of his death. There is no dispute that notwithstanding the separation the will continued to be valid after 8 July 1975.

On 21 November 1977 the Wills Amendment Act 1977 was passed with effect from 1 July 1978. Because there was a decree absolute in divorce in effect at the date of death of the deceased (which was unknown but was determined by the Coroner to have occurred at some time between May and August 1978) s 2 of that Act had the effect that the appointment of the plaintiff as executrix was null and void as was the devise to her of the deceased's property. In consequence of that the deceased's brother took on intestacy.

The plaintiff's claim is based on services during the marriage, namely that she had:

- (a) been the major breadwinner, generally holding two jobs, while for periods of time the deceased was unemployed;

- (b) paid for half the building materials used at No. 15 and No. 31;
- (c) shared equally with the deceased in the building work on the two properties;
- (d) done all the housework for the deceased, without ever being paid any housekeeping contribution by him;
- (e) paid all the mortgage, rates, insurance, electricity and telephone expenses at No. 31 from approximately 1963 up to the date No. 31 was transferred to the deceased, while the deceased retained all rental received from No. 15;
- (f) bought all the food for the couple;
- (g) helped purchase most of the deceased's tools and machinery;
- (h) paid for the deposit on the properties at 31 Mount Pleasant Road and 104 Inglis Street;
- (i) paid all mortgage instalments in respect of the property at 104 Inglis Street.

She claimed that in recognition of and reward for the provision of those services the deceased on a number of occasions after the dissolution of marriage promised:

- (a) that he would not change the provisions of his 1971 will because he felt that the plaintiff had paid for "most of everything" and it was really all hers;
- (b) that he would not put tenants in, or sell No. 31 Mount Pleasant Road because the property was to go back to her.

The plaintiff limited her claim to the net proceeds of No. 31 less a proportion of estate expenses which it was accepted should be set off against her claim, but sought to have the whole of the estate litigation costs, amounting by 31 October 1992 to \$45,000.00, borne by Mr L.W. Goodwin's share in the estate.

The defendant relied on the agreement of 8 July 1975 as being a full and final settlement between the parties and therefore as a bar to any further claim by the plaintiff under the Law Reform (Testamentary Promises) Act or otherwise; and submitted that the evidence as to a promise, particularly after the separation and divorce, given by the plaintiff ought not to be relied upon. There was originally a

further defence of estoppel based on the agreement, but that was not pursued, the defendant relying on the terms and effect of the agreement.

Five witnesses gave evidence: the plaintiff and Mr H.B. Rennie, who acted as her solicitor at the time of separation; and Mr L.W. Goodwin, Mrs W.R. Murtagh and Mr P. Bly, a Public Trust officer, called by the defendant. Mrs Murtagh's evidence was on a peripheral aspect of the matter and was directed simply to the issue of the plaintiff's credibility. It is necessary to review the evidence in a number of peripheral areas because of the defendant's challenge to the plaintiff's credibility and the evident need when a claim based on a promise is supported only by the evidence of the plaintiff, to scrutinise that evidence closely.

The deceased was plainly, to say the least, an unusual man. He came to New Zealand as an assisted immigrant in 1951 under a scheme whereby he was required to work at the direction of the Government for two years. There is dispute amongst the witnesses about whether he completed that engagement or whether he broke it (as the plaintiff said was the case) and in consequence had to repay over a period the amount of his fare to New Zealand. I see no reason not to accept the plaintiff's circumstantial account on that aspect.

Mr Kenneth Goodwin was by trade a pattern maker. The plaintiff said that he never worked at that trade whilst she knew him. Mrs Murtagh, who was a neighbour of the deceased and his parents at No. 15 Mount Pleasant Road, said that he did for a period and Mr L.W. Goodwin said that he did for a period of just over a year, he thought about 1956 or 1957. The work of a pattern maker was variously described as to its content by the witnesses. I am inclined to the view that the descriptions from both sides were each only partially correct, which suggests that that work did not feature significantly in the deceased's life. The conflicting evidence in this regard does not affect adversely the plaintiff's credibility in my view.

He was followed to New Zealand by Mr L.W. Goodwin later in 1951 and their parents came to New Zealand in 1953 with funds realised from having sold their home in England. They brought with them a new motor vehicle which Mr Goodwin Senior was able to sell at a significant profit because of the then shortage of new motor vehicles in New Zealand.

The deceased met the plaintiff in June 1953. They became engaged on Christmas Day 1953 and married on 12 May 1956. The plaintiff said the deceased had bought 15

Mount Pleasant Road for £2050.00 in 1953. Of that price £665.10.6 was paid by the deceased and her recollection was that £400.00 of that was borrowed from her by the deceased from her savings and used as a down payment. The loan was not repaid. A mortgage was taken out, on which the deceased made all repayments.

Mr L.W. Goodwin's evidence was that that had not been the nature of the transaction at all. He said that his parents had brought sufficient funds to New Zealand to purchase a house and that it was in reality they who had provided the cash funds for No. 15. Because of Mr Goodwin Senior's age he could not obtain a mortgage and it was arranged that the deceased would obtain a mortgage and would move in with his parents, paying no board but paying the outgoings on the mortgage. Because he was to be the mortgagor, the deceased had to be the registered proprietor. The house was purchased with a mortgage of £1400.00 and there is evidence that Mr Goodwin senior paid £665.00 into a solicitor's trust account towards the purchase. The source of the £665.00 is not established.

Mr L.W. Goodwin gave reasons for his belief that the deceased did not contribute cash of £400.00 or any other amount to the purchase of the house, and expressed the view that it was unlikely that the plaintiff would have made the loan of £400.00 on what was in November 1953 a five months acquaintance with the deceased. There is weight in Mr Goodwin's reasons for his belief that the deceased did not contribute cash to the house purchase, but that does not mean that the plaintiff did not give the deceased the £400.00. They became engaged a month later.

By 1954 on Mr L.W. Goodwin's evidence, the deceased had an established workshop and tools at No. 15 sufficient for Mr L.W. Goodwin to be able to make furniture there. The plaintiff's evidence was that throughout their marriage the deceased bought expensive tools and equipment such as lathes and jig-saws for which he borrowed from her, although he would not want others to know that. She said that he borrowed the money from her to buy her wedding ring, but never repaid her. She said his whole attitude to money was that he would not pay for anything if he could possibly get someone else to pay for it.

There is no reason to disbelieve the plaintiff's evidence that she understood the house at No. 15 was the deceased's: he was the registered proprietor, he paid the mortgage outgoings; she had plainly thought that the Goodwin Seniors should have paid rent but did not once she and the deceased had moved out. The deceased's possessive attitude was demonstrated about 1982 or 1983 when Mr L.W. Goodwin asked for his share in

that property, which he said it was understood in the Goodwin family he was to get i.e. one-half of his parents' equity in it. The deceased refused the request saying that his brother would have to wait until he was dead for it, when he would get all deceased's property. The deceased had earlier refused to make income from the property available to his brother because he wanted the income for some other unspecified purpose. The evidence does not establish that the deceased used money obtained from the plaintiff for the purchase of the house at No. 15, but in the circumstances her evidence about the purchase does not damage her credibility.

There was dispute between witnesses about the financial arrangements between the plaintiff and deceased's parents. The plaintiff said that after return from their honeymoon she and the deceased moved into No. 15 with his parents and thereafter for a period she paid at first £11.00 per week and then £12.00 to the parents for board at her in-laws' request and her husband's urging. She said that came both from her earnings and her savings. It seems likely that her gross earnings at that time were less than £10.00 per week. Mrs Murtagh and Mr Goodwin cast doubt on the truthfulness of this evidence based on what they understood to be the position from the parents. Mr Goodwin simply did not accept that such an amount as £11.00 or £12.00 would have been paid by the plaintiff at that time. Mrs Murtagh said that she had been told that nominal board was paid.

Against the belief or understanding of those witnesses must be set to Mr L.W. Goodwin's evidence that his relationship with his parents was better than his brother's and that there had never been very good relationships between the plaintiff and his mother, the fact that on both witnesses' evidence the parents regarded the house as theirs and the evidence about the deceased's readiness to have his wife pay for things. I do not find it unbelievable that the plaintiff paid significant amounts to the parents for board for her and her husband, which she said was originally set at the figure of £11.00 because it was expected to be paid over a period of only one year.

Another issue on which the plaintiff's credibility was challenged, was whether or not the deceased was "often out of employment", as the plaintiff said, because he was a very slow worker. The plaintiff said that the deceased was a brilliant man with his hands but lacked the ability to finish off things he had started. Mrs Murtagh said that to her knowledge the deceased after the initial period of two years did pattern work, jobbing work and sold firewood (which seems likely to have been after 1973) and some work on the construction of a block of flats. She conceded that there may have been occasions when the deceased was out of work.

Mr L.W. Goodwin had little of detail to say about the deceased's employment history other than to say that if his brother had been unemployed for any length of time he is confident he would have known about it. With respect to him, I take leave to doubt that. Clearly the brothers were not close, the deceased and his parents were not close and the deceased was not forthcoming to his brother as to what money he had or was doing with it. Mr L.W. Goodwin over the years from 1952 on was making his own successful way in life, both in his employment and in providing for his family as well as caring for his mother after 1967, something to which the deceased would not contribute.

The evidence as a whole does not present a picture of the deceased as a man successful in the area of employment and does not in my view weaken the plaintiff's credibility.

Yet another area was the plaintiff's evidence that her father-in-law had never worked in New Zealand. Under cross-examination she modified that to acknowledging that Mr Goodwin Senior had worked for some time at the company the other witnesses nominated, but she said that she had never been involved in it or known about it. The evidence from Mr L.W. Goodwin and Mrs Murtagh, supported in the case of the latter by circumstantial detail, was that he had worked for some years between 1953 and some date before 1962 during which time the plaintiff and the deceased and his parents shared the same house. It is clear that the plaintiff was wrong about this point, but again, looking at the whole description of her marriage and relationship with her in-laws, which has some support from Mr L.W. Goodwin, and the lapse of time, I do not regard that aspect of the evidence as significantly compromising her as a credible witness.

Having dealt with those peripheral issues, I turn to my assessment of the plaintiff. I accept her as a truthful witness on essential matters. She was faced with a courteous but rigorous cross-examination by Mr Edgley in the course of which she rejected with I believe genuine anger an allegation of dishonesty made against her but admitted another, old, allegation. Her demeanour was straightforward and in aspects of her evidence when she referred in evidence in chief to a miscarriage, to the deceased's attitude to her at that stage, to references in later conversations between them about what might have been if they had had children, to her dogs which had in effect become for her to some degree substitute children, there was evident and, in my view genuine, emotion at the thought that the marriage had gone so wrong. I accept that she continued to care about the deceased even after the divorce although she could not live with him because of the circumstances of their life together and because of his attitude

to her dogs to which she had a special emotional attachment. That feeling I believe was probably reciprocated by the deceased, notwithstanding the difficulty which his personality put in the way of it. I base that on the circumstantial detail of the plaintiff's description of how after their separation and divorce he would regularly speak to her on the telephone and contrive to see her, to wave to her or speak to her on her way to work.

Her evidence about significant aspects of the deceased's attitude to her and to property was in my view supported by the evidence of Mr Rennie as to the refusal of the deceased to take advice about the separation agreement and Mr L.W. Goodwin's evidence about aspects of his dealings with his brother, to which I have already referred.

Mr Goodwin has, I suspect, no great regard for the plaintiff but I accept him as an honest witness. His evidence about his brother's life and the relationship between his brother and the plaintiff must be considered, however, subject to the facts that he in my opinion knew little or nothing of it at first hand, and that what he knew at second hand came through people who were not particularly well-disposed to the plaintiff.

Turning to dealings involving the houses, I accept Mrs Goodwin's evidence that she was the principal earner of the couple. The evidence is that she has worked since her teens as a babysitter during the war years and that thereafter, except for a period of illness, she has worked at one or two jobs at a time all her life. Accepting that, and accepting her evidence that her husband was not always in work and such documentary evidence as is available that he was not a high earner, but bought a number of pieces of machinery over his lifetime, I accept that she provided the moneys she said she did for property acquisition. I also accept that she physically assisted with work on the properties purchased. How 15 Mount Pleasant Road was acquired has been set out. Number 31 Mount Pleasant Road was purchased in Mrs Goodwin's name in April 1963 when the couple wished to get away from Mr and Mrs Goodwin Senior at No. 15. The purchase price was £2,600.00 with a mortgage to a building society for £2,000.00 plus £760.00 for premiums. £350.00 was retained for repairs which the plaintiff said were never done, although the deceased obtained the funds. A collateral security of £900.00 secured over No. 15 was obtained which was in turn collaterally secured by a life insurance policy on the deceased's life. The building society mortgage was discharged in 1974, the mortgage secured over No. 15 having been discharged in 1968. Mrs Goodwin's evidence is that she paid the mortgage outgoings on that property and the cost of materials for work done on it.

In 1973 the couple bought land in Inglis Street, Seatoun. The purchase price was \$9,500.00 with a mortgage for \$5,812.00 and Mrs Goodwin paying the balance from her savings.

Mrs Goodwin's evidence was that over the years her marriage to the deceased deteriorated; their housing conditions were very difficult because the deceased would commence repairs or alterations but not complete them. She described an occasion in 1964 when she returned home from work one day to find that the deceased had stripped all of the wall linings off inside the house at No. 31 so that "if you opened the door you could see right through everywhere". It took her over a year to get the deceased to get the materials ready to reline the interior, which was never painted or papered whilst they lived together.

The plaintiff said that the deceased always regarded No. 15 as his house and No. 31 as her house. He kept the rent from No. 15 after his father had died and his mother had gone to Palmerston North, a fact which is supported by Mr L.W. Goodwin's evidence.

Mrs Goodwin said that over the years her relationship with the deceased continued to deteriorate. She was unable to get him to finish off the inside of No. 31. He was employed intermittently. He became increasingly uncommunicative and hostile and she said was often physically violent towards her. In January 1975 she decided that they could not continue to live together. She tried to tell the deceased this but he was not interested and accordingly Mrs Goodwin consulted Mr Rennie. Thereafter she had discussions with the deceased about separation and discussions about what should be done about the houses. She suggested that he finish off No. 31, but he said that he could not be bothered. She suggested that he go to live at No. 15 and that she would stay in No. 31. She said he refused to do so because if he went to live in No. 15 he would no longer have a source of income. The deceased proposed developing an area under No. 31 into a new flat which he would occupy whilst the plaintiff occupied the top of the house. She would not accept that because she knew it would take months before the proposed new flat would be in a fit condition for occupation. She then suggested moving out to alternative accommodation whilst the deceased lived at No. 31 and paid her \$10.00 a week. He refused that and said he would not pay her anything. She tried to obtain other accommodation. She suggested selling the three properties that they owned and dividing the proceeds on the basis that she would keep the proceeds of No. 31 and he would keep the proceeds of No. 15. She would keep the proceeds on the sale of Inglis Street because she had paid the deposit and the mortgage instalments. She said the deceased would not agree to that.

Eventually, she said they reached an agreement that No. 31 would be transferred into the name of the deceased and he would reside there rent free. He was to pay all outgoing but undertook not to rent, sub-let or take in any boarders. He would continue to let No. 15 and keep the rent but if he returned to No. 15 he would transfer the interest in No. 31 back to her. She would receive a transfer of 104 Inglis Street.

A separation agreement was drawn up by Mr Rennie. Mr Rennie in evidence no longer had any files to which he could refer other than his diary which simply recorded appointment dates for Mrs Goodwin and one for Mr Goodwin although Mr Rennie said that he was sure he had never met Mr Goodwin. He said that his recollection of Mrs Goodwin at the time was of a gaunt and stressed lady who was finally trying to face the fact of failure in her marriage. He said that Mrs Goodwin was quite settled that she would not leave home unless she had an agreement with her husband in respect of separation and property. There were a number of reasons for that. The first was that to him Mrs Goodwin clearly felt that to leave the marriage and break her marriage contract, there should be a new agreement. Secondly, there was a fear that if matters were not sorted out before she left they never would be. Tied to that concern was her wish to sell the land at Inglis Street because if she could not get that land sold she could not get funds to buy herself another house. Thirdly, Mr Rennie said she also had a concern for her husband in that she was anxious to leave him in a tidy legal state. She had doubts about how he would care for himself once she no longer looked after him each day. Finally, he said Mrs Goodwin still seemed to think that there was a possibility that her husband would co-operate with her in building their dream home. He said that her attitude to the property division appeared to be that she believed she could gain what she needed then but that her husband would hold what remained and make it available for her benefit if she needed it and she could afford it later. It was his understanding that Mrs Goodwin wanted to obtain what she needed to have immediately which was the separation and the section leaving her husband with the accommodation but that if he died before she did then she would receive more.

In the event as indicated a formal separation agreement was entered into. It provided for the separation of the parties, for the plaintiff's declaration that she claimed no maintenance from the husband and agreed to maintain and support herself, for division of the chattels as existed at the date of separation and division as to property as follows:

- (i) the plaintiff to transfer to the deceased all her interest in 31 Mount Pleasant Road;

- (ii) the deceased to transfer to the plaintiff all his interest in the section of 104 Inglis Street, Seatoun;
- (iii) the plaintiff to assume sole liability for the monies lent mortgage over 104 Inglis Street and collaterally secured over 15 Mount Pleasant Road;
- (iv) the agreement recorded that the parties' intention by the division and transfer of properties described to divide equally "the properties in which either party had any interest to the extent that their existing respective rights are recognised and neither party will receive by such transfers more than is in the opinion of the parties hereto that party's existing entitlement". I note that on the face of it there was not an equal division, Mr Goodwin having two house properties and his wife one section of land.

Then followed clause 10 on which the defendant relies on this proceeding:

"Each party agrees with the other that in consideration on the division of chattels as aforesaid, and the transfers of the properties upon the terms set out above, neither shall have any further claim against the other whether under the Matrimonial Property Act 1963, the Matrimonial Proceedings Act 1963, the Family Protection Act 1968 (Reprint) or otherwise to any property whatsoever *and it is hereby agreed* that this agreement is the expression of a 'common intention' by the parties in terms of the Matrimonial Property Act 1963 and is in settlement of all or any rights that either party might have against the other whether under the Matrimonial Property Act 1963, the Matrimonial Proceedings Act 1963 (so far as that Act relates to matters of maintenance and property) or under any Act or Acts passed in amendment thereof or in substitution therefore or under any statute or in common law or in equity or otherwise howsoever arising to the intent that this clause shall be construed in its widest sense and not *eiusdem generis* or otherwise restrictively; and by this agreement each of the parties renounces against the other or stops himself or herself against the other from all or any claims or demands in respect of any property whether the matrimonial home or otherwise of any nature whatsoever to the intent that this shall be full and final settlement between the parties."

After the agreement was signed on 8 June 1975 the properties were transferred in the way dealt with in the agreement.

The plaintiff's evidence was that the deceased had been unwilling to sign the agreement but ultimately he did so. She said that the deceased always said that he signed the

agreement under duress; that he thought the agreement was illegal and that he regarded the couple as still married. After the separation Mrs Goodwin bought another house apparently having entered into an agreement to do so on 24 May 1975. The purchase was not completed until December 1975. Mrs Goodwin said that she was aware at the time of separation of her husband's will made in 1971 which left the whole estate to her. She said that that had been discussed at the time of separation when she had told her husband that she wanted only what belonged to her. She said that he then told her that everything was hers. At that stage so long as the deceased kept to the agreement which the plaintiff described and did not change his will, the position would have been as she stated her belief that it was.

The separation proceeded to divorce by reason of an incident which Mrs Goodwin described in evidence relating to the deceased's maltreatment of her two dogs which she left with the deceased for a weekend. She believed that he did not feed and water the dogs properly and on one occasion she had to take one dog to a veterinary surgeon because he was bleeding. She was told that the reason for that was that the dog had been kicked and knocked around and she asked the deceased about it. He denied any responsibility but at a later stage he admitted that he had knocked the dogs around and had not fed them. There was an argument between them about that and at that stage Mrs Goodwin said in evidence with some emotion that she decided that she would divorce him because of the way he had treated her pets.

The plaintiff said in evidence that she had thought during the separation that she would get No. 31 on her husband's death but that once they were divorced she no longer felt confident about that. She said she raised the matter with the deceased on the weekend after the divorce at which time he told her that he still regarded her as his wife and would continue to do so. She said that at that time the deceased said that No. 31 was still her house and that she could have it when she liked but that he was going to continue to live at No. 31. She raised the question of the deceased's will at that stage and said to him that No. 31 was not mentioned in it. She said that at that stage he said there was nothing wrong with the will; it would stand; nothing had changed; she was still his wife and that everything would go to her. She said that the deceased said to her that was because if it was not for her, he would not have the things that he had had. He said that there was nobody else and told her she had done everything for him and had looked after him.

She said there was such conversations on at least three occasions after the divorce which had common elements. In them the deceased had told her that he recognised the

separation had been necessary and that if it had not been for the work she had done and the money she had saved he would not have owned Nos 15 and 31 in any event. She had explained to the deceased that she wanted to make sure that there was provision for her to get No. 31 and that he had promised that he would not change the terms of his will and that everything he had would go to her when he died. There was no necessity to change his will because in his view the will meant that it all came to her.

In addition to the communications between the two after the divorce, the plaintiff said that she used to try after the separation to visit the deceased at least once a week. She did his washing for him for a period and cooked a meal for him almost every weekend. She said that she continued visiting him every week or second week until 1984 or 1985. Over that time she lent him money to help pay off his accounts and bought him various items of clothing. Those matters are not relied upon as part of the services to which the promise sued on relates, but are important elements of the background to the case.

On the basis of the evidence I accept that the deceased had an aversion to dealing with solicitors. He would certainly not consult one at the time of the separation and there is no record of any property transaction by him after the separation in 1975. Nor, it appears did he take any advice or any step at the time of the divorce in 1978 and 1979.

It is that which makes somewhat curious a piece of evidence by Mr L.W. Goodwin, the basis of which is unexplained. Mr L.W. Goodwin said that in 1972 after their mother's funeral he had raised with his brother the matter of the house at No. 15. The deceased said that there was something that they must discuss but refused to discuss it then. In a telephone conversation some months later the matter was raised again when the deceased said that there was no use talking about it as he had used the equity in it to buy more property, which was presumably the purchase of the land at 104 Inglis Street. Immediately after the separation there was another discussion initiated by the deceased in which he told Mr L.W. Goodwin of the separation about which he appeared to be extremely distressed saying that he had not wanted it but had agreed to his wife's terms. In respect of the house at No. 15 the deceased told Mr L.W. Goodwin that he intended changing his will to take care of everything and that he need not worry about it.

Mr Goodwin said that in 1982/83 there was a further discussion when he enquired about whether the house at No. 15 had been clearly left to him under the deceased's will and was told it had not. He became annoyed and told the deceased so and told him it was fair that the deceased should change his will. In answer the deceased said that

because of his divorce he did not have to change anything and that if his brother outlived him all that he owned would automatically come to Mr L.W. Goodwin. In the course of that conversation the deceased accused his brother of lying about a photographic album and abruptly ended the conversation.

There is no evidence that the deceased ever received any legal advice which would have informed him correctly that the Wills Amendment Act would have rendered his 1971 will void in effect and that Mr L.W. Goodwin would be the sole survivor to his estate on intestacy. The deceased could have become aware of the effect of the Wills Amendment Act because of publicity about its passage at a time when the matter would have been of particular interest to him, since the Act was passed and came into effect during the period that the plaintiff's application for divorce was going through the Court procedure. If that was the case, there is no evidence that he ever communicated that to the plaintiff. If he did know at that time of the effect of the Act, it would be consistent with his attitude testified to by both the plaintiff and his brother that he would not have raised it with the plaintiff because inevitably it would have given rise to further approaches to him from the plaintiff to make a valid disposition in her favour. When his brother raised the question of No. 15 years later, the knowledge provided a convenient way of putting off what the deceased is likely to have seen as his brother's importunities about making provision for him. If either the plaintiff or his brother had been pressing the deceased to take action to put things on a regular basis, the evidence all is that he would have been disinclined to do so because he had no enthusiasm for dealing with lawyers and as matters stood he was retaining his control of and title in the property.

Section 3 of the Law Reform Testamentary Promises Act 1949 provides that:

"(1) Where ... 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, ... 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 been enforced in the lifetime of the deceased), be enforceable ... to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime ...".

A promise is to include any statement or representation of fact or intention, and the section applies whether the services were rendered or the work was performed before or after the making of the promise.

There is in my view no doubt that in this case services were performed by the plaintiff for the deceased, both before and after the separation and divorce. Those relied on before the divorce included payments which enabled the acquisition of the property at Inglis Street and the payments in relation to No. 31 Mount Pleasant Road. Those acquisitions resulted in there being property available at the time of separation which enabled the plaintiff to start afresh to rehouse herself and the deceased to both own a property he could live in and retain one which would provide him with income. At the time of separation the plaintiff took what she had paid for (although the deceased was also on the title) and gave the deceased what she had paid for (No. 31) whilst he kept what he and, on the face of it, his father had paid for.

I accept that at the time of separation there was a promise collateral to the agreement to will to the plaintiff all of the deceased's estate which included not only the property at No. 31 but also that at No. 15 Mount Pleasant Road which was not one of those disposed of by the separation and property agreement. That promise was effectively implemented at the time of separation by the existence of the will having that effect, which the deceased never changed, but which, accepting Mr L.W. Goodwin's evidence, the deceased became aware at some time over the next seven years or so had ceased to have that effect.

The benefit available to the deceased I accept came within the meaning of services within the accepted approach to be taken to that term. In *Tucker v Guardian Trust & Executors Co* [1961] NZLR 773, 776 McCarthy J said:

"'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 obtain its objectives: *Nealon v Public Trustee* [1949] NZLR 148."

In that case the plaintiff and the deceased as beneficiaries in the estate of their deceased mother were entitled in equal shares to a house property in which the deceased was living. The plaintiff, on representations being made by the deceased, agreed to

disclaim his interest in the house property so that the deceased could continue to live in it, in return for which the deceased undertook to leave the house property to the plaintiff in his will. The necessary disclaimer was executed but the deceased failed to carry out his promise. It was argued by the plaintiff that it was not the act of disclaimer to which the Court's attention should be directed but rather the enabling of the deceased to live on in the house - in other words, the provision of accommodation. That it was argued was what the plaintiff had done and that the execution of the instrument of disclaimer was simply the legal machinery by which that was carried out. McCarthy J accepted that that was the proper way to regard the plaintiff's actions and concluded that the plaintiff's acts should be regarded as a service to the deceased. In my view, the analogy between *Tucker's* case and this case is sound although the mechanism by which the plaintiff rendered the particular service to the deceased is different from that which was in issue in *Tucker's* case.

I also accept that there was a promise made by the deceased both at the time of the separation and later that the provision in his will as to all his property (although the plaintiff was primarily interested only in No. 31) would continue in valid effect until his death unless some other earlier arrangement was made between them on the deceased's vacating No. 31. He did not, either inadvertently, or knowingly if Mr L.W. Goodwin's evidence is correct, keep his word which related to the services given and it is such a failure that the legislation is designed to remedy - *Jones v Public Trustee* [1962] NZLR 363 (CA).

If the promises and the services had all predated the signing of the separation agreement I would accept that there must be strength in the defendant's argument that the agreement on its face must be regarded as a bar to the plaintiff succeeding, having regard to the presence in the clause of the reference to claims "arising under any statute", to the clause being construed in its "widest sense", to the parties renouncing against each other "all or any claims or demands in respect of any property ... to the intent that this shall be a full and final settlement between the parties". However, the defendant's legal argument that the claim is barred by clause 10 of the separation agreement was submitted to apply both in respect of promises before the agreement and after, unless the later promises included a fresh approach or a new outlook not tried inseparably to the promise before the agreement.

In my view that is not a proper approach; if the deceased renewed the promise after the agreement and notwithstanding it, as I accept he did, and the consequences of the arrangement contained in the agreement can be seen as part of the services rendered by

the plaintiff to the deceased, as I accept in the circumstances of this case (including the continued existence of a valid will giving effect to the promise until that was nullified by operation of law) they should be, there is no basis, having regard to the purposes of the statute, on which to deny a remedy.

Accordingly I hold that both the necessary promise and its foundation on services to the deceased are made out.

That being the case an award can be made but in deciding the amount of it the Court must consider what award would be reasonable having regard to all the circumstances of the case including specifically:

- (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.

The fact that discussions in which the promise was contained centred, so far as the plaintiff was concerned only on No. 31 does not mean that she is entitled automatically to an award of the value of that house (*P. T v Bick* [1973] 1 NZLR 301), but in my view the whole picture of the marriage including the plaintiff's persistence in providing support as a wife and an earner and an accumulator of assets for a very difficult man whom she said, and I accept, said that he loved her "but in his own way", and for whom she continued to provide a degree of comfort and support even after divorce, make it appropriate by reference to the criteria in paragraphs (a), (b) and (c) above to award the value of that house. The value of what was promised was greater, indeed more than twice what the plaintiff has claimed.

The criteria in (d) and (e) do not alter the justice of the case. Mr L.W. Goodwin's claim arises by operation of law and ties of blood, but there is no element of a moral claim on his behalf except to the extent that he could have expected (although I think not enforced) payment of a half share of his parents' part of the equity in No. 15 Mount Pleasant Road - which equity on the evidence so far as it goes would have been

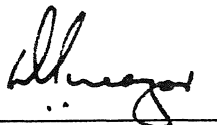
£765.00/2050.00 of its value or \$31,532.93 when that calculation is applied to its gross realised value of \$84,500.00.

In my judgment, the proper starting point for an award for Mrs Goodwin would be \$71,500.00 but that should be subject to two deductions:

- (i) such of the estate debts and administration costs including the cost of repairs to both houses and the realisation costs (but excluding the costs of the present litigation) which were not covered by cash assets and the realisation of personal property should be divided in the ratio of \$71,500.00:\$84,500.00 with Mrs Goodwin's award bearing the smaller share;
- (ii) the estate's legal costs for preparation in the litigation paid up to 2 September 1993 should be apportioned on the basis of 1:2 with Mrs Goodwin's award bearing the one-third share, for the reason that it was proper for the estate to put her to proof of her claim. Remaining estate legal costs will be borne by Mr Goodwin's share.

The amount of the award after deductions will bear interest at the gross rates allowed by the Public Trustee in the estate accounts from 20 February 1990, the date of commencement of the proceedings, and at 11% from the date of judgment to the date of payment.

The plaintiff will have costs according to scale on the judgment including a second and third day of trial, but reduced by \$1,000.00 by reason of the extra work required of the defendant to obtain full discovery.



D.P. Neazor J

Solicitors: Macalister Mazengarb Perry Castle, Wellington for Plaintiff
Public Trust Office, Wellington for Defendant

CP No. 862/89

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

UNDER The Law Reform
(Testamentary Promises
Act) 1949

IN THE MATTER of the estate of
**KENNETH JOHN
GOODWIN** late of
Wellington, Carpenter,
deceased

BETWEEN **ELSIE RHONDATHE
GOODWIN** (also
known as **TUI
GOODWIN**) of 91A
Duncan Terrace,
Kilbirnie, Wellington,
Receptionist

Plaintiff

AND **THE PUBLIC
TRUSTEE** a
corporation sole
constituted under
s 5 of the Public
Trust Office Act
1957 being, and being
sued as, the
administrator of the
estate of **KENNETH
JOHN GOODWIN**
late of Wellington,
Carpenter, deceased

Defendant

JUDGMENT OF NEAZOR J
