

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 10/93

UNDER The Law Reform
(Testamentary
Promises) Act 1949

IN THE MATTER of the Estate of
ALICE FLAVELL late
of Wellington,
Widow, Deceased

BETWEEN IVY MAY WRIGHT of
Nelson, Widow

Plaintiff

A N D THE NEW ZEALAND GUARDIAN
TRUST COMPANY LIMITED of
Wellington, Trust
Company

Defendant

Hearing: 15 September 1994

Counsel: G P Malone for plaintiff
B A Gibson for defendant
H W Riddoch for Royal NZ Foundation of the
Blind and Alice & Stan Flavell Charitable
Trust

Judgment: 15 September 1994

JUDGMENT OF DOOGUE J

This is a claim under the Law Reform (Testamentary Promises) Act 1949 ("the Act") where the only issue is the appropriate amount of the award. There can be no dispute in this case that the plaintiff has established the services and the promise of testamentary provision required to bring her claim under the Act.

The plaintiff is the surviving sister of the deceased. The deceased died on 6 July 1992.

Unfortunately her last will could only be said to be

insulting to the plaintiff. It made provision for the plaintiff in the sum of \$500, "as a token of my gratitude for the kindness and assistance given to me". The residue of the estate was to be held by the defendant in a charitable trust to be known as "The Alice & Stan Flavell Charitable Trust". The intention of the Trust was that the capital and income should be applied "for Charitable Purposes in New Zealand benefiting the blind (and blind children in particular)". The estate at the present time is a little over \$300,000.00. There are no competing claims in respect of the estate as there are no persons entitled to claim under the Family Protection Act 1955. The sole issue is, as already stated, what is the reasonable provision to be made for the plaintiff out of the estate having regard to the factors which have to be considered in terms of s.3 of the Act.

The nature of the services performed by the plaintiff for the deceased were primarily devoted to assistance and care of the deceased in the 1970's and 1980's up until the late 1980's. A period of time of at least 10 years was involved and on the evidence it was quite substantially in excess of that 10 year period. The deceased would stay with the plaintiff for extended periods of time, several times a year, averaging somewhere between one and three months in each year. The deceased was herself in comfortable circumstances whilst the plaintiff lived at that time in a state house and was reliant on welfare benefit for income. During those periods the deceased did not assist the plaintiff in

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The nature of the services performed by the plaintiff for the deceased were primarily devoted to assistance and care of the deceased in the 1970's and 1980's up until the late 1980's. A period of time of at least 10 years was involved and on the evidence it was quite substantially in excess of that 10 year period. The deceased would stay with the plaintiff for extended periods of time, several times a year, averaging somewhere between one and three months in each year. The deceased was herself in comfortable circumstances whilst the plaintiff lived at that time in a state house and was reliant on welfare benefit for income. During those periods the deceased did not assist the plaintiff in

respect of the costs of her support. She would particularly stay during the winter because the deceased did not believe in spending money on keeping her own house warm. The deceased did not assist in the household duties of the household. In addition, the deceased would ask the plaintiff to come and assist her at her home in Wellington. This would occur two to four times a year during the period already mentioned. As the plaintiff could not afford to fly from her home in Nelson she travelled by bus and ferry. She would stay with her sister for about 10 days at a time and tidy the house which the deceased lived in at the former part of the period and later her flat during the latter part of the period. The plaintiff during such periods gave considerable assistance to the deceased, both in respect of housekeeping and in relation to other matters, and in the 1980 period from about 1982 would ensure that the deceased was properly clothed and that her kitchen was properly stocked with food. Once again the plaintiff received no financial assistance from the deceased for what was done by her. Understandably the plaintiff is unable to quantify the precise expenditure incurred by her on her sister's behalf. All she can say is that it was perhaps a few thousand dollars at the most but that it was a great sum to her because she had so little.

These services, like the testamentary promises, are confirmed by a friend of the plaintiff who deposes that the plaintiff was at the beck and call of the deceased when the deceased stayed with her. It is accepted for

the plaintiff that the work and services provided by the plaintiff for the deceased would not of themselves have entitled the plaintiff to any substantial remuneration at the time. It is noted for the plaintiff, however, that, quite apart from the actual services performed by the plaintiff for the deceased, the deceased had the very substantial benefit that she could call upon the plaintiff at will for assistance to her and that she then had the assistance of a member of her own family with whom she naturally felt comfortable.

The deceased, no doubt because of the assistance being received by her from the plaintiff, and perhaps because of the overall family position, made testamentary promises on various occasions to the plaintiff in differing terms; for example: that she would be well looked after when the deceased was gone; that she would be left with enough money to buy her own property; that she would receive enough to last her her life; that she would not have to worry about rental accommodation because she would be able to afford her own property. Those promises are confirmed by the independent witness in this proceeding. They are also confirmed in a slightly different way by the actions of the deceased herself who at one time gave instructions for the preparation of a will in which she was intending to make provision for the plaintiff to have a life interest in her estate. That will did not proceed for reasons which do not need to be traversed but were themselves of some peculiarity. The will already referred to acknowledges,

the plaintiff that the work and services provided by the plaintiff for the deceased would not of themselves have entitled the plaintiff to any substantial remuneration at the time. It is noted for the plaintiff, however, that, quite apart from the actual services performed by the plaintiff for the deceased, the deceased had the very substantial benefit that she could call upon the plaintiff at will for assistance to her and that she then had the assistance of a member of her own family with whom she naturally felt comfortable.

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despite the derisory nature of the gift, the plaintiff's kindness and assistance to the deceased.

It is not in dispute that, if the plaintiff is to be provided with a roof over her own head in a home ownership unit in the Nelson city area, the cost would be somewhere between \$90,000.00 and \$200,000.00, with the median cost being somewhere about \$145,000.00. With this background the plaintiff, who is now aged 80 years, seeks an award of somewhere between \$150,000.00 and \$200,000.00 to enable her both to purchase a reasonable home unit and to have some capital available for the purpose of financial security and comfort.

In support of the claim, reference is made to but one decision which is said to be of some comparability, namely Re Archer [1992] 3 NZLR 737, where in respect of a much larger estate an award of approximately \$200,000.00 was made in somewhat different but also somewhat similar circumstances.

Understandably the defendant takes an entirely neutral position when those with a true interest in the estate are represented. Again understandably, counsel for the charitable trust and for the body having the greatest interest in that charitable trust does not suggest that anything other than reasonable provision should be made for the plaintiff out of the estate. It is submitted, however, that, having regard to the decision in Re Welch [1993] NZLR 1, the award must be a reasonable one and not one which overcompensates the plaintiff in the circumstances of the case.

The factors which bear highest with me in reaching a decision as to the appropriate quantum of the award are that it is apparent that in this case, unlike some, the plaintiff for a fairly substantial period of time put her life to answering the deceased's calls for help and assistance in a generous manner with the knowledge of the promises made by the deceased. In addition, this is a not inconsiderable estate where there are no moral claims and, even if a relatively generous provision is made for the plaintiff, there will still be a considerable sum available for the Trust. That is not to say that the award should be other than reasonable, as Welch's case makes plain that it must not be, but that the circumstances of this case are different from the case where there are competing moral claims or where the estate is a small one and the charity would receive little or nothing if a substantial award was made to the plaintiff.

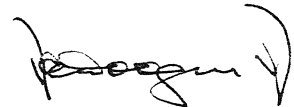
Doing the best that I can with the material before me, it seems to me appropriate that the Court should award a sum which would represent the approximate value of a reasonable roof over the plaintiff's head. Whether she uses the whole of that sum or not for that purpose must be a matter for her. It appears to me that an award which approximates half the total estate would reasonably recompense her in the present circumstances for the services carried out by her for her sister. I accordingly order that the plaintiff should receive the sum of \$150,000.00. I further make an order by consent

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under the provisions of the Administration Act 1969 that that sum, together with such sums as relate to the costs of the parties in respect of these proceedings, be paid out of the Alice & Stan Flavell Charitable Trust.

There is no dispute that in this case it is appropriate that the plaintiff have her solicitor and client costs in the sum of \$6,900.00 inclusive of GST together with her disbursements totalling \$2,667.00. There is no dispute that Mr Riddoch is entitled to appropriate costs which I fix in the sum of \$3,337.50 inclusive of GST together with his disbursements of \$55.00. It is appropriate that there be a small award of costs in favour of the Royal New Zealand Foundation of the Blind which was served with the proceedings and has taken steps in the proceedings. Those costs are fixed in the sum of \$500.



Solicitors for plaintiff:
Fletcher Vautier Moore, Nelson

Solicitors for defendant:
Macalister Mazengarb Perry Castle, Wellington

Solicitors for Royal NZ Foundation for the Blind and
Alice & Stan Flavell Charitable Trust:
Craig Griffin & Lord, Auckland

