IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-216
[2015] NZHC 2874

BETWEEN	TOHINUI HARRY TAWHAI Appellant
AND	SALLY GOVORKO AND DIANE JEANETTE MILLER Respondents

Hearing: 3 July 2015

Appearances: DW Grove for the Appellant
AJH Witten-Hannah and GM Cameron for the Respondents

Judgment: 18 November 2015

JUDGMENT OF NICHOLAS DAVIDSON J
(Appeal under the Law Reform (Testamentary Promises) Act 1949)

Introduction

[1] For over thirty years, Tohinui "Harry" Tawhai was the friend and companion, then partner, of Harold Robinson.

[2] Mr Robinson died in 2012 at the age of 93. His last Will was made on 10 March 2011. He made provision for Mr Tawhai and recognised many close friends by leaving them shares in his residuary estate.

[3] Mr Tawhai was not satisfied with the provision made for him. He brought a claim under the Law Reform (Testamentary Promises) Act 1949 (the Act), on the basis that he rendered services to Mr Robinson for which he says he was promised a level of reward in his estate, which Mr Robinson failed to honour.

[4] The respondents are the administrators and some of the other beneficiaries under Mr Robinson's last Will.

[5] Mr Tawhai's claim was dismissed in the Family Court by judgment delivered on 22 December 2014.

Facts

[6] Mr Robinson and Mr Tawhai met in the 1980s. Mr Robinson was about 30 years older. Both had been married. Mr Robinson had no children. They formed a friendship and eventually became partners.

[7] In the 1990s Mr Tawhai began staying for weekends at Mr Robinson's Whangaparaoa property. In 2001 he left his full-time employment with Mighty River Power and until 2003 worked as a semi-permanent caregiver for Mr Robinson, and as a part-time truck driver. Mr Robinson had dealt with serious illness for years and age exacerbated his health problems.

[8] In June 2003 Mr Robinson sold his Whangaparaoa property and moved to Mr Tawhai's Papatoetoe home. Mr Tawhai became a full-time caregiver, and continued in this role until Mr Robinson's death in 2012. He was paid a small wage by WINZ as caregiver.

[9] Mr Tawhai gave evidence that during his time as a full-time carer for Mr Robinson he fulfilled all of the household duties – cooking, cleaning, washing and mowing lawns – as well as caring for his partner's personal needs, including liaising with lawyers and accountants, ensuring that tax obligations were complied with and so on. Mr Robinson was adamant that he was not going into a rest home because they were "only for old people" (he was 83 at the time). The couple had a very busy social life and Mr Tawhai would accompany Mr Robinson to social engagements, and help him to participate in these with transport and helping him to converse, given his hearing difficulties.

[10] Mr Tawhai also deposed that he had an integral role in managing the couple's property investments, negotiating purchases, arranging mortgage advances and tenancies in countless ways. He was involved on an almost daily basis in looking after the properties, ensuring they were kept in good order and the tenants managed. Mr Tawhai says his efforts greatly increased Mr Robinson's wealth.

[11] The couple did some travelling together. When they went on a trip to Turkey in 2006 and London in 2007, Mr Tawhai's evidence was that he was effectively a nurse and the trips could be arduous and stressful. Mr Robinson required a wheelchair and had to be assisted on and off planes. Mr Tawhai had to deal with the luggage, get Mr Robinson up in mornings, dress him and organise meals, and get him to a toilet in the case of accidents.

[12] The history of Mr Robinson's Will making is relevant in several respects. Mr Tawhai seeks an award which reflects a Will dated 18 July 2003, under which Mr Tawhai was the major beneficiary. He says that this reflected the promises made to him when he and Mr Robinson began to live together full-time that year, which was a milestone in their relationship. There were several more Wills executed before the last Will dated 10 March 2011. A feature of the evidence is that Mr Robinson was careful to ensure Mr Tawhai did not know of these later Wills. For Mr Tawhai it is submitted that this secrecy was to conceal a broken promise.

[13] Following the sale of Mr Robinson's Whangaparaoa home in 2003, the couple bought two properties in quick succession in Papatoetoe – one, on Carolyn St, as tenants in common in equal shares, and another, on Carruth Rd, as joint tenants. Mr Robinson paid for Carolyn St from the sale proceeds of his home and both men contributed equally to the Carruth Rd property, borrowing to complete the purchase. Mr Robinson used the proceeds of the Whangaparaoa sale to buy another property on Carolyn St in his own name.

[14] In 2005 both Carolyn St properties were sold and they purchased a home at Matuhi Grove, Papatoetoe as tenants in common using some of the Carolyn St proceeds as well as substantial funds realised after Mr Tawhai sold another property

that he owned in Motatau Rd. The rest of the Carolyn St sale proceeds flowed into Mr Robinson's savings and bonus bonds.

[15] Mr Robinson's last Will made on 10 March 2011 left various household chattels, bonus bonds ($27,500) and his half-share in the properties on Carruth Rd and Matuhi Grove to Mr Tawhai on the condition that he assumed the mortgage debt. The bequest of the one-half share in Carruth Rd was unnecessary as Mr Tawhai took by survivorship. The residue of the estate was divided into 21 equal shares, with two shares going to some beneficiaries and single shares going to others. If any of those gifts should fail, that share would go to Mr Tawhai. None failed.

The estate

[16] Mr Cameron, counsel for the respondent administrators, provided a memorandum to the Court on 8 July 2015, setting out the position of the estate. Mr Witten-Hannah appeared as co-counsel, for various residuary beneficiaries, who resist Mr Tawhai's claim.

[17] There have been significant costs incurred in this litigation, and some in administration. There has been limited income. The balance of the estate, allowing for one counsel's costs, and further administration, leaves a nett current balance of approximately $390,000. There will be further costs. Mr Witten-Hannah has submitted an invoice for his costs in respect of this appeal. For the purpose of this judgment the nett estate is taken to be worth approximately $370,000 to $380,000. It would be more, but for the costs incurred.

History of Wills

[18] Mr Robinson has an extensive history of Will making. The Wills before the Court date back to 24 July 1991. In *Re Moore (deceased)*, which concerned a claim under the Act and the Family Protection Act, Hardie-Boys J commented on the utility of earlier Wills being disclosed to the Court, saying:[1]

> Not infrequently one can thus see the mind of a testator seeking to cope with changed circumstances both of his family and of his fortune, and it often

[1] *Re Moore (deceased)* [1965] NZLR 895 (SC) at 899.

> assists the Court to divine the reasons for the ultimate testamentary disposition.

[19] Adopting that approach I briefly summarise the dispositions made in Mr Robinson's various Wills leading up to his final Will in 2011. That helps provide context to understand the 2003 Will, on which Mr Tawhai founds his claim.

Will dated 21 April 1994

[20] Mr Tawhai was mentioned for the first time in this Will, taking a one-tenth equal share in the residue, which was most of the estate.

Will dated 3 May 1996

[21] Mr Tawhai took a one-tenth equal share in the residue, which again was most of the estate.

Will dated 14 September 1999

[22] This made similar provision to the 1996 Will.

Will dated 30 May 2002

[23] Mr Tawhai was to take a share of chattels, and six of 16 equal shares in the residue of the estate, which was most of the estate.

Will dated 17 December 2002

[24] The sale of Mr Robinson's home in Whangaparaoa was expressly contemplated by this Will. If it sold for "at least $420,000.00" then legacies of $1,000 would be paid to each of 15 named persons, with the residue to be divided into 16 equal shares, of which Mr Tawhai was to take 12. If any bequest failed, that would go to Mr Tawhai. So he was the principal beneficiary under this Will, taking about three-quarters of the estate.

Will dated 18 July 2003

[25] This Will anchors the claim by Mr Tawhai. It left him specific chattels and "[a]ny interest in any real property which I own at the date of my death". It provided legacies to 17 beneficiaries of $1,000 each if the home at Whangaparaoa sold for at least $420,000. The residue was to be held in 16 shares, 12 of which would go to Mr Tawhai. Thus, he would take Mr Robinson's property interests and three-quarters of the residue. Depending on Mr Robinson's property interests at his death the residue would vary, perhaps substantially. Mr Robinson had sold his Whangaparaoa property by the date of the 2003 Will so the bequest of property to Mr Tawhai must have been premised on plans for future property dealings. However Mr Robinson chose to invest, under the 2003 Will Mr Tawhai stood to take most of the estate, real property or other investments, or both. As it stood Mr Tawhai's share was about three quarters of the estate, as Mr Robinson sold his one property interest at the time.

Will dated 22 September 2004

[26] Mr Robinson and Mr Tawhai had by this date embarked on property purchases. Mr Tawhai would take certain chattels, and the Will provided for 16 legacies of $2,000 each. The residue would be divided into 11 equal shares, of which Mr Tawhai would receive two. This was a shift from the 2003 Will as property purchases had been completed and unless Mr Robinson's interest passed by survivorship Mr Tawhai would take less of the estate.

Will dated 28 December 2004

[27] The Will made provision for 16 legacies of $2,000 each, and Mr Tawhai would take two of 11 equal shares, again without reference to property.

Will dated 2 November 2006

[28] This made the same provision for legacies, and the residue would be divided into 10 equal shares, but Mr Tawhai was not named among the recipients. He would receive a specific legacy of Mr Robinson's one-half interests in Carruth Rd and Matuhi Grove.

Will dated 22 March 2007

[29] Mr Tawhai would receive specific chattels, there were 16 legacies of $2,000 each and Mr Tawhai would not receive any share of the residue.

Will dated 29 October 2010

[30] Mr Tawhai would receive specific chattels, and any bonus bonds, together with a half-share in the properties at Carruth Rd and Matuhi Grove, subject to any mortgage debt. The residue was divided into 23 equal shares, with no provision for him. If any of the bequests failed, they would pass to Mr Tawhai.

The Family Court judgment

[31] The Family Court dismissed Mr Tawhai's claim.[2] The learned Judge held that while Mr Tawhai described himself as Mr Robinson's close friend and carer rather than as his partner, "the two men were not only physically intimate but in all manner of ways conducted their lives so as to satisfy me that they were in such a relationship".[3] The Judge rejected claims made by witnesses, including some beneficiaries under the Will, that Mr Tawhai had been a neglectful or bad carer.

[32] The Court held that Mr Tawhai did render services and perform work for the benefit of Mr Robinson. Caring for Mr Robinson could be challenging due to his age and various ailments but the Judge thought that Mr Tawhai must have expected this when he entered the relationship, so that within this family the services he provided should be considered normal. It was noted that Mr Tawhai received a WINZ payment as a full-time caregiver.

[33] Her Honour did not accept that Mr Tawhai's caring for Mr Robinson on overseas trips and the acumen and effort he brought to their property investments, together with his physical and emotional support, took his services and work out of the ordinary, finding that "each man made different but equally important contributions to the development of the property pool and by pooling their resources

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2 *Tawhai v Govorko* FC Manukau FAM-2013-092-884, 22 December 2014.
3 At [4].

each man was financially advantaged".[4] The Court rejected as speculative the submission for Mr Tawhai that if he had not cared for Mr Robinson as he did, he would have been an even more successful property investor. Overall the Judge found there were no "services" of the character required to satisfy the first element of a testamentary promise claim.

[34] The Judge went on to consider the other limbs of a claim in case she was wrong that there were no qualifying services. She concluded that Mr Tawhai's evidence that Mr Robinson told him he would "get the lot", and he would "be a millionaire" and that he "had nothing to worry about" (sometimes in front of other people) was insufficient to amount to a promise; rather these were statements of factual expectation, and they had in any event been realised when Mr Tawhai's financial position was analysed, including the provision for him under the Will.[5] The Judge held that such statements reflected no more than an expectation that Mr Tawhai would be a millionaire, and that he would have nothing to worry about.

[35] The Judge also found that "what is singularly lacking from Mr Tawhai's claim is any evidence that [his] expectations were in any way connected with the care and services he provided for Mr Robinson".[6] Rather, the Judge said that Mr Tawhai had or would have made it clear that he was not motivated by the prospect of receiving Mr Robinson's money. She therefore held there was a "fatal lack of nexus between Mr Tawhai's expectations he says were derived from Mr Robinson's statements which found his claim to promises made to him and the services rendered".[7]

Appellant's submissions

[36] Mr Tawhai relies in substantial part on the 2003 Will and the circumstances in which it was made. It was executed at a time of much change in the lives of Mr Robinson and Mr Tawhai. Mr Robinson had sold his Whangaparaoa home, had cash in the bank, and moved in to Mr Tawhai's home. The Will anticipated potential

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4 At [33].
5 At [44].
6 At [46].
7 At [47].

ownership of real property at his death in which case it would pass to Mr Tawhai. Mr Robinson was aged 84 and Mr Tawhai 53 at the time.

[37] For Mr Tawhai, Mr Grove says the 2003 Will reflects the promise made to him, but he has to acknowledge that by that Will Mr Tawhai would not take the whole estate and, at the time the Will was made, the estate was mostly made up of liquid investments. Rather, Mr Grove says that at about the time the Will was made there was in effect a promise that Mr Tawhai would get the bulk of the estate. In return, the move to Mr Tawhai's house meant that Mr Robinson would not have to go to a retirement home. Mr Tawhai would give up his employment and become a full-time caregiver. Mr Robinson had a strong aversion to the prospect of institutional care, and Mr Tawhai would look after him through his later years.

[38] Mr Grove submits that the Family Court erred in several respects, first in finding there was no "promise" of the kind the law recognises to reward Mr Tawhai for his services. He relies on case law to submit that the 2003 Will is strong corroborative evidence of a testamentary promise, and that relatively slight corroboration of such a promise will suffice, particularly where there has been repetition, and in front of other people.

[39] He submits that the Judge wrongly placed reliance on Mr Tawhai's statement that he was not motivated by money in caring for Mr Robinson, and that such lack of fiscal ambition is, if anything, in his favour.

[40] Mr Grove submits that the Judge also erred in finding that the services provided did not exceed what would normally be expected in such a relationship. The Judge thought that Mr Tawhai must have known that in due course there would be complications in care due to Mr Robinson's age and health difficulties, and that this counted against his services being "out of the ordinary". Mr Grove submits the opposite conclusion should be drawn, that with full knowledge of the difficulties which lay ahead, Mr Tawhai committed to looking after Mr Robinson at home.

[41] Mr Tawhai relies on the content and timing of the 2003 Will as showing that there was a nexus between the services and the promise he alleges, given the

extensive provision made for him by that Will under the assumption of what was expected to be, and did eventuate as a commitment to the care of Mr Robinson for the rest of his life.

[42] Mr Grove submits that the correct way to reflect the promise and the services is to make an order that the estate be administered in accordance with the 2003 Will, but recognising that Mr Tawhai would not take the whole estate. Mr Grove submits that an award of three-quarters of the residuary estate – about $300,000 – would properly reflect the promise made to Mr Tawhai.

Respondents' submissions

[43] The respondents (the administrators of the estate supported by some of the residuary beneficiaries) submit that the Judge was correct to hold that there was no promise which the law should recognise, and that this finding was supported by the particular characteristics of Mr Robinson – his flamboyance and "propensity to grandiose statements". The respondents say that any promise made was not a promise to reward, but what was said reflected the situation in which Mr Tawhai would eventually find himself, a millionaire with nothing (financial) to worry about.

[44] If there was a promise to reward, Mr Cameron submits that it has been fulfilled through the property dealings undertaken together and the property which passed to Mr Tawhai by survivorship and under the Will. It is submitted that Mr Tawhai cannot seriously have expected to "get the lot" as even the 2003 Will made provision for others, and that the Judge was correct that Mr Tawhai's services were to be expected in a relationship such as this. It is further submitted that there was no qualifying nexus between any promise and the services provided.

[45] Finally the respondents submit that even if the elements of a claim are made out, the Court has a discretion whether or not to make an award, and it should not do so in this case. The overarching principle is one of reasonableness, and Mr Tawhai received substantial benefits during their joint lives, by remuneration, and under the Will admitted to probate. The position of the other beneficiaries must be taken into account. Many are elderly and not well off. Mr Robinson was keen to provide these

people with some tangible recognition of his relationship with them, which had so obviously delighted him.

Approach on appeal

[46] The right of appeal against a decision of the Family Court in a testamentary promises claim is set out at s 5A of the Act. The appeal is by way of rehearing. Therefore, the appellant is entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment.[8]

Law

Elements of a claim

[47] A claim based on a testamentary promise must establish that:[9]

(i) the claimant has rendered services to, or performed work for, the deceased during the deceased's lifetime; and

(ii) there was a promise (express or implied) by the deceased to reward the claimant; and

(iii) there was a nexus between the services and the promise; and

(iv) the deceased has failed to make the promised testamentary provision or otherwise remunerate the claimant.

Services rendered and work performed

[48] The Court will take a broad view of what constitutes the necessary "work" or "services"; these words are to be given a large and liberal construction to achieve the

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8 *Austin, Nicholls and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

9 Law Reform (Testamentary Promises) Act 1949, s 3; *Samuels v Atkinson* [2009] NZCA 556, [2010] NZFLR 980 at [34].

remedial objectives of the Act.[10] Services include not only things done for the deceased but also companionship, affection and emotional support.[11]

[49] Cases which involve close-knit family relationships have proven testing. *Re Welch* indicated that services arising in the context of a family relationship were unlikely to give rise to a remedy under the Act.[12] However, cases since then have held that there can be circumstances in which family services can found a claim, but the services must go beyond "what is normally to be expected of a relative, a member of the same household, a neighbour or a friend".[13] What is required is "something extra".[14] The services are to be assessed in the context of what would be normal within the particular family – it is a subjective, not an objective, test.[15]

[50] The issue here is whether the services and work provided by Mr Tawhai went beyond what would normally be expected in the context of his relationship with Mr Robinson (the parties do not contest the Family Court's characterisation of this as a de facto relationship.) The Judge did not think so. Although she accepted that caring for an older and infirm partner had its real challenges, that Mr Tawhai did bear the bulk of the domestic responsibilities, and did make valuable contributions to the development of the property assets, she held that Mr Tawhai chose to develop the relationship with full knowledge of the age difference and Mr Robinson's serious health issues.

[51] While I have referred to the competing submissions, the facts warrant further consideration.

[52] Mr Grove says that the chronology of the relationship demonstrates contact between the men from the mid-1980s, and it is relevant to Mr Tawhai's case that in the late 1980s Mr Robinson was diagnosed with a chronic condition. The services relied on in support of the claim are companionship, affection and emotional support, particularly given the significant age difference, and "24/7" physical care and

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10 *Nealon v Public Trustee* [1949] NZLR 148 (CA) at 155.
11 *Byrne v Bishop* [2001] 3 NZLR 780 (CA) at [6].
12 *Re Welch* [1990] 3 NZLR 1 (PC).
13 *Byrne v Bishop*, above n 11, at [6].
14 *Samuels v Atkinson*, above n 9, at [53].
15 *Re Sellars* [1996] NZFLR 971 (DC) at 978.

support. Further, it is submitted that Mr Tawhai gave up his other opportunities to care for Mr Robinson for about 11 years until his death, and that was a financial sacrifice because Mr Tawhai was in his working prime and could have earned hundreds of thousands of dollars over that period. The qualifying services are said to include the work on the couple's property investments, and that he provided his home for them both after Mr Robinson moved from Whangaparaoa in June 2003.

[53] Mr Grove referred to the fact that Mr Tawhai was required to provide much more physical care and support for his partner than might be expected in many other relationships. He submitted that the fact Mr Tawhai chose to embark on a committed relationship in full knowledge of potential difficulties should not count against him; to the contrary, he undertook to care for Mr Robinson at what was for the older partner an "extremely difficult and distressing time".

[54] Mr Grove said that Mr Tawhai was loyal and diligent in keeping his side of the bargain. The services he provided were exactly what was contemplated when the promise was made. It is submitted they went "beyond the norm" because they exceed what would be expected in the ordinary course of a relationship with no such inherent burdens.

[55] The respondents, on the other hand, point to the fact that Mr Tawhai was a paid caregiver (he received somewhere between $9,000 and $14,000 per annum from WINZ), and Mr Robinson was contributing $1,000 per month to joint living expenses, and $300 per fortnight from his superannuation to the Matuhi Grove mortgage. The couple enjoyed extensive and rather exotic travel. Mr Tawhai gave evidence that this was largely funded through rental income from the couple's investment properties.

[56] While it might be thought that intensive care of a partner who is aging and in ill health is a normal incident of a committed long-term relationship, case law supports Mr Tawhai's argument. Given Mr Robinson's advanced age and serious health problems in his later years, the services Mr Tawhai provided went well beyond the realm of ordinary services provided in the course of a relationship. Even

as the expected incidents of a relationship they may still count as services. In *Thwaites v Keruse*, discussing services in a family context, the Court said that:[16]

> Companionship, affection, cohabitation, may properly be regarded as "services" in some circumstances, where for example the promisor is elderly or lonely or in poor health. But that cannot be so in the case of young people simply sharing together the pleasures of each other's company in a common household.

[57] In *Kite v May* the claimant worked as the housekeeper of the deceased and eventually became his de facto partner.[17] In the years before he died the deceased was in very poor health and his partner supported him in ways that enabled him to stay out of institutionalised care. She did the housekeeping, grocery and personal shopping, provided hospitality to friends and family, sexual intimacy and companionship. The Judge found that:[18]

> … in the last two to three years of [the deceased's] life, the services performed by [the claimant] could by no means be described as being merely of the "usual" kind which are incident on a relationship of that character. They went well beyond that, and enabled [the deceased] to live out his time at his beloved farm.

[58] The fact that Mr Tawhai knew that caring for Mr Robinson would become increasingly difficult should not negate that what was provided here was a personal service well out of the ordinary, however much it was based on underlying love and affection. Mr Tawhai took on a significant burden caring for Mr Robinson well into his 90s. He gave up paid employment to do so and clearly supported Mr Robinson to maintain his life in the way that he wanted, and importantly helped him avoid institutional care. Thus I respectfully disagree with the conclusions of the Judge at first instance and find that Mr Tawhai did provide qualifying services.

The promise

[59] The Judge found there was no qualifying promise. In *McCormack v Foley*, the Court of Appeal made observations about the Act which have application here.[19]

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16 *Thwaites v Keruse* [1993] 11 FRNZ 19 (CA) at 23.
17 *Kite v May* [2001] NZFLR 514 (HC). See also *PH v GH* [2013] NZHC 443.
18 At [63].
19 *McCormack v Foley* [1983] NZLR 57 (CA).

Cooke J said:[20]

> The mischief which it was designed to remedy was largely the tendency of testators to persuade people to render services to them by promises later found to be too vague to establish at common law contracts enforceable against the estate.

[60] "Promise" is defined in s 2 of the Act to include "any statement or representation of fact or intention". The promise must be to make "testamentary" provision for the claimant. The promise can be express or implied. In keeping with the remedial intention of the Act, the courts have been prepared to interpret even very imprecise statements made by a deceased person as promissory in order to grant relief where a reasonably plain case has been made out.[21] Mr Grove referred to *Re William*, in which McGechan J held that statements such as "you'll be right" associated with visits and personal assistance were sufficient to amount to a promise to reward for the services carried out.[22]

[61] The "promise" must indicate an intention to reward.[23] Some cases have emphasised that what the claimant understood the words to mean is important, rather than the intention of the deceased. In *Heathwaite v NZ Insurance Co Ltd*, the claimant was left only a life interest in property by his late mother.[24] He had understood she would leave the whole of her estate to him even though she never expressly said so. The Court found that the burden of proof on the claimant in such a case was "particularly heavy" but it was satisfied in that case. The Court placed particular emphasis on the fact that a 1944 Will had provided an absolute interest to the claimant; the Will under which he took a life interest was not made until 1946.

[62] Commentators have questioned whether this subjective approach to the promise is correct,[25] and why the state of mind of the claimant should be more important than the state of mind of the deceased, as the motives of the claimant in

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20 At 61.

21 Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, Wellington, 2013) at [13.13], citing in particular *Allender v Gordon* [1959] NZLR 1026 (CA) at 1030.

22 *Re William (deceased)* HC Wellington CP 866/92, 21 July 1994.

23 *Re Moore (deceased)* above n 1, at 900.

24 *Heathwaite v NZ Insurance Co Ltd* [1951] NZLR 6 (SC).

25 Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, Wellington, 2013) at [13.15].

providing the services are irrelevant. I consider that there must be some element of the promise which can objectively be taken to indicate intended reward; the inquiry is not just into the way in which a claimant says the promise was understood.[26]

[63] As *Heathwaite* demonstrates, a Will may be corroborative evidence that a promise was made. In this case, the 2003 Will is said to corroborate or supplement statements made by Mr Robinson to Mr Tawhai, sometimes in front of others, that when he died Mr Tawhai would be a millionaire, he would "get the lot" and would have "nothing to worry about".

[64] These promises were repeated over many years, right up until Mr Robinson's death. The Judge concluded that these were not promises, but reference to Mr Tawhai's future position, that is, Mr Robinson was making "a statement of factual expectation, and that expectation has been realised."[27]

[65] Mr Grove submits that that cannot be right because the promises can be tracked to the 2003 Will. Further, he emphasises the context – that Mr Robinson would not go to a rest home because that was for "old people", and that the promise was first made when he was 83 years old, and moving into Mr Tawhai's home full time.

[66] Mr Cameron submits that the Judge was correct to find this fell short of a qualifying promise. He makes something of the conclusion on the evidence that Mr Robinson was quite a personality, described by the Judge as "the most vivid presence", even in the company of others who were themselves colourful and exotic characters. He submits that the evidence shows Mr Robinson was theatrical, extravagant and grandiose in his words, gestures and demeanour, but at the same time generous to his friends.

[67] His background in international and New Zealand ballet and his marriage to Freda Stark, were all part of his being a flamboyant man espoused of the arts and the finer things in life. All of this is said to add weight to the argument that the

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[26] See also *PH v GH* [De facto relationship: no substantial contribution] [2013] NZHC 443, [2013] NZFLR 387 at [79] per Katz J.

[27] *Tawhai v Govorko*, above n 2, at [44].

statements made to Mr Tawhai, even in front of others, could not be taken particularly seriously. In my view, however, the Judge was wrong to find that no promise was made. The evidence clearly indicates that statements in the nature of a promise were made by Mr Robinson, and he was without question referring to Mr Tawhai's financial position after he died. The clear inference is that he would make substantial testamentary provision for him. The 2003 Will is evidence in support of that.

[68] That leaves a real question as to what Mr Robinson promised. At the time of executing the Will in July 2003, Mr Robinson had just sold his Whangaparaoa home for $510,000. Property purchases quickly followed in August (Carolyn St) and October (Carruth Rd), funded in part from those proceeds of sale.

[69] I do not think it can reasonably be said that Mr Robinson intended that Mr Tawhai take nearly all of his estate no matter what Mr Tawhai's eventual circumstances, although this may have been Mr Tawhai's belief. Even at the date of the 2003 Will, not everything was to go to Mr Tawhai. A number of small legacies were made to Mr Robinson's close friends and one-quarter of the residue would go to others. The extent of the residue depended on what property was owned by Mr Robinson on his death. What real property would pass to Mr Tawhai, if any, was unknown. Mr Robinson had just sold his home. Mr Tawhai could not, or should not, have taken Mr Robinson's statements that he would "get the lot" literally, as he knew that was not provided for in the 2003 Will.

[70] Overall I think that a promise of the kind the law recognises was made, and to have any real meaning it was that most of Mr Robinson's estate would pass to Mr Tawhai. I disagree with the proposition that when Mr Robinson said Mr Tawhai "would be a millionaire", he was simply referring to his inevitable path to prosperity. On the evidence, something was said to Mr Tawhai at a time where Mr Robinson was looking for the comfort and security of a companionable and fulfilling, but also very demanding, relationship. I think it is an inevitable inference that there was a link between what he was saying and the context in which it was said. The statements he made are not simply to be dismissed as grandiose or extravagant and seem to have been simply expressed. They were plainly representations of intended

reward for which he in turn expected, and in fact received, devoted care and companionship. That enquiry does not answer the question of what, if anything, would be reasonable recompense for the services ultimately provided. But the nature of the promise is relevant to the Court's discretion as to quantum. At the time the 2003 Will was made, if Mr Robinson did not buy more property Mr Tawhai would take about three-quarters of the estate. His share would only increase as property was purchased which would not then fall into the residue.

Nexus

[71] Mr Grove is correct to submit that Mr Tawhai's motivation (affection rather than a monetary incentive) is irrelevant. The promisee's motivation is of little, if any, importance. As the Court of Appeal said in *Byrne v Bishop*:[28]

> It would be repugnant if the fact that the services or work were performed out of a generous spirit and not for mercenary reasons or in the hope of reward should count against claimants by way of depriving them of a claim or devaluing it.

[72] However there must be a nexus between the promise made and the services rendered. The nature of such "nexus" was explained in *Jones v Public Trustee*:[29]

> … it is essential that the promise must, either expressly or impliedly, be one to reward the promisee for services rendered or work done by making some testamentary provision … and not a mere promise to make testamentary provision which is not linked with, or founded upon, such services or work.

[73] Although Mr Tawhai's evidence as to what Mr Robinson said to him does not go so far as a statement that "if you care for me, I will leave you my entire estate", the events in 2003 are strong evidence of a nexus between the promise and the services. Mr Robinson's sale of his Whangaparaoa property, his moving in with Mr Tawhai and drawing up the Will naming Mr Tawhai as the major beneficiary all occurred within a month or two. Mr Robinson's prospects were uncertain other than that his years were running down and he would continue to have difficulties with his health. He did not want to go into a rest home. Here was the answer. Mr Tawhai

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[28] See *Byrne v Bishop*, above n 11, at [10].
[29] *Jones v Public Trustee* [1962] NZLR 363 (CA) at 364.

would care for him. In those circumstances the Court can safely find there was a nexus between the services and the promise.

Failure to fulfil the promise

[74] Determining whether Mr Robinson has failed to fulfil the promise, and if so what award should be made to remedy the breach, is the most difficult aspect of the appeal, given the imprecise nature of the promise made by Mr Robinson and the fact that the estate changed significantly in the decade following the making of the 2003 Will. The difficulty lies in assessing the promise in monetary terms and bringing to account the benefits derived by Mr Tawhai under the last Will and during their joint lives.

[75] The respondents argue that if Mr Robinson is found to have made a promise then it has been met by the bequests under the Will, his taking property by survivorship, and his personal wealth derived in part from his ownership of other property and investments with Mr Robinson. Mr Tawhai did not, of course, get "the lot", but that was plainly not the intention at any time. I have held that the promise was that Mr Tawhai would get most of Mr Robinson's estate (but not all of it) and the proportion of the estate going to Mr Tawhai would vary depending on how Mr Robinson's wealth had been invested; the total monetary value of the estate would likewise vary. It was, to a degree, a moveable feast but the table was set.

[76] Mr Witten-Hannah submits that when the 2003 Will was made, Mr Robinson did not have anything of significance. That is not correct, because he would soon have the proceeds of sale of his property at Whangaparaoa. Mr Witten-Hannah's submission is that a reward of the kind Mr Tawhai now seeks could not have been contemplated in 2003 because of the limited assets held by Mr Robinson. But this was not a promise for a fixed sum, but a proportion of Mr Robinson's estate. To freeze the analysis of what the promise meant against the assets held by Mr Robinson in 2003 is to ignore the reality of the market and the reasonable contemplation of the parties as the years went by. That is, as the years went by, Mr Robinson's assets would change, and in all probability, increase in value. I do not accept that because the value of the assets Mr Tawhai has taken, under the Will and

by survivorship, exceed the value of what he might have received according to the Will in 2003, the promise has been met.

[77] In summary, the promise was to leave to Mr Tawhai most of the estate, and that was not to be measured against the assets in 2003, when the Will was drawn up. Indicatively Mr Tawhai would have taken about three quarters of the estate if it substantially comprised liquid assets.

[78] Mr Witten-Hannah submits that the deceased's own assessment of the services and their value should influence the judgment on appeal. Mr Robinson made "generous and appropriate provision" and taking into account the reciprocal benefits received during the relationship, Mr Robinson's assessment of the value of the services performed should stand. Mr Witten-Hannah correctly reminds the Court that an award for services can only be made to the extent the services went unremunerated. He submits that Mr Tawhai fails to acknowledge the reciprocal benefits he received from the relationship, as if he was the only person who performed services of a companionable kind.

[79] It is necessary to consider what Mr Tawhai has in fact received during their joint lives and under the last Will. What is required is a "netting off" of benefits and burdens, as artificial as that might be in a case of close personal relationships.[30]

[80] The property transactions are of particular relevance. The following observations are made:

(i) The purchase of 2/5 Carolyn St in August 2003 for $200,000 was as tenants in common in equal shares. Mr Robinson provided the purchase price from the proceeds of sale of his Whangaparaoa property.

(ii) The purchase of Carruth Rd on 3 October 2003 for $210,000 was registered as joint tenants in equal shares, each contributing $25,000

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30 *Samuels v Atkinson*, above n 14, at [77]–[78].

with the balance raised by a mortgage to PSIS. This was a joint and equal purchase.

(iii) The purchase of 1/5 Carolyn St on 19 November 2004 for $197,000 was registered in Mr Robinson's sole name again funded by proceeds of sale of the Whangaparaoa property.

(iv) On 18 March 2005, Mr Tawhai's Family Trust sold 2/37 Motatau Rd, for $240,000. On the same day, Mr Robinson and Mr Tawhai purchased Matuhi Grove, Papatoetoe, for $404,000 as tenants in common in equal shares. Mr Tawhai's Trust contributed $244,000, Mr Robinson $22,595, with an ASB mortgage of $139,000.

(v) In March 2007, 1/5 and 2/5 Carolyn St were sold for $325,000 each. Mr Tawhai did not receive a one-half share of the proceeds of sale, although Mr Robinson paid off $20,000 then $107,000 from the ASB Matuhi Grove mortgage. Otherwise the proceeds of sale of the Carolyn St properties form the bulk of the residuary estate.

[81] Mr Cameron emphasised that Mr Robinson's funds were used to purchase the two adjoining units in Carolyn St for about $400,000 in total. One of these was registered as tenants in common in equal shares, although Mr Tawhai did not contribute to the acquisition cost. They were later sold for $650,000, a profit of $250,000, and the properties at Carruth Rd and Matuhi Grove were purchased with Mr Robinson's interest passing to Mr Tawhai by the Will and survivorship.

[82] This analysis shows that Mr Tawhai received some benefit in terms of acquiring property, which was in part made possible by Mr Robinson's financial contribution. However, close analysis shows that the properties which have devolved by the Will and survivorship were either paid for equally or Mr Tawhai put in more of the equity. The respondents' position is, of course, that Mr Tawhai has done very well out of his relationship with Mr Robinson and now is a wealthy man on any view.

[83] Mr Cameron referred to Mr Tawhai's overall financial position, including the benefits he takes under the Will, as amounting to some $1,143,000. That includes his own assets which are worth some $438,000, valuable chattels, the bonus bonds of $27,500 and the nett value of Carruth Rd and Matuhi Grove. Mr Tawhai also takes joint bank accounts by survivorship, and there are assets in the Tawhai Family Trust.

[84] This is contrasted with Mr Tawhai's position when the relationship began when Mr Robinson owned a property at Whangaparaoa which he believed was worth some $425,000 but was sold for a nett $458,000. Mr Tawhai at that time owned a property at 2/37 Motatau Rd which sold for a nett $240,000 a Howe St investment unit (still retained) and other assets.

[85] I agree that Mr Tawhai has done well from the relationship in material terms. While Mr Tawhai's services were of great benefit and comfort to Mr Robinson, he received many reciprocal benefits from the relationship, including overseas travel, a pooling of financial resources into property and their lifestyle, and property which has come down to him. He received WINZ payments for his work as a caregiver, amounting to between $9,000 and $14,000 per year, which must be part of the reckoning, in assessing any unrewarded element of his services.

[86] Overall, Mr Tawhai has received financial benefits of one-half of the nett value of Carruth Rd, and one-half of the nett value of Matuhi Grove, to which he contributed more than one-half of the equity on purchase. Market valuations as at 9 March 2012 were $340,000 (Carruth Rd) and $450,000 (Matuhi Grove). There was a small mortgage debt on the Carruth Rd property. He has the bonus bonds. He has thus received about half of Mr Robinson's estate on the figures before the Court on appeal. This would increase if 2014 valuations applied, or later. The Court does not ignore the market, nor the estate's residuary value before the litigation that has so reduced its worth. Mr Tawhai is indeed a millionaire with "nothing to worry about" financially.

[87] Nevertheless the residuary estate was more than the nett value of the two properties at 9 March 2012. I have held that the promise made to Mr Tawhai was that he would receive most of the estate. As it stands, he received about half of the estate,

given the value of his half-shares in the Carruth Rd and Matuhi Grove properties in 2012 and the other assets received. There was, therefore, a failure to fulfil the promise made.

What award should be made

[88] The question is what award should be made to compensate for the failure. The Court has a broad discretion as to the quantum of any award once it has found all elements of a claim to be made out. Tipping J in *Re Collier-Cambus* said:[31]

> In a case, however, where there is a promise of a specific amount or of specific real or personal property, there are two limitations on the amount which can be awarded. First, the amount cannot be more in value than what was promised, and second it must be reasonable. The Court will not automatically award the amount specified or the specified real or personal property. It will only do so if that is fair recompense for the services. If the amount promised is greater than what is reasonable only such lesser amount as is reasonable may be awarded.

[89] Section 3(1) of the Act requires the Court to take into account the value of the services or work; the value of the testamentary provision promised; the amount of the estate; and the nature and amount of the claims of other persons in respect of the estate. The criterion of the relief to be granted is reasonableness.[32] When both parties have received benefits from each other, the Court will compare those benefits and compensate a claimant only for the unremunerated balance.[33] In *Re Welch* the Court said:[34]

> It is not to be doubted that, for instance, where there have been meritorious services and considerable sacrifice on the part of a claimant and the property promised has been a central feature in the services or the life of the claimant, the natural order under the Act may be one vesting the property in the claimant, provided that this does no injustice to any other with meritorious claims against the estate. *Jones v Public Trustee* [1962] NZLR 363 was such a case. On the other hand, despite a promise of a specific property, either the limited value of the claimant's service by comparison or other circumstances of the case may result in a lesser or different award, as in *Public Trustee v Bick* [1973] 1 NZLR 301 and *Re Townley* [1982] 2 NZLR 87.

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31 *Re Collier-Cambus* [1994] NZFLR 520 (HC) at 146.
32 *Re Welch*, above n 12 , at 6.
33 *Samuels v Atkinson*, above n 14, at [77].
34 *Re Welch*, above n 12, at 6.

[90] In the final reckoning are the other beneficiaries, many of whom are elderly. Mr Robinson held these people dear and made substantial provision for them. The Court is considering what, in effect, is the application of a statute which is designed to hold people to their promises but the Court is not blind to other intended provision. Mr Robinson wanted to benefit his friends, just as he had gratefully received unexpected provision from a relative.

[91] I have come to the view that Mr Robinson did fall short in his promise to Mr Tawhai and something more is required to meet this claim, but it is limited. Mr Tawhai should not receive the award he seeks, given the financial benefits he received during his relationship with Mr Robinson, and under the Will, and that this was a true relationship with many reciprocal benefits.

Ancillary finding

[92] Because of the submission that there was a promise deliberately broken I want to say something further. It is clear on the evidence that Mr Robinson did not want Mr Tawhai to know of the content of some of his later Wills. While this was submitted to be based on his concern that Mr Tawhai would regard such as a broken promise, I do not think that is the inference to be drawn. Mr Tawhai was prepared to enter a fulltime relationship with him in 2003 and take him into his home, for what would be an uncertain period, but proved quite lengthy in the context of Mr Robinson's age and ill health. He undoubtedly wanted to reward some of those who had given him pleasure in life, and the history of Mr Robinson's Will making is clear in that regard. As he grew older, these thoughts were retained.

[93] His promise did not bind him not to make further Wills, but he quite reasonably would have been concerned that Mr Tawhai might take an adverse view of them given the degree of dependency. He also may have wanted a degree of privacy about his Will. He certainly did not in a wholesale way abandon his promise to Mr Tawhai, by this judgment, but rather fell short.

[94] These conclusions are set out not as an aid to reaching judgment, but to put aside the suggestion that Mr Robinson deliberately concealed what was said to be a

broken promise. This much is owed to Mr Robinson, and Mr Tawhai should know this too.

Disposition

[95] In all the circumstances, a modest further award is appropriate, to take Mr Tawhai beyond a one-half share in Mr Robinson's property at his death. It should not be the "lot", and not nearly such, but should take him over a one-half share by some margin. In the circumstances, a reasonable award is the sum of $100,000, but with some costs implications.

[96] Mr Tawhai will bear all his own costs in both Courts from the awarded sum. No order for costs will be made against the respondents in these proceedings and no order will be made against Mr Tawhai. I direct that Mr Witten-Hannah's costs should be paid from the estate. The reasonable costs of administration and Mr Cameron's fee will come from the estate. Counsel properly resisted the claim and did so with commendable balance.

[97] Mr Witten-Hannah submitted that some of the beneficiaries have incurred costs. The Court does not have details of all those costs, but one beneficiary, Ms Feron, is said to have incurred costs on a solicitor-client basis of $18,000 plus GST, although this may not cover all her costs. It is unlikely that separate costs awards would be made in favour of individual beneficiaries as there has been full representation in opposition to the claim. However, there is general leave reserved, as set out below.

[98] Leave is reserved for any further orders necessary to effect this judgment, including as to costs.

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Nicholas Davidson J

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