THE TESTAMENTARY PROMISES ACT: TO BE OR NOT TO BE?

Would a Testamentary Promises Claim By Any Other Means still be as Sweet?

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INTRODUCTION

This paper seeks to determine whether the Law Reform (Testamentary Promises) Act 1949 (TPA) is still useful law in light of significant legal developments that have occurred since it was enacted. Prior to legislation, persons who had provided services to a testator in the expectation of payment by will had no remedy available where the expectation was not met, even where years of unpaid services had been provided.[1] Such persons usually could not establish a claim under contract law because the agreement or understanding with the testator was too vague or uncertain to constitute a binding contract.[2] Furthermore, agreements involving land were required to be in writing.[3]

In 1944 Parliament recognised that the existing law was inequitable,[4] and designed a unique "testamentary promises" provision to provide for situations in which a "testamentary promise" was made and not fulfilled by a testator.[5] That provision formed the basis of the existing TPA, which still has no equivalent in any other country today.[6]

Section 3(1) of the TPA states:

> **"3 Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision**
>
> (1) Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise

1 *Sutherland v Towle* [1937] GLR 509.

2 For example in *Higgie v Wilkinson* [1903] 23 NZLR 74, and *Sutherland v Towle* [1937] GLR 509.

3 The Statute of Frauds 1677 required agreements involving land to be accompanied by a memorandum in writing. Contracts not meeting this requirement were unenforceable. See: *Young v Anderson* [1940] NZLR 239; *Nealon v Public Trustee* [1949] NZLR 148; and *McCormack v Foley* [1983] NZLR 57.

4 For example, in *Sutherland v Towle* [1937] GLR 509 at 511, Fair J described the law as inequitable, and resulting in an injustice in that particular case. Parliament described the law in similar terms during discussion on the Law Reform Bill at (23 November 1944) 267 NZPD HR 299-300.

5 Law Reform Act 1944, section 3.

6 The TPA repealed section 3 of the Law Reform Act 1944, but essentially re-enacted it in more detail. From the outset, Parliament acknowledged that there was no material difference between the two provisions (06 October 1949) 288 NZPD HR at 2597).

> was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, civil union partner, children, next of kin, or otherwise."

The TPA allows a person to enforce a testamentary promise against a deceased testator's estate where they can establish the following: (1) they had provided the deceased with work or services during the deceased's lifetime; (2) the deceased had promised to benefit the claimant by will; (3) the promise was made specifically to reward the claimant for their work or services; and (4) the claimant has not been otherwise remunerated by the deceased for their services.[7] Once these requirements have been established, the Courts will award the claimant "a reasonable amount" as remuneration, taking into account all relevant circumstances, such as the value of the services and the promise, and the interests of other beneficiaries and creditors of the estate[8].

The TPA is not a code. Section 3(8) provides that common law remedies are not affected by the Act. Where another remedy is available, the claimant can elect whether to enforce that remedy or the remedy under the TPA, and both claims can be considered together within the same proceedings.[9] Any alternative cause of action to the TPA must be established under the Law of Contract, *Quantum Meruit*, Restitution, Estoppel, or Constructive Trust.[10] In 1944, claimants were unlikely to succeed in any of these other options but this position may be different in light of legal developments that have occurred since that time. Where another remedy might prevail, it might now be better for the claimant to elect that remedy rather than to rely on the TPA, where remuneration is highly discretionary.[11] The Law Commission suggested that there should be clearer principles for determining how these awards should be made. In a comprehensive review of succession law, the Law Commission criticised the arbitrary relationship between the TPA and other remedies, and proposed that the TPA be repealed and re-enacted within a comprehensive Act, covering all laws of succession.[12]

7 Law Reform (Testamentary Promises) Act 1949, s3(1); *Samuels v Atkinson* [2009] NZCA 556 at [34].

8 Law Reform (Testamentary Promises) Act 1949, section 3(1).

9 Law Reform (Testamentary Promises) Act 1949, s. 3(8). Where a claimant has an alternative remedy available, they can either enforce that remedy or the remedy under section 3 but not both. However, the non-preferred remedy can be considered together in the same action, as an alternative claim.

10 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 291.

11 *McCormack v Foley* [1983] NZLR 57 at 72-73. The quantum of a TPA award depends on a consideration of the factors listed in section 3(1), including the entitlements of other persons in regards to the estate. Therefore, a claimant is likely to get less than the amount promised where there are any other existing interests in the estate. For these reasons, Patterson suggested that contractual remedies are preferred, when available: WM Patterson *The Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis NZ Ltd, Wellington, NZ, 2004), at p184, Chapter13.5.

12 See: Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996); Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997).

The focus of this paper is to determine whether the TPA still has a useful role in our current law. Specifically, it considers whether the Act should be retained, repealed, replaced, or amended. This assessment will be made in consideration of legal developments that have occurred since the Act was first adopted, nearly 70 years ago.

Chapter 1 will focus on the history of the Act to determine the reasoning behind its enactment. It will assess the remedies available to recipients of testamentary promises in 1944, and consider why these were not adequate. It will conclude with discussion regarding Parliament's intentions for the newly introduced provision.

Chapter 2 will focus on the current status of the law. It will outline the judicial approach to TPA claims, and then consider the existing uncertainties regarding what constitutes "services" under the Act, and how the quantum of TPA awards are assessed.

Chapter 3 will examine the current status of the common law, and consider whether it could adequately provide for testamentary promises claimants today. Comparisons will be made between claims made under the TPA compared to the common law.

Chapter 4 will consider other options for dealing with testamentary promises, focusing in particular on the Law Commission's proposal to assess claims on the basis of either an express promise or codified unjust enrichment principles. This is not recommended because it prevents claimants from being able to benefit from future developments under the common law, and is wholly unnecessary.

In conclusion, the TPA still has a useful role in our law. While developments under the common law have made the need for legislation less paramount, the TPA is still able to provide for many cases which are currently not provided for under the common law.[13] Some uncertainty currently exists with the TPA, but these are close to being resolved and can be addressed with further judicial analysis and clarification of principles. There is currently no need for a full reform of the law, as suggested by the Law Commission. The TPA appears to be working as a whole. It is clearly being utilised, still attracting a significant number of claims today, and has been praised by judges and others.[14] Thus, in answering whether the TPA should be retained, repealed, or amended, I quote a wise man who once said "if it aint broke, don't fix it".[15]

13 This view is supported by the Law Commission (Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at [302]; Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at [38]).

14 The testamentary promises provision was described by Hammond J in *Kite v May* [2001] NZFLR 514 at 518 as a "beneficient" provision. Sarah Nield advocated for a similar provision to be adopted in England due to the limitations of common law in resolving testamentary promises cases (S Nield "If you look after me, I will leave you my estate': The enforcement of testamentary promises in England and New Zealand" (2000) 20 Legal Studies 85). This was also considered in S Nield "Testamentary Promises: A test bed for legal frameworks of unpaid caregiving" (2007) 58 N Ir Legal Q 287.

15 US Politician Thomas Bertram Lance, advisor to Jimmy Carter, 1976. *Nation's Business* (May 1977).

CHAPTER ONE: Why was Legislation required in 1944?

I. Introduction

In order to consider the current utility of the TPA, it is necessary to determine why such a provision was necessary in 1944. The testamentary promises provision was entirely unprecedented and untested. It was a radical change in the law motivated by the inequitable position of testamentary promise recipients, who as highlighted by *Sutherland v Towle*,[1] had no remedy available at common law.[2]

II. *Sutherland v Towle*[3]

This case concerned Mrs Sutherland's claim for remuneration against a testator's estate. Mrs Sutherland had provided the testator with many years of unpaid domestic and nursing services on his express promise to pay her by will. She had incurred personal costs to provide these requested services, and believed at all times that she would be remunerated. The testator had informed her that she would be well rewarded for her services, and had represented that provisions had already been made for her in his will. However, despite his assertions, the testator made no such provision for Mrs Sutherland, and she was given no relief from the Courts for relying on his promise.

This decision was inequitable, and perhaps incorrectly decided. Ostler J found that the testator had promised to provide a legacy.[4] He therefore nonsuited the plaintiff because of the statement of the law in *Halsbury's Law of England*, which stated:[5]

> A man who does work for a testator on the understanding that he is to be remunerated by a legacy has no claim against his estate, if the testator fails to provide for the legacy, and the executors are not entitled to satisfy such a claim. It rests, however, upon the executors to show that the work was done upon such an understanding; and mere forbearance to send in a claim for work done in the expectation of a legacy is no bar to a claim against the executors for the services rendered if the party is disappointed in his expectation.

1 *Sutherland v Towle* [1937] GLR 509.

2 The Law Reform Act 1944 was an Act to "effect Miscellaneous Reforms in the Law". The Attorney-General Mason described the testamentary promises clause as enabling the Court to remedy the undesirable legal position facing persons expecting testamentary benefits as payment for their services (Parliamentary Debates (23 November 1944) 267 NZPD HR at pp299-300). *Sutherland v Towle* has been frequently cited as the final decision prompting parliamentary action, and clearly highlighted the need for legislative action. For example, see: Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965); *Nealon v Public Trustee* [1949] NZLR 148; *McCormack v Foley* [1983] NZLR 57; WM Patterson *The Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis NZ Ltd, Wellington, NZ, 2004).

3 *Sutherland v Towle* [1937] GLR 509.

4 *Sutherland v Towle* [1937] GLR 509 at 509-510.

5 *Halsbury's Laws of England* (2nd Ed., Vol 14, 407), at paragraph 764. In support of this statement, the cases of *Maddison v Alderson* (1883) 8 App Cases 467; *Shallcross v Wright* (1850) 12 Beav 558; *Baxter v Gray* (1842) 3 Man & G 771; and *Osborn v Guy's Hospital* (1726) 2 Str 728 were cited as footnotes.

Ostler J concluded that no remuneration could be made because Mrs Sutherland had provided services *on the express understanding that she would be paid by a legacy*.[6] Such persons had no claim against a testator's estate, unlike those who had merely refrained from enforcing payment during the testator's lifetime because of *hope that a legacy might be given* instead.[7]

Coote suggested that *Sutherland* was wrongly decided.[8] Ostler J had interpreted the *Halsbury* statement literally, understanding the intended mode of payment as being vital.[9] He suggested that testamentary promises could never be enforced against an estate, even where it amounted to a contract.[10] However, it is apparent from the cases cited within *Halsbury* that this interpretation was incorrect.[11] The plaintiff in those cases failed not merely because testamentary payment was intended, but because there was never any enforceable contract for payment. Whenever services were provided gratuitously or payment was entirely at the testator's discretion, remuneration could not be recovered against a testator's estate.[12] This was common in testamentary payment cases, which explains the misleading statement. Persons expecting testamentary payment usually could not establish that their services were expected to be remunerated, whether by reasonable wages,[13] or a contract to provide a certain legacy.[14]

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6 *Sutherland v Towle* [1937] GLR 509 at 510 and 511. He relied on the statement in *Halsbury's Laws of England* (2nd Ed., Vol 14, 407), at paragraph 764, and cited three earlier NZ decisions (FN 7) that had relied on the statement, and described it as "an accurate statement of the law" in NZ. He did not assess the plaintiff's claim in either contractual, *quantum meruit*, or estoppel terms before nonsuiting her.

7 *Sutherland v Towle* [1937] GLR 509 at 510 and 511. Ostler J held that earlier NZ cases of *Te Ira Roa v Materi* (1919) GLR 492; *Dick v Nicholson* (1920) GLR 454; and *Crawshaw v The Public Trustee* (1925) GLR 145 reinforced such a distinction but did not provide a reason the distinction, other than the statement in *Halsbury's*. However, Coote suggests these cases do not support his conclusions. See: Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at p8.

8 Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at p8.

9 Ibid.

10 Ostler J was subsequently quoted as stating "I think there was a contract, but it is not enforceable" in relation to this case (Telegraph Press Association "Law Inequitable" *The Evening Post* (Auckland, 10 December 1937) at 6). He did not state why he considered the contract to be unenforceable, but this statement was followed by his interpretation of the description of the law provided in *Halsbury's*.

11 These cases include: *Maddison v Alderson* (1883) 8 App Cases 467; *Shallcross v Wright* (1850) 12 Beav 558; and *Baxter v Gray* (1842) 3 Man & G 771. See: Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at pp4-8 for more discussion on this topic.

12 *Dick v Nicholson* (1920) GLR 454; *Osborn v Guy's Hospital* (1726) 2 Str 728; *Baxter v Gray* (1842) 3 Man & G 771; Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at p7.

13 *Dick v Nicholson* (1920) GLR 454; Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at 7.

14 *Maddison v Alderson* (1883) 8 App Cases 467; *Higgie v Wilkinson* [1903] 23 NZLR 7; *Dillwyn v Llewellyn* 31 LJ Ch 658; *Cameron v Cameron* (1891) 11 NZLR 642; *Simpson v Simpson* (1918) 37 NZLR 319; *Young v Anderson* [1940] NZLR 239; *Shallcross v Wright* (1850) 12 Beav 558. See also: *Halsbury's Laws of England* (vol 14, 2nd ed, 407), at paragraph 763 regarding promises to make a gift.

Despite his conclusions, Ostler J clearly felt sympathy for the plaintiff. He stated "I do not think that the law is equitable, and in this case I feel it will work an injustice" and "I hope that the beneficiaries will recognise that the plaintiff has a moral claim and will make her some allowance".[15] These comments were repeated in an article in the Evening Post.[16] The responses to this article likely prompted parliamentary action.[17]

The "testamentary promises" provision was enacted only seven years afterwards.[18] It is clear from their Debates that Parliament also perceived persons such as Mrs Sutherland as having no remedy available under the common law.[19] However, the reasons for this have not been considered in any depth. The next part of this chapter will consider why the common law was inadequate for testamentary promises cases.

III. Common Law Remedies Available

Before 1944, a claimant could only obtain a remedy under the Law of Contract, *Quantum Meruit*, or Estoppel.[20] Remedial Constructive Trust and Unjust Enrichment claims were not yet available.[21]

1. Contract Law

Testamentary promises cases were primarily dealt with under Contract Law.[22] Contractual remedies were available where there was a valid contract to leave property by will, and a breach of its terms. This required proof of a valid contractual agreement, certainty, an intention to create binding legal relations, and valid consideration.[23] These requirements were difficult to establish for three main reasons, to be considered in turn.

15 *Sutherland v Towle* [1937] GLR 509 at 511.

16 Telegraph Press Association "Law Inequitable" *The Evening Post* (Auckland, 10 December 1937) at 6.

17 This conclusion is supported in Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965); *Nealon v Public Trustee* [1949] NZLR 148; *McCormack v Foley* [1983] NZLR 57; and WM Patterson *The Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis NZ Ltd, Wellington, NZ, 2004).

18 See: Law Reform Act 1944, section 3.

19 See: (23 November 1944) 267 NZPD HR at 299-300; and (30 November 1944) 267 NZPD LC at 423.

20 *Higgie v Wilkinson* [1903] 23 NZLR 7; *Cameron v Cameron* (1891) 11 NZLR 642.

21 The concept of remedial Constructive Trusts and Unjust Enrichment only began developing in the 1960s, during the equitable "renaissance" period, after the "classical period" expired: DM Wright *The Remedial Constructive Trust* (Butterworths, Sydney, 1998. See also: P Matthews "The words which are not there: a partial history of the constructive trust" in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, Oxford, 2010); M Pawlowski *The doctrine of proprietary estoppel* (Sweet & Maxwell, London, 1996) at 10-12; S Gardner "Reliance-based Constructive Trusts" in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, Oxford, 2010); Juentgen, DA "Unjust enrichment in German and New Zealand law" (2002) 8 Canterbury Law Review 505; *Carly v Farrelly* [1975] 1 NZLR 356 at 367; and *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

22 See: *Cameron v Cameron* (1891) 11 NZLR 642; *Higgie v Wilkinson* [1903] 23 NZLR 74; *Sutherland v Towle* [1937] GLR 509 at 511; and (23 November 1944) 267 NZPD HR at pp 299-300.

23 See: *Higgie v Wilkinson* [1903] 23 NZLR 74; *Bennett v Kirk* [1946] NZLR 580; *Nealon v Public Trustee* [1948] NZLR 324; [1949] NZLR 148; and *McCormack v Foley* [1983] NZLR 57.

(a) Uncertain Arrangements within Close Relationships

Testamentary promises recipients usually had a close personal relationship with the testator.[24] Promises between close parties were usually informal, lacking certainty and an intention to create binding legal relations.[25] Where there was "good feeling and trust between the parties", it was natural to rely on a vague promise, rather than to insist on it being put into writing.[26] To do so would savour doubting the other's integrity, and could jeopardise the existing relationship, and prospect of receiving a generous reward.[27]

Thus, testamentary promises were usually uncertain, especially in regards to the quantum of promised benefits.[28] In *Sutherland,* for example, the testator had promised that the plaintiff would be "well-paid" on his death, but never specified what she was to receive.[29] This promise and those such as "I'll see you right", and "I will remember you in my will" were too uncertain to constitute a contractual promise.[30] Under contract law, a promise was to be clear and unequivocal.[31] An ambiguous promise,[32] or mere statement of intention,[33] was therefore not binding.

(b) The writing requirement for land

Another significant barrier was the writing requirement for promises regarding land.[34] A non-written agreement involving land was unenforceable unless the claimant had

24 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 288; *Nealon v Public Trustee* [1949] NZLR 148 at 160, per Finlay J. Strangers are unlikely to agree to testamentary payment because of uncertainty regarding when payment would be received, and potential for the testator to renege on their promise. In *Higgie v Wilkinson* [1903] 23 NZLR 74; *Young v Anderson* [1940] NZLR 239; and *Sutherland v Towle* [1937] GLR 509, the plaintiff did not insist on a written agreement because they genuinely believed the testator would honour their promises to reward them on death.

25 *MacPherson v Public Trustee* (1914) 33 NZLR 1505; *Nealon v Public Trustee* [1949] NZLR 148; *Bennett v Kirk* [1946] NZLR 580; *McCormack v Foley* [1983] NZLR 57; Martin Davey "Testamentary Promises" (1988) 8 Legal Studies 92; S Nield "'If you look after me, I will leave you my estate': The enforcement of testamentary promises in England and New Zealand" (2000) 20 Legal Studies 85.

26 *Bennet v Kirk* [1946] NZLR 580 at page 582, per Fair J.

27 *Nealon v Public Trustee* [1949] NZLR 148 at 160, per Finlay J.

28 *Bennett v Kirk* [1946] NZLR 580 at p582, per Fair J; Parliament Debates (06 October 1949) 288 NZPD HR at 2597, per Attorney-General. See: *Higgie v Wilkinson* [1903] 23 NZLR 74; *MacPherson v Public Trustee* (1914) 33 NZLR 1505; and *Sutherland v Towle* [1937] GLR 509.

29 *Sutherland v Towle* [1937] GLR 509 at 510. The testator merely stated "You and your family will never regret what you have done for me" and "You are getting well paid for this. I have made provision for you in my will, and when the time comes to settle up you will be well-paid".

30 *Bennett v Kirk* [1946] NZLR 580; *Jones v Public Trustee* [1962] NZLR 363; *MacPherson v Public Trustee* (1914) 33 NZLR 1505; *Higgie v Wilkinson* [1903] 23 NZLR 74; *In Re Fickus* [1990] 1 Ch 331; AG Davis "The Law Reform (Testamentary Promises) Act 1949 (NZ)" (1950) 13 Mod L Rev 353.

31 *Higgie v Wilkinson* [1903] 23 NZLR 74 at 78-81; *MacPherson v Public Trustee* (1914) 33 NZLR 1505.

32 In *MacPherson v Public Trustee* (1914) 33 NZLR 1505, the representation "I have a small farm of 126 acres here which you can have" was too ambiguous to constitute a contract to leave property on death.

33 See: *Higgie v Wilkinson* [1903] 23 NZLR 74 at 78-81, per Stout CJ.

34 Statute of Frauds 1677, s. 4. This section required dispositions relating to land to be accompanied by a signed memorandum in writing. It has now been replaced by the Property Law Act 2007, s. 24. See: *Nealon v Public Trustee* [1949] NZLR 148 at 156, per Kennedy J. See also: *Maddison v Alderson* (1883) 8 App Cas 467; *Horton v Jones* (1935) 53 CLR 475; and *Young v Anderson* [1940] NZLR 239.

committed sufficient acts of part-performance in pursuance of the agreement.[35] In these cases, the equitable doctrine of part-performance provided relief, but only where the acts of part-performance were unequivocally referable to the contract.[36]

This was difficult to establish.[37] In *Maddison v Alderson*, the plaintiff had provided years of unpaid housekeeping services in reliance on her master's promise to leave her certain property.[38] However, this was not in writing and was therefore unenforceable. Part-performance could not apply because the plaintiff's housekeeping acts were a mere continuance of service, and "not unequivocally and by its nature referable to the agreement".[39] Similarly, the claimants in *Young v Anderson* could not enforce their mother's contractual promise to leave them her estate equally because it had not been in writing and did not attract the equitable doctrine.[40] The claimants' forbearance to sue their mother for unremunerated services and unpaid loans was not an "act" of part-performance by them.[41]

The strict writing requirement and high threshold for part-performance left many deserving claimants unable to enforce a testamentary promise.[42]

(c) Past Services and Consideration

Contractual consideration was a further barrier to relief where the claimant had provided services before the promise for reward was made.[43] Past services performed without any expectation of benefit could not be relied upon as consideration for a subsequent promise.[44] This well-established principle left some deserving claimants unprovided.[45]

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35 See: *Maddison v Alderson* (1883) 8 App Cas 467; *Horton v Jones* (1935) 53 CLR 475; *Dillwyn v Llewellyn* 31 LJ Ch 658; *Cameron v Cameron* (1891) 11 NZLR 642; *Simpson v Simpson* (1918) 37 NZLR 319 at 322; and *Young v Anderson* [1940] NZLR 239.

36 *Dillwyn v Llewellyn* 31 LJ Ch 658; *Maddison v Alderson* (1883) 8 App Cas 467; *Cameron v Cameron* (1891) 11 NZLR 642; *Simpson v Simpson* (1918) 37 NZLR 319 at 322; *McKenzie v Templeton* (1915) 34 NZLR 596; *Horton v Jones* (1935) 53 CLR 475; *Young v Anderson* [1940] NZLR 239.

37 See: *Maddison v Alderson* (1883) 8 App Cas 467; and *Young v Anderson* [1940] NZLR 239, where it was unsuccessful. Compare: *Cameron v Cameron* (1891) 11 NZLR 642, where the claimant was in possession of property and had made various improvements and paid the testator an annual sum of money in pursuance of his agreement with the testator that he would inherit title to the property.

38 *Maddison v Alderson* (1883) 8 App Cas 467.

39 *Maddison v Alderson* (1883) 8 App Cas 467. This House of Lord's decision has been often applied in NZ. See: *Simpson v Simpson* [1918] NZLR 319; and *McKenzie v Templeton* (1915) 34 NZLR 596.

40 *Young v Anderson* [1940] NZLR 239 at 246-248.

41 *Young v Anderson* [1940] NZLR 239 at 247.

42 See: *Maddison v Alderson* (1883) 8 App Cas 467; *Horton v Jones* (1935) 53 CLR 475; *Dillwyn v Llewellyn* 31 LJ Ch 658; *Cameron v Cameron* (1891) 11 NZLR 642; *Simpson v Simpson* (1918) 37 NZLR 319 at 322; *McKenzie v Templeton* (1915) 34 NZLR 596; *Young v Anderson* [1940] NZLR 239; and *Nealon v Public Trustee* [1949] NZLR 148 at 156, per Kennedy J.

43 See: *Re McArdle* [1951] Ch 669; and *Stevens v Stevens* (1896) 15 NZLR 620.

44 *Re McArdle* [1951] Ch 669; *Stevens v Stevens* (1896) 15 NZLR 620; Havighurst, H "Services in the home: A study of contract concepts in domestic relations" (1932) 41 The Yale Law Journal 386 at 396.

45 See: *Re McArdle* [1951] Ch 669 at 673, 677, and 679.

(d) Conclusions

Testamentary promises recipients were seldom able to obtain contractual remedies because testamentary promises were usually uncertain and unlikely to be in writing.[46] Furthermore, an enforceable contract did not guarantee a remedy unless its terms had been breached. A contract to merely make a will in favour of the claimant for their services would not be breached where a will was made but subsequently revoked.[47]

Although Ostler J's reasoning was flawed in *Sutherland*,[48] the plaintiff could not have established a valid contract because the testator's promise that she would be "well paid" for her services was uncertain, and was further not in writing.[49]

2. Non Contractual Remedies

Non-contractual remedies were not often relied upon in a testamentary promises case, and it is unclear why a *quantum meruit* or estoppel claim could not have provided for such claimants. These remedies will be considered in turn.

(a) Quantum Meruit

A *quantum meruit* claim allows a person to claim reasonable compensation for services rendered in cases where they are usually expected to be paid for, and there is an implied agreement for payment.[50] It seems that the Attorney-General was referring to this principle when he stated "We know that where nothing is said about payment, there is an implied promise to pay, and a reasonable remuneration can be recovered".[51]

In 1944, a *quantum meruit* was a quasi-contractual claim which could be relied upon only where payment was clearly intended, and where there was either no express contract for payment, or it had been repudiated or declared void.[52] In cases where there

46 *Nealon v Public Trustee* [1949] NZLR 148 at 156, per Kennedy J; at 160, per Finlay J.

47 See: Sarah Nield "Testamentary Promises: A test bed for legal frameworks of unpaid caregiving" (2007) 58 N Ir Legal Q 287; and Roger Kerridge *Parry and Kerridge: The Law of Succession* (12th ed, Sweet & Maxwell, London, 2009).

48 See: Part II of this chapter.

49 *Sutherland v Towle* [1937] GLR 509 at 510.The testator never specified what the plaintiff was to receive under his will, and no values were ever indicated by him in his promises. It is also likely that his estate comprised of land, which meant that writing was also required.

50 *Planche v Colburn* (1831) 8 Bing14; *Sumpter v Hedges* [1898] 1 QB 673; Jones, G "Claims arising out of anticipated contracts which do not materialise" (1979-1980) 18 UW Ontario L Rev 447; *Steven v Bromley & Son* [1919] 2 KB 722; *Meates v A-G* [1979] 1 NZLR 415; Rafferty N "Contracts Discharged through Breach: Restitution for Services Rendered by the Innocent Party" (1999) 37 Alta L Rev 51; GHL Fridman "Quantum Meruit" (1999) 37 Alta L Rev 38; *Dickson Elliott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608; AT Denning "Quantum Meruit and the Statute of Frauds" (1925) 41 LQR 79; *Scott v Pattison* [1923] 2 KB 723; *Crawshaw v Public Trustee* (1925) GLR 145.

51 At (23 November 1944) 267 NZPD HR, 299 (during debate on the Law Reform Bill, clause 3).

52 See: *Chicago v Tilley* (1880) 103 US 146; *Gilbert & Banker Mfg Co. v Butler* (1887) 146 Mass 82; *Schmetzer v Broegler* (1918) 105 Atl 450; *Crawshaw v The Public Trustee* (1925) GLR 145; *Dick v*

was an existing contract, or express understanding of alternative arrangements, the doctrine would not have been applicable because there could be no implied contract for payment in these cases.[53] For this reason, Mrs Sutherland and other testamentary promises claimants could not have succeeded in a *quantum meruit* claim.[54]

A *quantum meruit* would be difficult to establish in cases involving persons within close relationships, because usually there can be no proper expectation of payment for services provided in these contexts.[55] This might be different where the services had been provided over a long period of time, and in onerous circumstances where payment would normally be expected.[56]

(b) Estoppel

In 1944, Estoppel consisted of distinct doctrines, including Estoppel by Representation, and Encouragement, and Promissory Estoppel.[57] None of these could have been used as the basis of any proceedings,[58] or otherwise provided for a testamentary promises case.

(i) Estoppel by Representation

Estoppel by Representation could prevent a person from denying the truth of their prior representations in certain circumstances.[59] It was not often raised in testamentary promises cases, and could only be used to prevent a case or defence from otherwise

Nicholson (1920) GLR 454; *Baxter v Gray* (1842) 3 Man & G 771. Services that are provided by a contractor or physician would normally expected to be paid for, and thus a reasonable amount would be recoverable for labour, or for medicines and treatment, even though no express contract was agreed upon before the services were provided. The presumption of an implied agreement to pay for such services can be rebutted by evidence showing that there were different arrangements in place.

53 *Schmetzer v Broegler* (1918) 105 Atl 450; "Recent Decisions: Contracts- Agreement to pay by legacy-Damages- Quantum Meruit" (1919) 19 Colum. L. Review. 241; *Scott v Pattison* [1923] 2 KB 723; AT Denning "Quantum Meruit and the Statute of Frauds" (1925) 41 LQR 79.

54 See: *Sutherland v Towle* [1937] GLR 509; *Baxter v Gray* (1842) 3 Man & G 771; *Crawshaw v Public Trustee* (1925) GLR 145; *Dick v Nicholson* (1920) GLR 454; *Halsbury's Laws of England* (2nd Ed., Vol 14, 407), at paragraph 764; and Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965).

55 See: Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965).

56 See: *Adams v Public Trustee,* discussed in "SM Court: Warkworth, Adams v Public Trustee" *Rodney and Otamatea Times, Waitemata and Kaipara Gazette* (Auckland, 15 August 1917) at p5.

57 These classifications of Estoppel were not well-established, and vary in each of these texts: George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 13-19; Turner, AK *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (Butterworths, London, 1966); Bigelow, M *A Treatise on the Law of Estoppel and its application in practice* (4th ed, Little Brown, Boston, 1876); Everest, Lancelot Fielding *Everest and Strode's Law of Estoppel* (2nd ed, Stevens, London, 1907). The general principles were essentially the same however.

58 George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 11-13. Estoppel also had to be raised in the proper manner and at the proper time.

59 George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 351-364; Turner, AK *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (Butterworths, London, 1966).

succeeding.[60] A claimant could not have initiated proceedings against a testator's estate under this doctrine. Furthermore, Estoppel by Representation related only to clear and unequivocal representations of existing facts, and excluded any statements of intentions or future affairs.[61] Testamentary promises are naturally representations of the testator's future intentions.[62] Earl of Selborne LC stated in *Maddison* that the doctrine could not apply because it is not applicable "to promises *de futuro*, which, if binding at all, must be binding as contracts".[63] This was confirmed in *Higgie v Wilkinson*.[64]

In *Sutherland*, the testator had represented that his will contained a generous provision for the plaintiff, a representation as to an existing fact.[65] Although capable of giving rise to an estoppel,[66] the representation in *Sutherland* regarding the will's contents was too imprecise and equivocal to have succeeded.[67] The testator gave no indication as to what provisions had actually been made beyond it being generous.[68] Furthermore, Estoppel could not have been used to initiate proceedings.

(ii) Proprietary Estoppel or Estoppel by Acquiescence or Encouragement

This doctrine could prevent a person from denying the existence of the claimant's property rights, but only where the claimant had been mistaken as to their legal rights, and acted to their detriment, with the other party's encouragement.[69] It could not provide for a testamentary promises case because there was usually no legal misunderstanding

60 George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 11-13. Estoppel also had to be raised in the proper manner and at the proper time.

61 Ibid at 37-49; *Cameron v Cameron* (1891) 11 NZLR 642. *Higgie v Wilkinson* (1903) 23 NZLR 74 at 78; *Maddison v* Alderson (1883) 8 App Cases 467 at 473; *Jorden v Money* (1854) 5 HLC 185.

62 *Maddison v Alderson* (1883) 8 App Cases 467 at 473, Per Earl of Selborne LC; *Cameron v Cameron* (1891) 11 NZLR 642; *Higgie v Wilkinson* (1903) 23 NZLR 74 at 78.

63 *Maddison v Alderson* (1883) 8 App Cases 467 at 473. See also: *Higgie v Wilkinson* (1903) 23 NZLR 74 at 78; and *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

64 *Higgie v Wilkinson* (1903) 23 NZLR 74 at 78, per Stout CJ. He simply held that the plaintiff's case could not come within the doctrine as "there was no representation of anything existing as a fact".

65 *Sutherland v Towle* [1937] GLR 509 at 511.

66 George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 342; *Re Lewis* [1904] 2 Ch 656 at 662-663, per Vaughan Williams LJ.

67 See: *Re Lewis* [1904] 2 Ch 656 at 662-663, per Vaughan Williams LJ.

68 *Sutherland v Towle [1937] GLR 509 at 510.*

69 *Willmot v Barber* (1880) 15 Ch D 96 at 105-106, per Sir Edward Fry; *Ramsden v Dyson* (1866) LR 1 HL 129 at 170*; Willmott v Barber* (1880) 15 Ch D 96; *Plimmer v Wellington Corp* (1884) 9 App Cas 699; *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641. Estoppel by Conduct or Acquiescence or Encouragement requires strict compliance with the five probanda outlined by Sir Edward Fry. The doctrine could not be relied upon where any one of these requirements could not be established. The doctrine is now referred to as a Proprietary Estoppel claim because of its frequent use in relation to land (P Matthews "The words which are not there: a partial history of the constructive trust" in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, Oxford, 2010) at 24). Spencer Bower noticed that these requirements are essentially the same as those for an estoppel by representation, and argued that Estoppel *by conduct, encouragement or acqueiscence* was merely a sub-set of Estoppel by Representation: George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 13-19 and 351-364.

as to the plaintiff's existing rights in these cases, but as to their *future rights*.[70] Claimants usually provide services to the testator in the hope and expectation of future benefit.[71] As suggested by Spencer Bower, this doctrine could not be esablished without satisfying the more general criteria of Estoppel by Representation.[72]

(iii) Promissory Estoppel

Promissory Estoppel was not clearly articulated until 1946, when it was applied in *Central London Property Trust Ltd v High Trees House Ltd*.[73] The underlying principles had existed long before this however, and were available in 1944.[74] Since *Hughes v Metropolitan Railway Company,*[75] Courts had refused to allow a promisor to act inconsistently with their promise in cases where it was clearly "intended to be binding, intended to be acted on, and in fact acted on" by the other party.[76]

Promissory Estoppel could not have provided for a testamentary promises recipient. First, it was limited to cases where the plaintiff and defendant were already bound in contract, and where the promise affected the parties' rights within their pre-existing legal relationship.[77] This was simply not applicable to a testamentary promises case.[78] Mrs Sutherland, for example, did not have a pre-existing legal relationship with the testator.[79] Furthermore, the doctrine could only apply where the promisor clearly intended to be bound by the promise.[80] As discussed in Part 1a, there was usually no intention to create legal relations between parties to a testamentary promise. Finally, Promissory Estoppel could not be used to enforce a testamentary promise or seek

70 See: *Sutherland v Towle* [1937] GLR 509 at 510. The plaintiff expressly admitted knowing that she had no legal rights, but had provided the services in reliance on the testator's promise.

71 See: *Maddison v Alderson* (1883) 8 App Cases 467 at 473; *Cameron v Cameron* (1891) 11 NZLR 642; *Higgie v Wilkinson* (1903) 23 NZLR 74 at 78; and *Sutherland v Towle* [1937] GLR 509.

72 George Spencer Bower *The Law relating to Estoppel by Representation* (Butterworth & Co. Ltd, London, 1923) at 351-364.

73 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256.

74 *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439; *Fenner v Blake* [1900] 1 QB 426; *In Re Wickham* (1917) 34 TLR 158; *Re William Porter & Co. Ltd* [1937] 2 All ER 361; *Buttery v Pickard* [1946] WN 25; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; Turner, AK *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (Butterworths, London, 1966) at 334-335. In particular, see *Bruner v Moore* [1904] 1 Ch 305 for an earlier assertion of the promissory estoppel doctrine, decided expressly on the principles from *Hughes*.

75 *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439.

76 See: *Fenner v Blake* [1900] 1 QB 426; *In Re Wickham* (1917) 34 TLR 158; *Re William Porter & Co. Ltd* [1937] 2 All ER 361; and *Buttery v Pickard* [1946] WN 25; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134.

77 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; *Hughes v Metropolitan Railway Co.* (1877) 2 App Cas 439; Turner, AK *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (Butterworths, London, 1966).

78 There was usually no pre-existing relationship between parties to a testmantary promise except where the promise was made between a master and servant. In these cases, the doctrine would still not apply becase the testamentary promise does not expressly affect the legal relationship between parties.

79 *Sutherland v Towle* [1937] GLR 509.

80 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134.

damages because it was not a cause of action, but merely a shield against the "inequitable enforcement of enforceable rights".[81]

3. Conclusion

In 1944, the common law was inadequate for the majority of testamentary promises claimants. Because a testamentary promises case could not fit into an existing cause of action, the need for legislation was apparent.

IV. The Law Reform Act 1944

The initial testamentary promises provision was enacted as a single section within the Law Reform Act 1944, an "Act effecting miscellaneous reforms of the law".[82] Parliament acknowledged that the existing law was unfair to persons such as Mrs Sutherland, who had provided services in reliance on a testamentary promise.[83] The Attorney-General stated:[84]

> A person might work for a long time and render services, maybe over many years, in the faith of that expectation, and yet be defeated in respect of it, and have no remedy of any sort.

The proposed clause enables the Court to remedy that undesirable situation in "proper cases".[85] Because of the complex nature of testamentary cases, and significant variation, the best way to deal with the matter, and ensure fairness, was to direct the Court to take all facts into consideration and "secure such reward as is proper in the circumstances".[86]

Classification of Awards

Because there was no prior legal basis for the provision, Parliament was unsure about how to treat testamentary promises claims once they were recognised in law.[87] Some

81 Turner, AK *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (Butterworths, London, 1966). In *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134, Denning J expressly acknowledged that a cause of action in damages for a breach of a non-contractual promise had never been recognised by the Courts.

82 Law Reform Act 1944, Long Title. See also: Law Reform Act 1944, s 3.

83 Parliament Debates (23-30 November 1944) 267 NZPD; *Nealon v Public Trustee* [1949] NZLR 148 at p7, per O'Leary CJ, and Kennedy J at p10.

84 Parliament Debates (23 November 1944) 267 NZPD HR at 300, per Attorney-General Mason.

85 Parliament Debates (23 November 1944) 267 NZPD HR at 300; (30 November 1944) 267 NZPD LC at 423, per McLagan. See also: (06 October 1949) 288 NZPD HR at 2597.

86 Parliamentary Debates (23 November 1944) 267 NZPD HR at 300, per Attorney-General Mason. The discretionary nature of TPA remedies has been heavily criticised. See: Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996); Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997).

87 Webb MP (Kaipara) considered that it was more logical to treat the award as a debt rather than a legacy, because it was not really a gift, "but a payment in return for services rendered during the lifetime of the deceased": (23 November 1944) 267 NZPD HR at 301. However, he further stated that it probably would not make much difference either way and supported the Bill in its entirety (at 301).

MPs considered it more logical to treat the award as a debt because of its contractual basis, and avoidance of death duties.[88] However, the award was to be treated as a legacy because the Attorney-General considered it most logical to treat the award "the same as if it had actually been embodied in the will", as promised.[89]

Objections

Oram MP strongly objected to the proposed clause, arguing that it was not right or just to enforce a claim against a testator's estate that could not have been enforced against him while he was alive.[90] He stated "Nothing the Attorney-General has said has given any justification for the passing of a provision of that sort".[91] Oram was clearly not influenced by the harshness of the existing law, as the Attorney-General and others were.[92] He was concerned with the precise reasoning of the clause, and its inconsistencies in how the promise and award were to be treated.[93] Oram was also concerned with testamentary freedom, stating that "if a testator had wanted to make it a legacy, he could have made it so by his will".[94]

Oram's concerns were not addressed before the Bill was passed.[95] The majority of Parliament seemed unconcerned that the new provision was inconsistent with existing principles because they considered it necessary to avoid real injustice to testamentary promises recipients. This recognised mischief outweighed any of Oram's concerns. Parliament specifically refused to omit the words "whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased" to ensure that the "inequitable distinction" highlighted in *Sutherland* would be abandoned.[96]

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88 Parliament Debates (23 November 1944) 267 NZPD HR at 300-302. The issue is not as relevant as it was in 1944 because death duty has now been abolished.

89 (23 November 1944) 267 NZPD HR at 300 and 302. However, under the current provision, the TPA award is still to be treated as if it were embodied in the will and is deemed to be "devised or bequeathed by the deceased to that person": Law Reform (Testamentary Promises) Act 1949, s. 4(2)(b).

90 Parliament Debates (23 November 1944) 267 NZPD HR at 301.

91 Parliament Debates (23 November 1944) 267 NZPD HR at 301, per Oram MP.

92 See: Parliament Debates (23 November 1944) 267 NZPD HR at 301. Oram MP was the only one who objected to the Bill. It had been endorsed by the Statutes Revision Committee (Statutes Revision Committee "Reports of the Statutes Revision Committee" (1944) AJHR I 11.1) and accepted by the Legislative Council without criticism, but with praise.

93 Parliamentary Debates (23 November 1944) 267 NZPD HR at 301, per Oram MP. In particular, he was concerned that the promise was "enforceable as a contract", but yet the award was a legacy.

94 Ibid.

95 The Attorney-General simply suggested that cases under the clause had to be treated the same as claims made under a will in a satisfied testamentary promise case. He stated "we have to consider the law in relation to the legacy or whether the contract had been performed. Had the legacy been left in the will, the matter would have been classified as the amendment classifies it". Furthermore, "it is easier to assimilate this clause to the existing clause than to open up the difficulties that would be opened up if we accepted the view that is put forward": (23 November 1944) 267 NZPD HR at 302.

96 See: (30 November 1944) 267 NZPD LC at 423, where the Legislative Council referred to an "inequitable distinction" in the law, distinguishing between cases where a claimant had an enforceable right to payment during the testator's lifetime and merely refrained from asserting that right, and

Conclusion

The testamentary promises clause was designed to give deserving persons who had provided services in exchange for a testamentary benefit a remedy in law, which put them in the same position as they would have been in, had the promise for reward been fulfilled.[97] This was similar to the principles underlying promissory estoppel, preventing the testator from avoiding "a promise that was intended to be binding, intended to be acted on, and in fact acted on".[98]

The focus of the provision was clearly on the result to claimants rather than on the testator's culpability.[99] However, the Act also has a deterrent value because it removes any existing incentives for a testator to make vague testamentary promises and not give effect to them.[100]

V. The Law Reform (Testamentary Promises Act) 1949 (TPA)

The TPA was introduced because of uncertainties in the original provision regarding the meaning of a "promise", whether awards could be made in relation to land, and the application of the Statute of Frauds.[101] The TPA was essentially "a re-enactment" of the earlier provision,[102] which did "not in any way alter the principles of the law" but made it clearer.[103] Watts MP suggested that the TPA would better "enable justice to be done" in a testamentary promises case.[104] This will now be examined in Chapter 2.

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where no such right existed. See: *Sutherland v Towle* [1937] GLR 509.

97 (23 November 1944) 267 NZPD HR at 302.

98 See: *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

99 Parliament was more concerned about preventing the harsh consequences suffered by recipients of unenforceable promises than with the testator's conduct and culpability.

100 WM Patterson *The Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis NZ Ltd, Wellington, NZ, 2004), at p184.

101 See: *Nealon v Public Trustee* [1948] NZLR 324; and *Nealon v Public Trustee* [1949] NZLR 148; (06 October 1949) 288 NZPD HR at 2597, per Attorney-General Mason, and Watts MP; (11 October 1949) 288 NZPD LC at 2685, per Wilson.

102 (06 October 1949) 288 NZPD HR at 2597, per MP Watts.

103 (06 October 1949) 288 NZPD HR at 2597, per Attorney-General.

104 Parliament Debates (06 October 1949) 288 NZPD HR at 2597, per Watts MP; (06 October 1949) 288 NZPD HR at 2597, per Attorney-General. The Attorney-General described cases as those in which a person had used another to work for him without wages because of that person's understanding that provisions would be made to him by will on the death of the employer, and where no such will was made in accordance with the understanding, despite years of unpaid services

CHAPTER TWO: The Strengths and Limitations of the TPA

I. Introduction

This chapter will consider the current status of our law under the TPA.[1] It will first outline the judicial approach to TPA claims, and then consider whether existing uncertainties regarding "services" and awards can be resolved.

II. The Judicial Approach to TPA Remedies

The TPA was adopted to make better provision for enforcing testamentary promises made in return for services.[2] The Act had a contractual basis,[3] but was always inconsistent with traditional common law principles.[4] TPA claims are unique, and distinct from those made in Contract, Estoppel, Constructive Trust, Restitution, or any other cause of action. However, recent decisions have shown a trend towards these common law approaches when services are provided within a close relationship.[5]

1. The Required Elements

A TPA claim requires proof of four elements.[6] There must be (a) work or services, (b) a testamentary promise, (c) a causal link between these two elements, and (d) insufficient remuneration.[7] These individual requirements are now reasonably well-settled. However, there is still some difficulty determining what "services" qualify within a close relationship and how these services should be assessed to determine quantum.[8] These uncertainties will be considered in Parts 2 and 3 of this chapter. This part will outline the general approach to TPA claims by summarising each individual element.

(a) "Work" or "Services"

A TPA claim must be founded upon the claimant's performance of work or services for the deceased during his lifetime.[9] The meaning of "work" is relatively clear and non-

1 Law Reform (Testamentary Promises) Act 1949. This is provided in Appendix A.
2 Law Reform (Testamentary Promises) Act 1949, Long Title.
3 Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at p10; WM Patterson *The Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis NZ Ltd, Wellington, NZ, 2004), at p184.
4 Parliamentary Debates (23 November 1944) 267 NZPD HR at 301, per MP Oram. Oram's comments were discussed in some depth in chapter 1.
5 See: *Re Welch* [1990] 3 NZLR 1; and *Samuels v Atkinson* [2009] NZCA 556. See also Part 2 and 3.
6 *Samuels v Atkinson* [2009] NZCA 556 at [34].
7 Law Reform (Testamentary Promises) Act 1949, s 3(1); *Tucker v Guardian Trust and Executors Co of New Zealand Ltd* [1961] NZLR 773; *Samuels v Atkinson* [2009] NZCA 556 at [34].
8 See: *Re Welch* [1989] 2 NZLR 1; [1990] 3 NZLR 1; *Byrne v Bishop* [2001] 3 NZLR 780; *Atkinson v Samuels* HC Auckland CIV-2006-404-7878, 30 May 2008; and *Samuels v Atkinson* [2009] NZCA 556.
9 Law Reform (Testamentary Promises) Act 1949, s 3(1).

contentious. It constitutes employment acts, such as the provision of business services, caregiving, farming, or housekeeping.[10] However, the wider meaning of "services" has attracted much consideration, and its scope is still unclear.[11] In *Tucker v Guardian Trust*, McCarthy J suggested that "services" should be given a wide liberal meaning, given the remedial purpose of the legislation.[12] This approach has been followed. The concept of "services" has expanded significantly beyond its initial scope. In 1944, the Act was designed to provide for persons who provided housekeeping, caregiving, nursing, or farming duties to a testator. It now provides for various other cases too.

"Services" include both tangible and intangible benefits to the deceased.[13] Tangible benefits include those above, as well as the provision of meals, accommodation, financial assistance, and labour.[14] It also includes a forbearance of an interest in favour of the testator.[15] Intangible services are more difficult. In *Hawkins v Public Trustee*, a grandson assuming the testator's name and performing the role of near-adopted son at his request were "services" under the TPA, it being irrelevant that the services were intangible and incapable of precise monetary assessment.[16] Various other intangible benefits have since been recognised, including postponing marriage for the testator,[17] giving up employment,[18] co-habitation,[19] emotional support,[20] and in some circumstances, mere companionship and affection.[21] Its wide application enabled Courts to make provision for de facto partners in some cases, for their mere companionship and comfort provided during their relationship with the testator.[22]

10 See: WM Patterson *The Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis NZ Ltd, Wellington, NZ, 2004) at Chapter 13; and *Samuels v Atkinson* [2009] NZCA 556 at [46].

11 For example, in *Bennett v Kirk* [1946] NZLR 580; *Hawkins v Public Trustee* [1960] NZLR 305; *Tucker v Guardian Trust & Executors Co. of New Zealand Ltd* [1961] NZLR 773; *Re Welch* [1990] 3 NZLR 1; *Byrne v Bishop* [2001] 3 NZLR 780; and *Samuels v Atkinson* [2009] NZCA 556.

12 *Tucker v Guardian Trust and Executors Co of New Zealand Ltd* [1961] NZLR 773.

13 This is well accepted: *Heathwaite v NZ Insurance Co.* [1951] NZLR 6; *Hawkins v Public Trustee* [1960] NZLR 305; *Tucker v Guardian Trust & Executors Co of New Zealand Ltd* [1961] NZLR 773; *Re Welch* [1990] 3 NZLR 1; *Byrne v Bishop* [2001] 3 NZLR 780 at [6]; and *Samuels v Atkinson* [2009] NZCA 556.

14 See: *Bennett v Kirk* [1946] NZLR 580; *Nealon v Public Trustee* [1949] NZLR 148; *Tucker v Guardian Trust and Executors Co of New Zealand Ltd* [1961] NZLR 773; *Jones v Public Trustee* [1962] NZLR 363; *Re Oliver* [1968] NZLR 168; *Hawkins v Public Trustee* [1960] NZLR 305; *Re Webster* [1976] 2 NZLR 304; *Re Townley* [1982] 2 NZLR 87; *Re Archer* [1990] 3 NZLR 737; *Re Hanlon* [2000] NZFLR 227; *Re Cotton* HC Dunedin CP18/00, 5 April 2001; and *Byrne v Bishop* (2001) 20 FRNZ 609.

15 For example, in *Tucker v Guardian Trust and Executors Co of New Zealand Ltd* [1961] NZLR 773 at 775, McCarthy J held that a brother's surrender of his half-interest in a house to the testator qualified as a TPA "service". See also: *Re Sellars (deceased), Bailey v Public Trustee* [1996] NZFLR 971.

16 *Hawkins v Public Trustee* [1960] NZLR 305 at 313.

17 *Heathwaite v NZ Insurance Co.* [1951] NZLR 6.

18 *Wright v Holland* [1996] 1 NZLR 213.

19 *Chambers v Weston* (1981) 1 NZFLR 377; *Thwaites v Keruse* (1993) 11 FRNZ 19.

20 *Re Greenfield* [1985] 2 NZLR 662.

21 *Thwaites v Keruse* (1993) 11 FRNZ 19; *Byrne v Bishop* [2001] 3 NZLR 780; *Samuels v Atkinson* [2009] NZCA 556; *Hawkins v Public Trustee* [1960] NZLR 305; *Powell v Public Trustee* [2003] 1 NZLR 381; *Chambers v Weston* (1981) 1 NZFLR 377; *Re Lamb* [1993] NZ Recent Law Review 208.

22 See: *Chambers v Weston* (1981) 1 NZFLR 377; *Re Lowe* [1991] 1 NZLR 98; *Re Stowers* (1991) 8 FRNZ 389; *Wright v Holland* [1996] 1 NZLR 213; and *Thwaites v Keruse* (1993) 11 FRNZ 19. In *Chambers,*

Intangible services do not always give rise to a claim however. Such services can only be considered if they go beyond what would normally be expected in the relationship, or where "something extra" has been provided.[23] However, there is uncertainty regarding the precise boundary of qualifying services within the context of close relationships, and regarding whether familial and non-familial relationships should be distinguished. This controversy is a current limitation of the TPA and will be addressed in Part 2.

Services can be provided specifically by the claimant, or by the claimant's family as a whole.[24] They do not need to be requested but must be provided "for the deceased's benefit".[25] A claimant's motives for performing the services are irrelevant, and it is immaterial that they might have acted without any desire or expectation of reward for those services.[26] This is supported by the section applying regardless of whether the services were provided before or after the making of the testamentary promise.[27]

(b) "Testamentary Promise"

A claimant must prove either that the testator made an *express promise to benefit the claimant by will*, or that such a promise may be implied from the circumstances.[28] Section 2 defines a promise as including "any statement or representation of fact or intention".[29] This is not difficult to establish. A testamentary promise does not require any technical form of words.[30] It was established where the testator merely nodded in agreement with a promise by his mother that he would provide for the claimant.[31] The

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a de facto partner's provision of companionship and comfort during her relationship with the testator, who was much older was considered a "service" under the Act entitling her to a remedy. However, after *Re Welch* claims like this are unlikely to succeed. In *Thwaites*, the Court of Appeal stated that young people simply sharing the pleasures of each other's company would not be entitled to an award.

23 See: *Re Welch* [1990] 3 NZLR 1; *Thwaites v Keruse* (1993) 11 FRNZ 19; *Re Lamb* [1993] NZ Recent Law Review 208; *Byrne v Bishop* [2001] 3 NZLR 780; and *Samuels v Atkinson* [2009] NZCA 556.

24 *Byrne v Bishop* [2001] 3 NZLR 780 at [9] and [53], per Blanchard J; *Samuels v Atkinson* [2009] NZCA 556. Compare this with the previous view in *McMillan v NZ Insurance Co* [1956] NZLR 353 that services were to be provided directly by the claimant.

25 Law Reform (Testamentary Promises) Act 1949, s. 3(1); Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) at 15. This interpretation is preferred to the narrow interpretation of being provided "in accordance with his will". See: *Jones v Public Trustee* [1962] NZLR 363; and *Byrne v Bishop* [2001] 3 NZLR 780.

26 *Jones v Public Trustee* [1962] NZLR 363 at pp374-375, per North J; *Byrne v Bishop* [2001] 3 NZLR 780 at [10], per Blanchard J; *Welch v Stewart* [1989] 2 NZLR 1 at 6; *Re Welch* [1990] 3 NZLR 1.

27 See: Law Reform (Testamentary Promises) Act 1949, section 3(2)(a).

28 Law Reform (Testamentary Promises) Act 1949, section 3(1).

29 This wide definition allows the diffculties experienced with uncertain promises at common law to be expressly avoided: *Jones v Public Trustee* [1962] NZLR 363.

30 *Jones v Public Trustee* [1962] NZLR 363; *Re Archer (deceased)* [1990] 3 NZLR 737 at 746; *Work v Thomson* HC Whangarei M72/87, 3 March 1992; *Brunton v Sheard* HC Christchurch M232/97, 2 November 1999; *Re Cotton* [2001] BCL 495; *Gibson v Gibson* HC Dunedin CP9/90, 15 April 1992.

31 *Re Cotton (deceased); Cotton v Griffin* [2001] BCL 495. Some other gesture may also be sufficient, provided that it communicated an intention to benefit the claimant by will. See: *Gibson v Gibson* HC Dunedin CP9/90, 15 April 1992, at p6, per Tipping J: the testator's conduct was reasonably interpreted as communicating agreement with his sister's promise, which was sufficient for a TPA "promise".

relevant question is whether a reasonable person would have understood the testator's representation to mean that the claimant was to receive a testamentary benefit.[32] A claimant's reasonable expectation of benefit alone is not enforceable under the TPA.[33]

(c) "Causal link" between promise and work or service

A testamentary promise must be intended as a reward for work or services.[34] In *Tucker,* the claimant could not establish a TPA claim for his personal and household assistance because the testator's promise to leave him a house was not motivated by those services, but by the claimant's earlier forbearance of his half-interest.[35] In *Re Welch*, the Privy Council suggested that a sufficient nexus was not established because the promise was motivated by the testator's mere love and affection for the claimant.[36] Their Lordships stated "there is no evidence that the promises were ever seen by either the deceased or the appellant as an assessment of a reward for services",[37] as evidenced by the discrepancy between the value of the testator's promise and the alleged work and services.[38] *Re Welch* led to some initial controversy, but this is now resolved.[39] As long as some connection can be established between the promise and services, a claimant will not fail to obtain an award simply because the testator might also have been motivated by affections for the claimant.[40] A partial nexus is sufficient provided the services were an "operative cause" for the promise.[41] An objective inference can also be made regarding the testator's intentions where the services were so extensive that the testator could not have reasonably ignored them.[42]

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32 *Heathwaite v NZ Insurance Co.* [1951] NZLR 6; *Gibson v Gibson* HC Dunedin CP9/90, 15 April 1992. This applies to both express and implied promises. Circumstances in which a testamentary promise can be implied will not be considered in this paper, but was considered in *Rennie v Hamilton* [2004] NZFLR 270 at [33], per Gendall J; *Jones v Public Trustee* [1962] NZLR 363 at 372 and 376, per North J.

33 *Family Law Service* (online looseleaf ed, LexisNexis) at 7.934; *Re Willis; Paterson v Public Trustee* DC Auckland FP004/582/98, 22 February 1999 at 20; *Jones v Public Trustee* [1962] NZLR 363.

34 *Tucker v Guardian Trust and Executors Co of New Zealand Ltd* [1961] NZLR 773; *Re Welch* [1990] 3 NZLR 1; *Leach and Booth v Perpetual Trustees Estate and Agency Co.* CA 48/88, 20 March 1990; *Jones v Public Trustee* [1962] NZLR 363.

35 *Tucker v Guardian Trust and Executors Co of New Zealand Ltd* [1961] NZLR 773. Fortunately, the claimant could establish a claim on the basis of this forbearance because it was also a "service" (at 775).

36 *Re Welch* [1990] 3 NZLR 1 at pp7-8, per Sir Robin Cooke.

37 *Re Welch* [1990] 3 NZLR 1 at p7, per Sir Robin Cooke.

38 *Re Welch* [1990] 3 NZLR 1 at p77-8. See also *Welch v Stewart* [1989] 2 NZLR 1 at 8, per Casey J.

39 See: *Re Crombie* [1990] BCL 254; *Re Fagan* [1999] NZFLR 222 at 231-234; *Re Archer* [1990] 3 NZLR 737; *Leach & Booth v Perpetual Trustees Estate & Agency Co* CA 48/88, 20 March 1990; *Re Lamb* [1993] NZ Recent Law Review 208; *Byrne v Bishop* [2001] 3 NZLR 780; *Humphrey v New Zealand Guardian Trust* [2004] NZFLR 179; and *Samuels v Atkinson* [2009] NZCA 556.

40 *Leach and Booth v Perpetual Trustees Estate and Agency Co.* CA 48/88, 20 March 1990; *Byrne v Bishop* [2001] 3 NZLR 780 at [10]; *Cain v Nyhon* [2007] NZFLR 1055 at [40] and [43].

41 *Cain v Nyhon* [2007] NZFLR 1055 at [40] and [43]; *Byrne v Bishop* [2001] 3 NZLR 780 at [10]; *Leach and Booth v Perpetual Trustees Estate and Agency Co.* CA 48/88, 20 March 1990; *Webb v Smith* HC Tauranga CIV-2010-470-264, 25 August 2010.

42 See: *Leach and Booth v Perpetual Trustees Estate and Agency Co.* CA 48/88, 20 March 1990, per Richardson and Bisson JJ; *Byrne v Bishop* [2001] 3 NZLR 780 at [41]. In *Leach,* Bisson J found that the deceased must have considered that he was entitled to stay with each claimant over the years, without

(d) Insufficient Remuneration

The Act applies only to the extent that the deceased has failed to make testamentary provision or otherwise remunerate the claimant.[43] The mere fact that the testator has paid wages or made gifts to the claimant during his lifetime will not necessarily rule out a claim.[44] These are only "remuneration" if they were made in recognition of the services for which remuneration was promised.[45]

Whether there was "sufficient remuneration" depends on an assessment of the value of the services provided.[46] This is difficult when services were intangible and incapable of precise monetary assessment.[47] In *Powell v Public Trustee,* and *Samuels v Atkinson*, the testator and claimants had provided one another with intangible benefits.[48] In assessing the award for "unremunerated services", the Courts accounted for reciprocal advantages received by the claimant.[49] This process was outlined in *Samuels*, where the benefits and burdens received by each party were off-set against one another in a "netting-off" exercise.[50] Because the benefits to the testator outweighed those to the claimants, they were entitled to a "reasonable award" for the unremunerated balance. The Court of Appeal admitted:[51]

> Although it is awkward, and in a sense distasteful in respect of close personal relationships, to have to "net off" the balance of benefits and burdens in a case like this, the court has to do the best it can if the principles of the Act are to be properly observed.

A similar approach was applied in *Jones v Public Trustee,* where an award was made because the claimant's services outweighed any benefits received from the testator's provision of free accommodation.[52] The matter has not been re-visited since *Samuels*.[53]

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making any contribution to living expenses, because of his intention to reward them by fulfilment of his testamentary promises. See also: *Jones v Public Trustee* [1962] NZLR 363 at 375-376.

43 Law Reform (Testamentary Promises) Act 1949, s. 3(1).

44 *Gartery v Smith* [1951] NZLR 105; *Tombs v Macassey* CA 174/02, 18 June 2003.

45 *Gartery v Smith* [1951] NZLR 105 at 113-114 and 120, per Hutchison J.

46 *Re Smith (deceased), Gartery v Smith* [1949] NZLR 426 at 432; *Gartery v Smith* [1951] NZLR 105 at 120-121; *Powell v Public Trustee* [2003] 1 NZLR 381 at [31]; *Cain v Nyhon* [2007] NZFLR 1055 at [24]; *Samuels v Atkinson* [2009] NZCA 556 at [77]-[80].

47 See: *Powell v Public Trustee* [2003] 1 NZLR 381 at [31]-[33], and *Samuels v Atkinson* [2009] NZCA 556.

48 *Samuels v Atkinson* [2009] NZCA 556 at [79].

49 *Re Welch* [1990] 3 NZLR 1 at 8; *Byrne v Bishop* [2001] 3 NZLR 780 at [11] and [42]; *Powell v Public Trustee* [2003] 1 NZLR 381 at [31]-[33]; *Samuels v Atkinson* [2009] NZCA 556 at [77]-[80].

50 *Samuels v Atkinson* [2009] NZCA 556 at [77]-[80].

51 *Samuels v Atkinson* [2009] NZCA 556 a [78], per Hammond J.

52 [1962] NZLR 363 at 375-376. This approach had also been applied in *Powell v Public Trustee* [2003] 1 NZLR 381 at [31]-[33], and *Cain v Nyhon* [2007] NZFLR 1055 at [24], [44], and [48]-[55].

53 *Samuels v Atkinson* [2009] NZCA 556 has only been considered by one case so far: *Webb v Smith* HC Tauranga CIV-2010-470-264, 25 August 2010. In *Webb*, Associate Judge Doogue only referred to *Samuels* in support of the general requirements of a TPA claim, including in particular the required nexus between the promise and service. Quantum and prior remuneration were not considered.

2. The Problem With "Services"

It is currently unclear when intangible benefits such as companionship and support can give rise to a TPA claim when provided within a close relationship.[54] This controversy arose primarily from *Re Welch* and its interpretation.

(a) Re Welch[55]

This case concerned Mr Stewart's "services" towards his stepfather, with whom he had shared a close relationship for most of his life. The deceased had been married to Mr Stewart's mother for over thirty years, until her death. During discussion regarding her will, the deceased indicated that he would leave all of his property to the claimant, his only "son". Shortly afterwards, the deceased died intestate leaving an estate valued at over $300,000, to be distributed amongst his siblings. His main assets were his matrimonial home with the claimant's mother, and certain shares in a company, obtained on the sale of the family business. He had promised to leave these items to the claimant on his death.[56] Mr Stewart initiated proceedings to enforce this promise against his stepfather's estate on the basis of his work for the testator's business, and his intangible "service" of assuming and performing the role of a son.[57]

At trial, his claim succeeded on this basis, and he was awarded the full value of the promise.[58] Williamson J found that Mr Stewart had occassionally helped his stepfather in his transport business, and accompanied him on social gatherings and other outings. He also provided the deceased with companionship and had conferred on him the enrichment of having a daughter-in-law and grandchildren. These were considered intangible services capable of attracting a significant TPA award.[59] The Estate accepted that business services had been provided, but appealed on the ground that the award was too high in the circumstances. The Court of Appeal agreed and reduced the claimant's award significantly.[60] Casey J stated:[61]

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54 *Samuels v Atkinson* [2009] NZCA 556 at [49], per Hammond J.

55 *Welch v Stewart* [1989] 2 NZLR 1; *Re Welch* [1990] 3 NZLR 1; 7 FRNZ 536.

56 The deceased stated that the plaintiff would inherit these items, even asking the claimant not to sell the shares, but to pass them to his own children. See: *Welch v Stewart* [1989] 2 NZLR 1 at 3.

57 *Welch v Stewart* [1989] 2 NZLR 1 at 6.

58 Half of the testator's estate was awarded under the Matrimonial Property Act, and the remaining half on the basis of the TPA. See: *Welch v Stewart* [1989] 2 NZLR 1 at 2-6 for the initial decision delivered by Williamson J. The Court of Appeal judgement was delivered by Casey J at pp7-9.

59 See: *Welch v Stewart* [1989] 2 NZLR 1 at 2-6. This decision was made in light of *Hawkins v Public Trustee* [1960] NZLR 305, where the claimant was awarded generously for leaving his own home to live with his grandfather, adopt his name, and perform the role of a son to him, at his request.

60 The award was reduced to $20,000 to provide for the claimant's business services, which were not attacked by the Estate. The Court of Appeal upheld the High Court's award under the Matrimonial Property Act claim however, which resulted in the claimant inheriting a significant section of the testator's estate through his mother's will. See: Welch v Stewart [1989] 2 NZLR 1 at 9.

61 *Welch v Stewart* [1989] 2 NZLR 1 at 8, per Casey J.

> The evidence points to nothing more than a normal family relationship between a stepfather and stepson, who had the good fortune to get on well with each other. There was a reasonable balance of benefits and personal satisfaction on each side, and in earlier years Mr Welch helped his stepson with job opportunities and the gift of a section, as well as providing the general support of a father, and this carried on into the mutual companionship and family association of later times.

The Court of Appeal suggested that "in making such a large award the Judge must have overlooked the reciprocal advantages Mr Stewart received from his stepfather".[62] The Privy Council agreed, and suggested that no award should have been made because the parties had enjoyed reciprocal benefits throughout their relationship.[63] Their Lordships stated that:[64]

> … some straining of the scope of the Act is required to bring within the concept of services the natural incidents and consequences of life within a close family group, such as existed in this case.

The Privy Council distinguished this case from *Hawkins,* where there was much more than a normal relationship between grandson and grandfather.[65] Their Lordships made it clear that "something more than a normal relationship" is required to attract the TPA provisions. However, they did not clarify how "something extra" should be determined in each case. Following *Re Welch* there are two distinct methods that could potentially be used to determine whether a service should be remunerated.

One potential method is to compare what was provided by the claimant to what a person in the claimant's position could normally be expected to provide.[66] This can be achieved by first assessing the norm, and then deciding whether the benefits significantly exceeded that norm.[67] If the claimant's acts go above and beyond what can normally be expected within that relationship, the claimant will be entitled to an award.[68] This suggests that familial and non-familial relationships should be distinguished, because significant intangible services are not ordinarily expected in the latter context. *Byrne v Bishop* and *Samuels v Atkinson* suggest that this distinction is not made. In these cases, the claimant's close relationship with the deceased arose out of the services provided, rather than any family relation, but the same principles were nonetheless applied.

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62 *Welch v Stewart* [1989] 2 NZLR 1 at 8, per Casey J.

63 *Re Welch* [1990] 3 NZLR 1 at pp7-8, per Sir Robin Cooke. Their Lordships suggested that no award should have been made at all because of the lack of nexus between the promise and work provided by the claimant. See: Part 1c of this Section.

64 *Re Welch* [1990] 3 NZLR 1 at 7, per Sir Robin Cooke.

65 *Hawkins v Public Trustee* [1960] NZLR 305 at 313.

66 *Parata v McGowan* [1994] NZFLR 937 at 943; *Re Greenfield* [1985] 2 NZLR 662 at 666; *Wright v Holland* [1996] 1 NZLR 213; Re *Sellars (deceased); Bailey v Public Trustee* [1996] NZFLR 971; *McFetridge v Bowater-Wright* [1996] NZFLR 429; *Re Deldon* (1998) 17 FRNZ 598; *Re Fagan (deceased)* [1999] NZFLR 222 at 236.

67 *Re Fagan (deceased)* [1999] NZFLR 222 at 236.

68 Ibid.

Alternatively, the "extra" requirement can be determined by weighing up the benefits received by each party, and determining whether something "extra" has been provided by the claimant, beyond what was provided by the testator.[69] This method is much simpler, and is the preferred method because it can be applied universally.

(b) Byrne v Bishop[70]

This case concerned distant relatives and neighbours who shared a close relationship akin to that of family members. The testator, Mr Byrne was a severe alcoholic who had been hospitalised on various occasions. After his initial hospitalisation in 1977, he was nursed to health, and cared for by the Bishop family. They had looked after Mr Byrne's farm while he was hospitalised, and on his discharge had encouraged him to stop drinking, offering him companionship and open access to their home. For almost twenty years, Mr Byrne ate all of his meals with the Bishops at their home, except when he was drinking, and was treated as a part of their family. He rarely left their home, and they had provided him with loving acceptance and "the pleasure of a happy family life which he might otherwise not have known".[71] The Bishop children were essentially his "surrogate children". The Bishops also helped him build, design, and furnish his own home. Their services significantly prolonged the testator's life, and were highly valued by him.[72] From 1990 onwards, he stated repeatedly that he would leave his two farms to the Bishop children. In 1995, he made a will in such terms but it was declared void because there was doubt regarding his testamentary capacity at the time it was made.[73]

The Bishop children initiated a TPA claim on the basis of the testator's promises. In assessing the Bishops' services, the Court of Appeal referred to *Re Welch,* stating that "companionship, affection and emotional support" are included as services when they exceed what is normally expected of a relative, neighbour, co-habitant, or friend.[74] Applying this, the Court found that the Bishop family's conduct qualified as "services", and deserved a generous award.[75]

The appellant beneficiaries suggested that the close relationship between the testator and the claimants was analogous to that in *Re Welch*, and should reduce the award.[76] However, the Court of Appeal rejected this, highlighting substantial differences between

69 *Welch v Stewart* [1989] 2 NZLR 1 at 8; *Samuels v Atkinson* [2009] NZCA 556 at [79]-[80].

70 *Byrne v Bishop* [2001] 3 NZLR 780.

71 *Byrne v Bishop* [2001] 3 NZLR 780 at [29], per Blanchard J.

72 *Byrne v Bishop* [2001] 3 NZLR 780 at [50]-[51]. The services were largely provided by Mr and Mrs Bishop, but these were able to be considered in a claim made by the children, whom the testator had promised to reward (at [53]). He had in fact made a will in their favour but this had failed on the grounds of uncertain testamentary capacity: *Bishop v O'Dea* (1999) 18 FRNZ 492.

73 See: *Bishop v O'Dea* (1999) 18 FRNZ 492. The testator had been admitted to hospital after another drinking spout, and everybody believed that he was going to die. He had even been read his last rights.

74 *Byrne v Bishop* [2001] 3 NZLR 780 at [6].

75 *Byrne v Bishop* [2001] 3 NZLR 780 at [50]-[51].

the two cases.[77] While in *Re Welch* there had been nothing more than a normal relationship between stepfather and stepson, the Bishop family's services towards their neighbour were extraordinary. The Court found that the Bishops "came to the rescue of their lonely neighbour, who may well have drunk himself to an early death in his almost derelict farmhouse" if they had not provided him with their companionship.[78]

The Court did not draw any distinction between *Re Welch* and *Byrne* based on the specific nature of their relationships. The parties in *Re Welch* were family but were merely neighbours in *Byrne.* Although Mr Bishop was distantly related to Mr Byrne, their closeness grew from them being immediate neighbours and from the Bishops' services, rather than familial ties. This was mentioned by the Court of Appeal but not given any weight. Their decision focused mostly on the nature of services provided.

It is unclear which of the two tests the Court of Appeal applied in assessing "services". The Court stated that the claimants' services went beyond what could ordinarily be expected by neighbours, but in doing so considered the reciprocal benefits received by each party.[79] The Court of Appeal held that the High Court's award[80] of one of the two farms promised was appropriate because it "made allowance for the reciprocal benefits received by the Bishop family".[81] The Court of Appeal stated that "benefits conferred by the deceased ... may have be netted off against the value of the services".[82] These comments suggest that the latter approach to assessing services was most predominant. That was clearly true in *Samuels.*

(c) Samuels v Atkinson[83]

This case primarily concerned shares that Sammy had acquired during his relationship with the Atkinsons, which were promised to the Atkinson boys.[84] The Atkinsons had shared a close relationship with Sammy, which had developed from his shared war experiences with Mr Atkinson Senior. Sammy and his wife Freda became close with the

76 *Byrne v Bishop* [2001] 3 NZLR 780 at [47]. This objection was mostly related to the cause of the promise. The appellants argued that the close relationship meant that the promise was more motivated by the testator's love and affection for the claimants rather than their services, but this was rejected.

77 *Byrne v Bishop* [2001] 3 NZLR 780 at [49]-[51].

78 *Byrne v Bishop* [2001] 3 NZLR 780 at [50], per Blanchard J.

79 *Byrne v Bishop* [2001] 3 NZLR 780 at [49]-[51].

80 *Byrne v Bishop* [2001] 3 NZLR 780 at [40]-[46] and [50]-[56].

81 *Byrne v Bishop* [2001] 3 NZLR 780 at [56], per Blanchard J.

82 *Byrne v Bishop* [2001] 3 NZLR 780 at [11], per Blanchard J.

83 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980.

84 In 1966, the Atkinson farm required expansion, which was possible with a loan provided by Sammy on the condition that he have a financial stake in the farm. On this basis, a company was formed, which acquired both farms, and Sammy was allocated 12.91 percent of the shares of the company. These shares are the subject of the testamentary promise to the claimants. From 1970 onwards, he had promised on various occassions that the shares would be left to the two Atkinson sons, and do something else for the Atkinson daughter Jennifer. These promises were repeated in 1990.

Atkinsons and often visited the Atkinson farm, spending summer holidays there. The Atkinson children were born shortly afterwards. Because Sammy and Freda could not have their own children, they wanted to play a special role in the Atkinson children's lives, and did so. The children enjoyed a "special relationship" with Sammy, calling him "uncle". He financially assisted them on various occasions, but these loans were repaid with interest. Freda died of cancer in 1964, and Sammy continued to visit the farm alone after her death. In general, the parties treated each other as family, which was the source of difficulty in this case in light of *Re Welch* and subsequent authorities.[85]

The parties had provided reciprocal benefits to one another for over 50 years, and Sammy had promised that he would leave the shares to the Atkinson boys and "do something else" for the daughter Jennifer, on his death. However, towards his death Sammy became close to his relatives in Scotland and lost some affection for the Atkinsons. He left his entire estate to his relatives, and the Atkinsons initiated TPA proceedings to enforce Sammy's testamentary promise.

The trial Judge found that the Atkinsons' companionship, family life, and affection towards Sammy went well beyond the ordinary bonds of friendship.[86] The Atkinsons were essentially Sammy's New Zealand family, a particular benefit to him when he was geographically removed from his own relatives.[87] This was especially valuable because Sammy could not have his own children. The Atkinson farm was also free to Sammy and his relatives for visits and holidays. The essence of the Judge's reasoning was that the intangible benefit of having surrogate children was "something extra" for Sammy.[88]

The Court of Appeal acknowledged the difficulties in assessing intangible "services" in a close relationship.[89] They recognised that there was difficulty "drawing a line between those services that might be expected in a normal family relationship, and those that go beyond that threshold".[90] Hammond J provided examples of such attempts since *Re Welch*,[91] and considered it necessary to identify "something extra" in all cases involving close parties.[92] The Court outlined an approach to assessing this which, "if correctly followed, has the added benefit of making the quantification of claims more straightforward".[93]

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85 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [59].
86 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [56].
87 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [56].
88 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [61].
89 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [49]-[53], per Hammond J.
90 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [50].
91 *Samuels v Atkinson* [2009] NZCA 556 at [50]. See: *Thwaites v Keruse* (1993) 11 FRNZ 19 at 23, per Hardie Boys J; and *Re Fagan (dec'd)* [1999] NZFLR 222 at 236, per Baragwanath J. In *Re Fagan,* the earlier method, of assessing the norm and comparing this to the benefits provided, had been applied.
92 *Samuels v Atkinson* [2009] NZCA 556 at [53], per Hammond J.
93 *Samuels v Atkinson* [2009] NZCA 556 at [53], per Hammond J. See also: [59]-[62] and [71]-[80].

The Court of Appeal clearly preferred the second method to assessing "services". They considered it necessary to assess the benefits and burdens received by each party to determine whether sufficient services had been provided.[94] Where the benefits received by the testator outweighed those received by the claimants, they would be entitled to an award.[95] On the facts, the Court of Appeal found that the friendship and companionship was reasonably balanced between parties. However, the Atkinsons had provided considerable care to Freda during her illness, and supported Sammy while he grieved her loss. Furthermore, their farm was available to Sammy for many years. These benefits were to be balanced against Sammy's financial assistance, albeit on commercial terms, and his strong friendship. Caregiving services provided by Jennifer in Sammy's declining years, was also something "extra".[96]

Overall, the Court held that the benefits received by Sammy exceeded those received by the Atkinsons, and that this "unremunerated balance requires awards".[97] The Court of Appeal found that Sammy had acquired a "surrogate" family, and that his benefits from this had increased over the years as his wife became ill and then died, and during his own declining years.[98] The Atkinsons had their own family, but Sammy had lacked that kind of solidarity in his life without the claimants. Therefore, an award was allowed based on this element of "extra benefit" to Sammy.[99]

(a) Conclusion: A Reconciliation of Principles

Re Welch is still the leading authority on testamentary promises within a close relationship.[100] There are two interpretations to assessing "services" from that case. The latter interpretation adopted in *Samuels* is most appropriate, and will result in less confusion and uncertainty. In *Re Welch*, the Court of Appeal and Privy Council both suggested "the reciprocal advantages Mr Stewart received" should be considered.[101] The Court of Appeal held that "there was a reasonable balance of benefits and personal satisfaction on each side".[102] These comments were quoted in *Samuels,* in support of their preferred approach. Similar comments were also made in *Byrne*, and other cases.[103] This approach is most fair, and consistent with the purpose of the legislation. In general,

94 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [77]-[80].
95 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [77]-[80].
96 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [61] and [79].
97 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [80].
98 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [80].
99 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [80].
100 *Byrne v Bishop* [2001] 3 NZLR 780; *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980; WM Patterson *Law of Family Protection & Testamentary Promises* (3rd ed, LexisNexis NZ, Wellington, 2004).
101 *Welch v Stewart* [1989] 2 NZLR 1 at 8, per Casey J; *Re Welch* [1990] 3 NZLR 1 at 7, per Sir Robin Cooke.
102 *Welch v Stewart* [1989] 2 NZLR 1 at 8, per Casey J.
103 *Byrne v Bishop* [2001] 3 NZLR 780 at [11], per Blanchard J. See also: *Powell v Public Trustee* [2003] 1 NZLR 381 at [31]-[33]; and *Cain v Nyhon* [2007] NZFLR 1055 at [24], [44], and [48]-[55].

it would be unfair to require remuneration for intangible benefits, without considering what intangible benefits were provided in return.

Thus, "the problem with services" can be resolved. *Re Welch* did not establish a new rule for claims in the family context, but merely reinforced the need for "something extra" to be provided by claimants in these contexts, and in all others. The particular relationship between the testator and claimant is not important. No general distinction between family members and non-family members is necessary, and is in fact undesirable.[104] When enacting the legislation, Parliament recognised that it would be applicable only to persons closely related to the testator.[105] There is no reason to treat family members differently, merely because family can be expected to provide services, as this is true with any close relationship. In all cases, reciprocal benefits should be relevant to whether a "service" was provided. This is consistent with the approach to assessing awards outlined in *Powell*[106] and *Samuels*.[107] Following this approach, the boundaries of "services" will be much clearer.

3. A "reasonable remuneration": Assessing Quantum

Once the required elements have been established, a TPA claim shall be enforceable against the deceased's estate "in the same manner and to the same extent as if the [testamentary] promise were a promise for payment by the deceased in his lifetime *of such amount as may be reasonable*", having regard to all circumstances.[108] These include, in particular, the circumstances in which the promise was made and services were provided; the respective values of the services, promised provisions, and estate; and the interests of any creditors or other beneficiaries.[109]

The ultimate test for granting an award in each case is "reasonableness".[110] However, no indication is given regarding which considerations are to be given most weight, or how they are to be considered. As a result, there are significant discrepancies between TPA awards. When enacting the Act, Parliament was reluctant to establish any definite rule or measure in order to maximise fairness between the parties of each case.[111] However, this discretionary approach has resulted in much uncertainty, and some criticism.[112]

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104 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at para 302.

105 Parliament Debates (06 October 1949) 288 NZPD HR at 2597. This recognition was also made by the Law Commission in *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 288.

106 *Powell v Public Trustee* [2003] 1 NZLR 381.

107 *Samuels v Atkinson* [2009] NZCA 556 at [77]-[80]. See also: *Powell v Public Trustee* [2003] 1 NZLR 381 at [31]-[33]; and *Cain v Nyhon* [2007] NZFLR 1055 at [24], [44], and [48]-[55].

108 Law Reform (Testamentary Promises) Act 1949, section 3(1), emphasis added.

109 Law Reform (Testamentary Promises) Act 1949, section 3(1).

110 [1990] 3 NZLR 1 at 6; 7 FRNZ 536 at 541.

111 Parliament Debates (23 November 1944) 267 NZPD HR at 300; (06 October 1949) 288 NZPD HR at 2597.

112 *Humphrey v New Zealand Guardian Trust* [2004] NZFLR 179; Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996); Law Commission *Succession Law: A Succession*

Because of inconsistent approaches, there is a general inability to predict the quantum of reward likely to be received by a claimant. This is highlighted by *Re Welch* and *Samuels.* In these cases, the High Court's award was significantly reduced on appeal. In *Samuels,* the High Court had awarded the shares promised to the Atkinson boys to the Atkinson children equally.[113] However, the Court of Appeal criticised this as being effectively a specific performance of the testator's promise, and distinguished between a testamentary promises and contractual claim.[114] While contract law provides remedies based on the contractual promise, the TPA is concerned with "reasonableness" measured against various factors.[115]

Many have highlighted the need for making consistent awards under the TPA.[116] If consistency is maintained, then TPA cases can be settled much more efficiently.[117] The Law Commission suggested that the promised amount should be awarded by default, but this suggestion has not been adopted.[118] The value of the promise is a useful indication of the testator's perceived value of the services and should be given sufficient weight,[119] but the criteria of "reasonableness" is most important.[120] This ensures that promises of specified and non-specified amounts are treated consistently.

Samuels provided a general approach to assessing TPA claims.[121] Following this, future cases may be less unpredictable. The Court of Appeal held that the ultimate test was to award reasonable remuneration "for the services actually identified."[122] They suggested that the first step is to determine the extent of the unremunerated benefits by netting off the respective benefits and burdens.[123] Once these benefits have been determined, "a reasonable amount" is to be awarded for these identified services with consideration of each of the factors listed in section 3(1).[124] Although each factor must be given some

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(Adjustment) Act: Modernising the law on sharing property on death (NZLC, Report 39, 1997).

113 *Samuels v Atkinson* [2009] NZCA 556 at [2]. The shares were valued at approximately $600,000 total. The High Court made this award because the value of the testator's estate was significant.

114 *Samuels v Atkinson* [2009] NZCA 556 at [74], per Hammond J.

115 *Ibid.* For example, it was relevant that the testator was a business man and considered he had not received a "fair return" from the shares during his lifetime.

116 See: *Humphrey v New Zealand Guardian Trust* [2004] NZFLR 179 at [65], William Young J; Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at para 296; and Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997).

117 *Humphrey v New Zealand Guardian Trust* [2004] NZFLR 179 at [65], William Young J.

118 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at para 296; Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997). Their proposal will be considered in Chapter 4.

119 *Re Welch* [1990] 3 NZLR 1 at 6, per Sir Robin Cooke.

120 *Re Welch* [1990] 3 NZLR 1 at 6, per Sir Robin Cooke; *Samuels v Atkinson* [2009] NZCA 556 at [81].

121 This approach relied on that in *Powell v Public Trustee* [2003] 1 NZLR 381. See: *Samuels v Atkinson* [2009] NZCA 556 at [76]-[80].

122 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [81] and [90], per Hammond J.

123 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [77]-[80].

weight, it may or may not affect the value of the award.[125] The value of the services is particularly important but must be assessed objectively, not from the testator's viewpoint.[126] Individual services should be attempted to be properly valued where it is easily "capable of being translated into some kind of concrete assessment".[127]

In reliance on this approach, the Atkinson children were each awarded $50,000 for their provision of a "surrogate family" to the testator, and Jennifer was awarded an extra $50,000 for her caregiving role. Although significantly less than the promised amount, it was all that was "reasonable" in the circumstances, in light of reciprocal benefits and a proper valuation. This approach is a significant step towards more consistent TPA awards. It is also very similar to common law restitutionary principles, which makes it worthwhile to explore the practical differences between TPA awards and such remedies.

III. Conclusions

The majority of TPA claims are relatively straight-forward. However, where a person closely related to the testator seeks an award based merely on intangible benefits, the Courts have experienced some difficulties. These problems are not beyond reconciliation however, and there has been significant judicial development in the right direction. If the approach outlined above is followed in regards to both assessing "services" and "quantum", the uncertainties regarding TPA claims will be reduced.

Furthermore, these difficulties should be considerd in light of the very real possibility that these claimants would be unprovided for under the common law. This will be explored in Chapter 3.

124 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [66] and [81]-[88]. These include, in particular, the circumstances in which the promise was made and services were provided; the respective values of the services and promised provisions, and the estate; the interests of any creditors or other beneficiaries; and any other relevant factors.

125 *Samuels v Atkinson* [2009] NZCA 556 at [66]. See this approach being applied in paras [81]-[98].

126 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [74] and [86]. This is different from past case law, which suggested that the value of services were to be assessed from the testator's point of view. See: WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis NZ, Wellington, 2004).

127 *Samuels v Atkinson* [2009] NZCA 556 at [76], per Hammond J.

CHAPTER THREE: The Impact of Significant Legal Developments

I. Introduction

This chapter will consider the common law's current ability to provide for testamentary promises cases, in light of developments that have occurred in Estoppel, Constructive Trust, and Restitution, since 1944. Persons such as Mrs Sutherland can now succeed under any of these causes of action.[1] However, persons such as Mr Stewart and the Atkinsons and Bishops might not be provided for. Each cause of action will be considered in turn, and compared to a TPA claim.

II. Contract Law

A valid contract to leave property by will requires certainty, valuable consideration or deed, and an intention to create legal relations.[2] Writing is further required for contracts involving land,[3] unless there is sufficient part-performance.[4] Where there is a valid contract and clear breach, it will be better for a claimant to rely on contractual remedies than a TPA claim, especially where specific performance is desired.[5] While the TPA requires consideration of competing interests and the "reasonableness" of an award, Contract Law does not.

However, Contract claims are still subject to the limitations highlighted in Chapter 1, regarding certainty and writing.[6] Mrs Sutherland would still be unprovided for under Contract Law for these reasons, despite having a clear TPA claim available. Similarly, the close relationship between the parties in *Re Welch*,[7] *Samuels*,[8] and *Byrne*,[9] suggests that there was no intention to create binding legal relations by their arrangements, and the testator's promises in each case would not be enforceable under contract law.[10]

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1 *Sutherland v Towle* [1937] GLR 509. She will still be unprovided for under Contract for the same reasons because it has not significantly changed since 1944. See: Chapter 1 and comments above.

2 Roger Kerridge *Parry and Kerridge: The Law of Succession* (12th ed, Sweet & Maxwell, London, 2009).

3 Property Law Act 2007, s24. See also: s25- certain dispositions relating to land must be in writing. Note: The writing requirement in s25 does not apply to the making or operation of a valid will (s25(4)(b)), or to the creation or operation of a resulting, implied, or constructive trust (s25(4)(a)).

4 Property Law Act 2007, s26. The doctrine of part-performance is preserved by this section.

5 WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis NZ, Wellington, 2004) at 13.4, p181. See also: *Breuer v Wright* [1982] 2 NZLR 77 at 86; *Re Townley* [1982] 2 NZLR 87 at 89; *Samuels v Atkinson* [2009] NZCA 556 at [74]; and Roger Kerridge *Parry and Kerridge: The Law of Succession* (12th ed, Sweet & Maxwell, London, 2009) at 6-02, p96.

6 See: *Re Gonin (deceased)* [1979] Ch 16.

7 *Re Welch* [1989] 2 NZLR 1; [1990] 3 NZLR 1.

8 See: *Samuels v Atkinson* [2009] NZCA 556 at [35]-[38].

9 *Byrne v Bishop* [2001] 3 NZLR 780.

10 See: Sarah Nield "'If you look after me, I will leave you my estate': The enforcement of testamentary promises in England and New Zealand" (2000) 20 Legal Studies 85; and Sarah Nield "Testamentary Promises: A test bed for legal frameworks of unpaid caregiving" (2007) 58 N. Ir. Legal Q. 287.

III. Estoppel

There have been significant changes in the law of Estoppel since 1944. First, the clear distinction previously existing between different forms of Estoppel have been virtually abandoned. Courts have moved away from discrete doctrines of Estoppel with strict criteria, in favour of a more general doctrine of Estoppel based on "unconscionability" and "detrimental reliance".[11] For convenience, this will be referred to simply as Estoppel.[12] Estoppel has been used successfully in the context of testamentary promises.[13]

1. The Essential Elements

Estoppel requires that: (1) a claimant had a certain expectation or belief of a proprietary interest; (2) this was created or encouraged by the other's representations or assurances; (3) the claimant had acted to his or her detriment; and (4) these acts were performed in reasonable reliance on the expectation or belief.[14]

There is significant overlap between these criteria, which are no longer strictly enforced, but serve merely as indicators of an estoppel.[15] In each case, the overall requirement is that there is unconscionability requiring the Courts to provide equitable relief.[16] However, unconscionability alone is not sufficient.[17] As Lord Walker stated, "Flexible

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11 See: *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 1 All ER 923 at 936; [1981] 3 All ER 577 at 584; *Taylor Finance Ltd v Liverpool Victoria Trustee Co. Ltd* [1981] 1 All ER 897 at 911-912; *Andrews v Colonial Mutual Life* [1982] 2 NZLR 556 at 570; *Wham-O MFG Co. v Lincoln Industries* [1984] 1 NZLR 641 at 671; *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 35-36; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404 and 420-422; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 409-411 and 413; *Stratulatos v Stratulatos* [1988] 2 NZLR 424 at 434-436; *Gillies v Keogh* [1989] 2 NZLR 327 at 345; *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 at 549; *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 at 197; *Juzwa v Hill* [2007] NZCA 222 at [15]; *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 at [45]; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at para 59; and *Thorner v Major* [2009] UKHL 18.

12 Note: Although a broad approach is generally recognised, there is still some uncertainty regarding correct terminology for estoppel in certain contexts. See: *Thorner v Major* [2009] UKHL 18 at para 67.

13 For example, see: *Wakeham v McKenzie* [1968] 1 WLR 1175; *In Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* (1995) 69 P & CR 170; *Public Trustee v Wadley* (1997) 7 Tas R 35; *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] WTLR 981; *Jenny v Rice* [2003] 1 FCR 501; *Grundy v Ottey* [2003] WTLR 1253; and most recently *Thorner v Major* [2009] UKHL 18; 1 WLR 776.

14 *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 at 86; *Gillies v Keogh* [1989] 2 NZLR 327 at 346; *Concrete Structures (NZ) Ltd v Dezign Works HB Ltd* HC Napier CIV-2009-441-115, 22 October 2009 at [10]; *Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* (1995) 69 P & CR 170; *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] WTLR 981; *Jenny v Rice* [2003] 1 FCR 501; *Grundy v Ottey* [2003] WTLR 1253; *Thorner v Major* [2009] UKHL 18; 1 WLR 776; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Stratulatos v Stratulatos* [1988] 2 NZLR 424; *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 at 197. Note: In many of these cases, only three of the essential elements listed above are identified because the first and second requirements are often treated as one.

15 *Stratulatos v Stratulatos* [1988] 2 NZLR 424 at 435-436, per McGechan J. See also: *Gillet v Holt* [2001] 1 Ch 210 at 225, per Robert Walker LJ; and *Uglow v Uglow* [2004] EWCA Civ 987 at [9].

16 *Stratulatos v Stratulatos* [1988] 2 NZLR 424 at 436, per McGechan J; Roger Kerridge *Parry and Kerridge: The Law of Succession* (12th ed, Sweet & Maxwell, London, 2009) at 6-09, p101.

though it is, the doctrine must be formulated and applied in a disciplined and principled way."[18]

2. Application to Testamentary Promises

Estoppel has been successfully used in the context of testamentary promises in several English cases, including the recent House of Lords case of *Thorner v Major*.[19] In *Thorner*, the claimant had worked on the testator's farm for a period of almost 30 years, 20 of which was full-time. He was not paid for his services, but had hoped to inherit the farm, and later expected to do so on the basis of the testator's representations.[20] He succeeded in his claim under Estoppel, and was awarded the farm.

The main issue considered by the House of Lords was whether the testator's representation was sufficiently clear to amount to an Estoppel, and whether it could be reasonably expected to be relied upon in the circumstances.[21] This is usually the controversial issue in Estoppel cases.[22] In order for an Estoppel to arise, the testator's representation or assurances must be sufficiently clear, the claimant's reliance must be reasonable, and the claimant's detriment must be sufficiently substantial.[23]

Claimants such as Mrs Sutherland would now be easily provided for under Estoppel. Like Mr Thorner, Mrs Sutherland had an expectation of benefit created by the testator's assurances, had reasonably relied on this, and suffered detriment as a result.[24] In all the circumstances it would be unconscionable for the testator to deny the truth of his representations. However, persons such as Mr Stewart, and the Bishop and Atkinson families are also provided for under the TPA, but would not necessarily succeed on an Estoppel action.[25] This will be considered in some depth.

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17 *Gillies v Keogh* [1989] 2 NZLR 327 at 345-347, per Richardson J; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at paras 14-18, 28, and 81-91. Estoppel also requires "clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat." (Lord Scott, at para 28).

18 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at para 46, per Lord Walker.

19 *Thorner v Major* [2009] UKHL 18; 1 WLR 776. See also: *Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* (1993) 69 P & CR 170; *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] WTLR 981; *Jenny v Rice* [2003] 1 FCR 501; and *Grundy v Ottey* [2003] WTLR 1253.

20 The focus of this case was whether the testator's representations were sufficiently clear and whether the claimant's reliance on it was reasonable in the circumstances (at 786, para 30, per Lord Walker).

21 See: *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at para 17, per Lord Scott; at 786, para 30, and 793-795, paras 54-60, per Lord Walker; at para 85, per Lord Nueberger.

22 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at para 67, per Lord Walker.

23 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at 781, para 15, per Lord Scott.

24 *Sutherland v Towle* [1937] GLR 509. Her expectation of benefit was for generous payment for her services. This representation is sufficiently clear because it can be assessed by commercial standards.

25 *Re Welch* [1990] 3 NZLR 1; *Byrne v Bishop* [2001] 3 NZLR 780; *Samuels v Atkinson* [2009] NZCA 556.

(a) The testator's representation or assurances

To give rise to an Estoppel, it is not enough that a testator had merely promised to make testamentary provision for the claimant.[26] Estoppel requires a clear and unequivocal representation which encourages the claimant to have a certain expectation or belief.[27] The promise must be unambiguous, and intended to be taken seriously.[28] This is to be considered objectively, and depends significantly on the particular context of the case.[29] For example, in *Thorner*, it was particularly relevant that the testator and claimant regularly communicated in oblique terms, and that the testator was unlikely to express his intentions clearly.[30] In that context, the testator's handing over of an insurance bonus notice and stating "that's for my death duties" was a sufficiently clear representation to the claimant that he would inherit the farm on the testator's death. This was also supported by "a continuing pattern of conduct", and represented an assurance and commitment by him that the claimant would inherit the farm.[31] Furthermore, it was reasonable for the claimant to understand and rely on the representations in this way.[32]

Following the approach in *Thorner*, it is not difficult to establish a representation in domestic cases. The testator's representations in *Re Welch, Byrne,* and *Samuels* would be sufficient to give rise to an estoppel because the testator had indicated in each case that the claimant *would benefit*, not merely that he intended for them to benefit.

In *Re Welch,* the claimant had a reasonable expectation of receiving the testator's house and shares on his death because of his repeated promises.[33] On one occasion, the testator had asked the claimant whether he liked the house, and stated "well you better like it because you are going to be living in it one day".[34] Similarly, he had asked the claimant not to sell the shares but to pass them to his own children.[35] Likewise, in *Byrne,* the testator's assurances that he would leave his two farms to the claimants, and that he had made a will to this effect, would have created a reasonable expectation of benefit.[36] In *Samuels,* the testator had promised that he would leave certain shares to the Atkinson boys on his death and to otherwise reward Jennifer.[37] This promise was repeated on

26 See: *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Thorner v Major* [2009] UKHL 18.
27 *Thorner v Major* [2009] UKHL 18; 1 WLR 776; *Verry v Jopp* [2003] BCL 502 at [113]; *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 at 197; *Gillies v Keogh* [1989] 2 NZLR 327 at 347.
28 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at para 56, per Lord Walker.
29 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at para 17, per Lord Scott, para 56, per Lord Walker.
30 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at paras 17, 26, and 80.
31 *Thorner v Major* [2009] UKHL 18 at paras 60, per Lord Walker, and 74-76, per Lord Neuberger.
32 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at para 76, per Lord Neuberger.
33 *Re Welch; Welch v Stewart* [1989] 2 NZLR 1 at 3, per Williamson J.
34 *Re Welch; Welch v Stewart* [1989] 2 NZLR 1 at 3, per Williamson J.
35 *Re Welch; Welch v Stewart* [1989] 2 NZLR 1 at 3, per Williamson J.
36 See: *Bishop v O'Dea* (1999) 18 FRNZ 492; and *Byrne v Bishop* [2001] 3 NZLR 780.
37 See: *Atkinson v Samuels* HC Auckland CIV-2006-404-7878, 30 May 2008 at [31]-[40] and [45]-[47], per Priestly J; and *Samuels v Atkinson* [2009] NZCA 556.

various occasions resulting in the claimants having a clear expectation of benefit, which was reasonable for them to rely on in light of their close relationship and trust.[38]

A representation cannot be relied upon where it is uncertain or conditional however.[39] In *Uglow v Uglow*, Estoppel could not be established because the testator's promise to leave the claimant his farm was not an unequivocal and irrevocable commitment by him to do so.[40] Because the testator and claimant were about to become partners, it was the natural inference in that context that the promise meant the claimant would inherit "if all went well with the business relationship".[41] A promise in that context could not be understood as meaning the claimant would inherit "come what may".[42] Furthermore, Estoppel requires the testator's representation to create an expectation for a certain interest in property.[43] This usually requires that the promise be in relation to property that can be easily identified at the time of the testator's death.[44] Therefore, Sammy's promise to "do something else" for Jennifer is too uncertain to be relied upon.[45]

In contrast, a TPA "promise" includes a testator's statement of intention, regardless of the testator's intention to be bound.[46] TPA promises are not required to be so clear and unequivocal that it could be reasonably relied upon. It can be established whenever a testator made any representation that could reasonably be interpreted as a promise to reward the claimant on death, including a mere nod or other gesture.[47] There is no additional requirement.[48] This makes the scope of the TPA significantly wider than that of Estoppel. The promise in *Uglow* would be no doubt covered by the TPA provisions.

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38 See: *Atkinson v Samuels* HC Auckland CIV-2006-404-7878, 30 May 2008 at [38]-[40]. This case can be contrasted with *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, where it was unreasonable to rely on the other party's assurance in a strictly commercial context where the claimant's expectation was merely speculative, and entirely subject to the other party's discretion.See in particular paras 25-28, per Lord Scott, and paras 91-92, per Lord Walker, in *Cobbe*.

39 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at paras 25-28, per Lord Scott, and paras 91-92, per Lord Walker; *Uglow v Uglow* [2004] EWCA Civ 987 at [9], [20], and [28] per Mummery LJ.

40 *Uglow v Uglow* [2004] WTLR 1183; [2004] EWCA Civ 987 at [9]; [20]; and [28], per Mummery LJ.

41 *Uglow v Uglow* [2004] EWCA Civ 987 at [20], per Mummery LJ.

42 Ibid.

43 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Thorner v Major* [2009] UKHL 18.

44 See: *Thorner v Major* [2009] UKHL 18; *Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* (1993) 69 P & CR 170; *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] WTLR 981; *Jenny v Rice* [2003] 1 FCR 501; and *Grundy v Ottey* [2003] WTLR 1253.

45 See: *Atkinson v Samuels* HC Auckland CIV-2006-404-7878, 30 May 2008 at [45]-[46], per Priestly J; and *Samuels v Atkinson* [2009] NZCA 556 at [35]-[38], per Hammond J. Compare: *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; *Thorner v Major* [2009] UKHL 18; *Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* (1993) 69 P & CR 170; *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] WTLR 981; *Jenny v Rice* [2003] 1 FCR 501; and *Grundy v Ottey* [2003] WTLR 1253.

46 See: Law Reform (Testamentary Promises) Act 1949, s. 2.

47 See: *Heathwaite v NZ Insurance Co.* [1951] NZLR 6; *Jones v Public Trustee* [1962] NZLR 363; *Re Archer (deceased)* [1990] 3 NZLR 737 at 746; *Work v Thomson* HC Whangarei M72/87, 3 March 1992; *Brunton v Sheard* HC Christchurch M232/97, 2 November 1999; *Gibson v Gibson* HC Dunedin CP9/90, 15 April 1992; *Rennie v Hamilton* [2004] NZFLR 270; and *Re Cotton* [2001] BCL 495.

48 For example, there is no requirement that promises be made with the intention that they be relied upon.

Furthermore, general promises to "properly" or "suitably" reward the claimant, or to "see the claimant right" for their services are sufficient to give rise to a TPA claim, but would not give rise to an Estoppel.[49]

(b) Reasonable Reliance or Inducement

To rely on Estoppel, there must be inducement.[50] The claimant must have acted to their own detriment in reliance on the testator's assurance, and it must have been reasonable to do so in the circumstances.[51] In *Thorner,* the claimant had foregone other opportunities and provided the testator with years of unpaid farm services in direct reliance on the testator's representation that he would inherit the farm. Had the testator's promise been withdrawn, the claimant would likely have left the testator, showing that he was induced by the promise.[52]

Inducement does not need to be proved by the claimant at first instance.[53] It will be readily inferred after a claimant has proved that a sufficient representation or encouragement was made, and that detriment was suffered.[54] Once these have been proved, the burden shifts to the opposing party to prove that the claimant did not in fact rely on the testator's representations, to defeat the Estoppel.[55] The claimant's motivations for services are therefore extremely relevant in an Estoppel action.

In contrast, claimants do not need to have been motivated by the testator's promise to give rise to a TPA claim.[56] In *Re Welch, Byrne*, and *Samuels* there is evidence that the claimant's services would have been provided regardless of the testator's promise, but they were nonetheless awarded under the TPA. In *Re Welch,* Mr Stewart had provided the qualifying business services to the testator well before any promise for reward was made, and could not have been induced by the testator's promises made only shortly before his death.[57] Similarly, in *Byrne,* the Bishops had provided over 13 years of

49 See: *Allender v Gordon* [1959] NZLR 1026; *Work v Thompson* HC Whangarei, M72/87, 3 March 1992.

50 *Eves v Eves* [1975] 1 WLR 1338 at 1345; *Grant v Edwards* [1986] Ch.638 at 648–649; *Amalgamated Property Co v Texas Bank* [1982] QB 84 at 104–105; *Greasley v Cooke* [1980] 1 WLR 1306 ; *Grant v Edwards* [1980] Ch.638 at 657; *Gillett v Holt* [2001] Ch.210 at 227-235.

51 See: *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at paras 17, 26, 74-76, and 80.

52 *Thorner v Major* [2009] UKHL 18; 1 WLR 776. See also: *Amalgamated Property Co v Texas Bank* [1982] QB 84 at 104–105; *Wayling v Jones* (1993) 69 P&CR 170; and *Ottey v Grundy* [2003] EWCA Civ 1176 at para 56.

53 *Eves v Eves* [1975] 1 WLR 1338 at 1345; *Grant v Edwards* [1986] Ch.638 at 648–649; *Amalgamated Property Co v Texas Bank* [1982] QB 84 at 104–105; *Greasley v Cooke* [1980] 1 WLR 1306 ; *Grant v Edwards* [1980] Ch.638 at 657; *Gillett v Holt* [2001] Ch.210 at 227-235.

54 *Greasley v Cooke* [1980] 1 WLR 1306; *Grant v Edwards* [1980] Ch.638 at 657.

55 *Greasley v Cooke* [1980] 1 WLR 1306; *Grant v Edwards* [1980] Ch 638 at 657; *Wayling v Jones* (1993) 69 P&CR 170; *Campbell v Griffin* [2001] WTLR 981; *Ottey v Grundy* [2003] EWCA Civ 1176 at para 42.

56 See: *Jones v Public Trustee* [1962] NZLR 363 at 374; Leach and Booth v Perpetual Trustees Estate and Agency Co. CA 48/88, 20 March 1990. Under the TPA, only the testator's motives are relevant, and a claimant does not need to have been motivated by the testator's promise in order to succeed

57 *Welch v Stewart; Re Welch* [1989] 2 NZLR 1; *Re Welch* [1990] 3 NZLR 1; (1990) 7 FRNZ 536.

services before the testator had indicated that he would leave the claimants his two farms.[58] Thus, these services were not induced by any promises and cannot result in an Estoppel claim. *Samuels* is different. Sammy had always represented that he would leave the claimants his shares, and the Atkinsons had acted in accordance with this expectation.[59] Thus, reliance can be inferred provided there is detriment.[60] However, their Estoppel can be defeated by evidence that the claimants would not have left the testator if the promise had been withdrawn.[61] Sammy's acquisition of the shares was a condition for him providing the Atkinsons a loan (required to expand their farm), and did not depend on his promise to leave the shares to the claimants or to provide for Jennifer. He made those promises because of his affections for the claimants. If he had withdrawn this promise, the claimants might have been disappointed but probably would not have left Sammy, in light of their close friendship and loving relationship.

(c) Detrimental Acts

"Detriment" is comparable with "services" under the TPA. Its scope has not yet been determined, but it is unlikely to provide for many of the "intangible benefits" covered under the TPA, particularly in the family context where such services can be ordinarily expected.[62] Lord Scott stated that Estoppel requires the detriment suffered to be sufficiently substantial to justify equitable intervention and prevent unconscionability.[63] In *Thorner,* the claimant's detriment was almost 30 years of unpaid farm labour, as well as lost opportunities from committing himself to the farm. Kerridge suggested that detriment need not cover financial detriment, but must be something "quite substantial" to be considered.[64] This is consistent with the overall purpose of Estoppel, which is to prevent "unconscionability" as a result of a claimant's reasonable reliance.[65]

The majority of successful estoppel cases to date have involved mostly tangible benefits. In *Re Basham*,[66] the claimant had provided unpaid caregiving services to her stepfather after he had promised to make certain testamentary provisions for her. Claimants have also provided testators with unpaid business services,[67] modest or

58 See: *Bishop v O'Dea* (1999) 18 FRNZ 492; and *Byrne v Bishop* [2001] 3 NZLR 780.
59 *Samuels v Atkinson* [2009] NZCA 556.
60 This will be considered next. Unfortunately, the Atkinson boys did not suffer any recognised detriment. Although Jennifer did, this was not based on a clear representation that could be relied on.
61 *Wayling v Jones* (1993) 69 P&CR 170; *Ottey v Grundy* [2003] EWCA Civ 1176 at para 56.
62 See: Sarah Nield "'If you look after me, I will leave you my estate': The enforcement of testamentary promises in England and New Zealand" (2000) 20 Legal Studies 85 at 99. Nield stated that the interpretation of "services" under the TPA has "gone far beyond acts which would qualify as sufficient detriment to support an estoppel or constructive trust".
63 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at 781, para 15, per Lord Scott.
64 *Gillett v Holt* [2001] Ch 210 at 232; Roger Kerridge *Parry and Kerridge: The Law of Succession* (12th ed, Sweet & Maxwell, London, 2009) at 6-09, p100-101.
65 *Gillett v Holt* [2001] Ch 210.
66 *Re Basham* [1986] 1 WLR 1498.
67 *Wayling v Jones* (1993) 69 P & CR 170.

unpaid farm employment,[68] domestic services such as cooking and shopping,[69] and unpaid gardening and household services.[70]

In *Grundy,* the claimant's estoppel claim was mostly based on intangible services. She had been in a de facto relationship with the testator, and had performed domestic duties, and provided caregiving, and "extraordinary assistance" in overcoming his severe alcohol addiction.[71] The Court found that her care for the testator went well beyond what could ordinarily be expected from a girlfriend. The claimant had also suffered detriment because she had put her acting and modelling career on hold for the testator. The Court considered that her care had prolonged the testator's life, and that it would be unconscionable to deny her relief in the circumstances.

These facts are analogous to that of *Byrne*. The Bishop family had provided Mr Byrne with significant care, providing him with daily meals and companionship, and going to extraordinary efforts to encourage him to stop drinking.[72] This went significantly beyond the level of care expected of neighbours. If the Bishop family's expectation is not met, it would result in significant detriment to them, in light of their expenditure of time, effort, and money in caring for Mr Byrne. The extent of their sacrifice is intangible, incapable of precise monetary assessment, but nonetheless significant.

Similarly, in *Samuels,* Jennifer provided Sammy with unpaid caregiving and domestic services.[73] The Court of Appeal estimated that she had provided approximately four years of steady caregiving before Sammy was moved into a resthome.[74] The provision of these services are a widely recognised "detriment" in support of Estoppel.[75]

Mr Stewart's business services in *Re Welch* would also be recognised as a detriment.[76] However, as with the TPA, his intangible benefits of merely performing the role of a son would not be considered.[77] Similarly, in *Samuels,* the claimants' role of providing Sammy with a "surrogate family" would not be recognised as a "detriment", despite being sufficient to give rise to a TPA claim.[78] This practical difference arises because Estoppel does not focus on the benefits received by a testator, as the TPA does, but on

68 *Gillett v Holt* [2001] Ch 210; *Thorner v Major* [2009] UKHL 18; 1 WLR 776, respectively.
69 *Campbell v Griffin* [2001] WTLR 981.
70 *Jenny v Rice* [2003] 1 FCR 501.
71 *Ottey v Grundy* [2003] EWCA Civ 1176; [2003] WTLR 1253.
72 *Byrne v Bishop* [2001] 3 NZLR 780.
73 *Samuels v Atkinson* [2009] NZCA 556.
74 *Samuels v Atkinson* [2009] NZCA 556. In particular, she had provided him with light food after his intestinal collapse, cleaned his home, and taken him to checkups. She had also helped with his financial accounts, and provided transport and a "search and rescue" role on his onset of Alzheimers.
75 See: *Re Basham* [1986] 1 WLR 1498; *Ottey v Grundy* [2003] EWCA Civ 1176; [2003] WTLR 1253.
76 See: *Re Welch* [1989] 2 NZLR 1; [1990] 3 NZLR 1; and *Wayling v Jones* (1993) 69 P & CR 170.
77 See: *Coombes v Smith* [1986] 1 WLR 808; *Ottey v Grundy* [2003] EWCA Civ 1176.
78 See also: *Dark v Boock* [1991] 1 NZLR 496, where Heron J held that there could be no Estoppel on the facts, but suggested that the claimant might succeed under the TPA for her services.

the detriment suffered by the claimant and whether this is "unconscionable". To assess "detriment", the Courts also consider reciprocal benefits received by the parties.[79]

(d) Satisfying the Equity

Once Estoppel has been established, the Courts do not necessarily award the promised property, but merely provide "the minimum equity to do justice".[80] This is often less than the promised amount.[81] In general, there must be proportionality between the expectation and detriment,[82] which is similar to the requirement for TPA awards to be a "reasonable amount" in consideration of the services provided, and other relevant considerations. As with all equitable remedies, there is significant judicial discretion in Estoppel awards. Thus, where both Estoppel and a TPA claim can be satisfied, they are likely to give rise to similar remedies.

3. Conclusions

Estoppel cannot be relied upon where there was no detrimental reliance. Thus, Estoppel is likely to fail in *Re Welch*, *Byrne*, and *Samuels* because the claimants were not induced to act by the testator's promise of reward.[83] In *Re Welch,* there was a sufficient representation and detriment, but no reliance whatsoever. This was true in *Bryne* also. In *Samuels,* there was a sufficient representation to the boys, but no detriment or reliance. However, for Jennifer, there had been no sufficient representation or reliance, but clear detriment. In each case the claimants would fail under Estoppel, despite each of them being entitled to TPA awards.

IV. Remedial Constructive Trusts

A constructive trust may cater for testamentary promises cases where the claimant had a reasonable expectation of an interest in property arising from the claimant's direct or indirect contributions.[84] In some cases where the testator did not make an unequivocal promise to the claimant, but where there was nonetheless a reasonable expectation of

79 *Dark v Boock* [1991] 1 NZLR 496. Note: this approach is similar to the TPA approach of considering reciprocal benefits to determine whether there were any unremunerated benefits to the testator.

80 *Crabb v Arun District Council* [1976] Ch. 179 at 198, per Scarman LJ.

81 For example, see: *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] WTLR 981; *Jennings v Rice* [2003] 1 FCR 501; and *Ottey v Grundy* [2003] EWCA Civ 1176; [2003] WTLR 1253.

82 *Jennings v Rice* [2003] 1 FCR 501.

83 See: Part 2c of this Chapter.

84 See: *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124; *Hayward v Giordani* [1983] NZLR 140; *Pasi v Kamana* [1986] 1 NZLR 603 at 605; *Stratulatos v Stratulatos* [1988] 2 NZLR 424; *Gillies v Keogh* [1989] 2 NZLR 327 at 333-335, per Cooke P; *Lankow v Rose* (1994) 12 FRNZ 682; *McFetridge v Bowater-Wright* [1996] NZFLR 429; *Ogilvie v Ryan* [1976] NSWR 504; and *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at 784, per Lord Scott.

benefit because of services provided, it might be more suitable to rely on Constructive Trust than Estoppel.[85]

1. Essential Elements

A Constructive Trust requires: (1) a claimant's direct or indirect contributions to the property; (2) the expectation of an interest in that property; (3) that the expectation is reasonable; and (4) that the defendant should reasonably expect to yield the claimant an interest in the circumstances.[86] Where these elements can be satisfied, Equity would regard the defendant's denial of the claimant's interest in property as unconscionable, and either impose a constructive trust of an appropriate share relative to the contributions, or award monetary compensation of the same value.[87]

(a) Contributions to Property

In order to give rise to a constructive trust, a claimant must make a sufficient contribution to the testator's property.[88] Constructive trust claims are limited to cases where "the plaintiff had contributed in more than a minor way to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly".[89] Because Constructive Trusts are a proprietary claim, there must be a causal relationship between the claimant's contributions and the testator's assets.[90] These contributions must be made to the testator's assets in general, if not to particular assets, and can be either direct or indirect.[91] Indirect contributions are those which "helps the other party acquire, improve or maintain the property or its value".[92] They need not be monetary-based.[93]

In many TPA claims the "service" provided by the claimant is not a contribution to the testator's property, but to the testator personally.[94] Services such as providing comfort, caregiving, companionship, a requested change of name, or support during a particular event will not give rise to any property interest, and cannot be provided for by a

85 *Thorner v Major* [2009] UKHL 18; 1 WLR 776 at 784, per Lord Scott; *Re Basham* [1986] 1 WLR 1498 at 1504, per Edward Nugee QC.
86 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 294, per Tipping J.
87 *Lankow v Rose* [1995] 1 NZLR 277 at 282, per Hardie Boys J, and 294, per Tipping J.
88 *Stratulatos v Stratulatos* [1988] 2 NZLR 424 at 436-437; *Gillies v Keogh* [1989] 2 NZLR 327 at 333-335, per Cooke P; *Re Jopson* [1993] NZFLR 480; *Lankow v Rose* [1995] 1 NZLR 277.
89 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 282, per Hardie Boys J.
90 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 282, per Hardie Boys J.
91 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 282, per Hardie Boys J.
92 *Lankow v Rose* [1995] 1 NZLR 277 at 295, per Tipping J.
93 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 282, per Hardie Boys J.
94 For example, see: *Hawkins v Public Trustee* [1960] NZLR 305; *Re Moore* (1984) 1 FRNZ 337; *Re Welch* [1990] 3 NZLR 1; *Heathwaite v New Zealand Insurance Co Ltd* [1951] NZLR 6; *Re Greenfield* [1985] 1 NZLR 662; *Re Lamb* [1993] NZ Recent Law 208; *Vaney v Bright* [1993] NZFLR 761; *Re Fagan (deceased)* [1999] NZFLR 222; *Bishop v Public Trustee* [2001] NZFLR 423; *Byrne v Bishop* [2001] 3 NZLR 780; *Powell v Public Trustee* [2003] 1 NZLR 381; and *Samuels v Atkinson* [2009] NZCA 556.

constructive trust.[95] These have all given rise to TPA claims however.[96] Constructive Trusts have been used in Australia to provide for testamentary promises cases in the absence of an equivalent to the TPA.[97] However, New Zealand Courts are usually reluctant to find that there was a Constructive Trust in a testamentary promises case.[98]

In *Re Cooper,* the claimant could not succeed on a constructive trust for her caregiving services, but was entitled to a TPA award.[99] She had been in a de facto relationship with the testator for many years, during which he had provided the home and contents, paid all outgoings, and undertook all repairs and maintenance.[100] All other household and relationship expenses were strictly shared. Towards the end of the relationship, the testator's health deteriorated and he required ongoing care, provided by the claimant and the testator's family. Greig J held that a constructive trust could not be established because the claimant had not directly contributed to the deceased's property, and her indirect contributions were not causally related to his assets.[101] Furthermore, the parties had a very clear sharing agreement beween them as to their services and contributions, and had both received reciprocal benefits. The avoided expenditure of professional care, provided by the plaintiff's caregiving assistance, was not significant because those costs could have been covered by the money available and did not affect the deceased's home. Also, the claimant's caregiving services were shared with many others and she could not reasonably expect an interest in the deceased's home or other assets as a result.

Similarly, in *Rennie v Hamilton,* the claimant's advice and paid services as an employee were not "indirect contributions" to the testator's business and could not give rise to a reasonable expectation of benefit, having already been paid for.[102] These paid business services were capable of attracting a TPA award however because the Court considered the testator's benefits from the claimant's management services as outweighing the

95 These services allowed for successful TPA claims in *Hawkins v Public Trustee* [1960] NZLR 305; *Re Moore* (1984) 1 FRNZ 337; *Heathwaite v New Zealand Insurance Co Ltd* [1951] NZLR 6; *Re Greenfield* [1985] 1 NZLR 662; *Re Lamb* [1993] NZ Recent Law 208; *Vaney v Bright* [1993] NZFLR 761; *Re Fagan (deceased)* [1999] NZFLR 222; and *Bishop v Public Trustee* [2001] NZFLR 423. See also: *Thwaites v Keruse* HC Auckland M215/89, 3 October 1991.

96 Ibid.

97 See: *Giumelli v Giumelli* (1999) 196 CLR 101.

98 See: *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998; *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996; and *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998, per Greig J. In these cases Constructive Trust claims failed but TPA claims were successful. The Constructive trust claim was properly analysed in these cases but has simply been avoided in other cases where it is easier to resolve the matter under the TPA.

99 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998. See also: *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996 where Kerr J held that the claimant had provided the deceased with friendship, support, companionship, and general domestic duties, but had not contributed sufficiently to the testator's estate or cash assets to give rise to a constructive trust. In each case, the claimant was entitled to an award under the TPA for their services however.

100 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.

101 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998, per Greig J.

102 *Rennie v Hamilton* [2004] NZFLR 270, confirmed in *Rennie v Hamilton* CA157/04, 10 August 2005.

remuneration she had received by her salary and other rewards.[103] This disparity was not sufficient to give rise to a constructive trust however.

The scope of "services" under the TPA is significantly wider than that of "contributions to property" under a Constructive Trust. In most testamentary promises cases, the claimant's contributions will not be sufficient to justify an interest in property or for the testator to recognise such an interest.[104]

(b) Reasonable expectation of benefit

An interest or right to compensation by constructive trust can only arise where a reasonable person in the claimant's position would have expected to receive a benefit in the circumstances.[105] This is closely related to the issue of whether it is reasonable for the defendant to expect to yield an interest.[106] These considerations are highly factual and depend on the claimant's contributions, their degree of sacrifice, the discrepancies between the value of their contributions and reciprocal benefits, and any understanding between the parties.[107]

In order for there to be a reasonable expectation of benefit, the claimant's contribution must "manifestly exceed the benefits" received by the claimant, or have been to the claimant's detriment, or resulted in the testator's unjust enrichment.[108] Mutual benefits are extremely significant, and can be detrimental to a plaintiff's claim.[109] Although reciprocal benefits are also relevant to a TPA claim, the extent of the discrepancy between the contribution and reciprocal benefits does not need to be "manifest" to attract a TPA remedy.[110]

The parties understandings, and testator's representations, are also relevant to whether there can be a reasonable expectation of benefit. These factors may either support or contradict an existing expectation.[111] Importantly, Greig J suggested that the expectation must be that of an *existing interest* in property and not merely "posthumous provision".[112] He stated that a further complication to the claimant's constructive trust argument in *Re Cooper* was that her expectation was based on promises for reward after

103 *Rennie v Hamilton* [2004] NZFLR 270 at [41].
104 *Re Jopson* [1993] NZFLR 480; *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996; *Re Cooper (dec'd)* HC Palmerston North CP15/96, 21 May 1998; *Rennie v Hamilton* CA157/04, 10 August 2005.
105 *Gillies v Keogh* [1989] 2 NZLR 327 at 333-335, per Cooke P.
106 This final element of a constructive trust claim will not be considered seperately in this paper.
107 *Gillies v Keogh* [1989] 2 NZLR 327 at 331-332, per Cooke P; *Lankow v Rose* [1995] 1 NZLR 277.
108 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 282, per Hardie Boys J.
109 *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996; *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998, per Greig J.
110 See the approach outlined in *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980.
111 *Gillies v Keogh* [1989] 2 NZLR 327; *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.
112 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.

death, which he considered incompatible with a constructive trust claim.[113] However, his comments should be viewed in light of his finding that the claimant had not made sufficient contributions to property to support a reasonable expectation. In cases where contributions have created such an expectation, it will probably be irrelevant whether the claimant expected to receive that interest during the testator's lifetime or on death.[114] In all cases, a mere testamentary promise will not give rise to a property interest by constructive trust, without sufficient contributions to property.

2. Application to Testamentary Promises

A claimant will only be entitled to a constructive trust over the testator's property where the claimant significantly contributed to the testator's assets and could reasonably expect an interest in those assets.[115] These requirements are substantially different from TPA claims, which are more compensatory, than proprietary-based. Because TPA "services" include more than mere contributions to property, its scope is significantly wider than that of a constructive trust claim.[116] In *Thwaites v Keruse,* the Court recognised that the claimant's care for the deceased after his accident, and transportation services could be considered for a TPA award but not in assessing a constructive trust claim, which was limited only to her proprietary contributions.[117]

The facts of *Sutherland* may support a constructive trust. Mrs Sutherland had provided various domestic duties to the testator including papering a room, whitewashing a ceiling, and heavy duty cleaning. These had contributed to the testator's property and estate and she received no reciprocal benefits.[118] She expected an interest in his estate as a result of her services and the testator's promises to reward her. Her expectation was reasonable and it was reasonable for the testator's estate to expect to yield an interest in the circumstances.[119]

These elements cannot usually be established in a testamentary promises case however because such cases usually depend on the testator's promise rather than any significant contribution to the testator's property.[120] This is apparent from *Re Welch* and *Samuels*.

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113 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.

114 See: *Thwaites v Keruse* HC Auckland M215/89, 3 October 1991. In this case, Smellie J was prepared to allow a constructive trust claim against the deceased's estate based on her prior contributions, although it was not the preferred remedy in that case.

115 *Gillies v Keogh* [1989] 2 NZLR 327; *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277; *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996; *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.

116 *Thwaites v Keruse* HC Auckland M215/89, 3 October 1991.

117 *Thwaites v Keruse* HC Auckland M215/89, 3 October 1991.

118 *Sutherland v Towle* [1937] GLR 509.

119 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277.

120 See: *Re Welch* [1990] 3 NZLR 1; *Byrne v Bishop* [2001] 3 NZLR 780; and *Samuels v Atkinson* [2010] NZFLR 980.

In *Re Welch,* Mr Stewart had occassionally assisted his stepfather in his transport business, over a four year period while he lived with the deceased.[121] The extent of the claimants contributions to the testator's business would have been insignificant, and was not such that he could reasonably expect an interest. Furthermore, the reciprocal benefits received from the testator were reasonably equal to his contributions.[122] Thus, there is no manifest imbalance requiring equitable intervention by Constructive Trust.[123]

In *Samuels,* the Atkinsons had contributed to Sammy's assets by their farm work, which increased the value of his shareholding. However, because of their own greater shareholding, any contribution to the value of the testator's shares would be balanced by reciprocal benefits received to the Atkinson's own assets. Thus, the Atkinsons could not reasonably expect their contributions to give rise to an interest in Sammy's shares, even in light of his promises. Moreover, Sammy could not expect to yield his interest in recognition of their contributions. The children's provision of intangible benefits to Sammy cannot be relied upon because they are not contributions to property. Nor were Jennifer's caregiving services. These personal services to Sammy did not preserve or enhance his assets, and could not support any proprietary expectation.[124] Because the claimants' reasonable expectations arose from Sammy's promise for testamentary reward rather than their contributions to property, no constructive trust can arise.[125]

In contrast, the Bishop family's contributions could give rise to a constructive trust because their conduct did help preserve and enhance the testator's assets, both directly and indirectly.[126] Their services allowed Mr Byrne to continue working on his farm, and to enhance his property by building a new home. These contributions were not outweighed by any reciprocal benefits to the claimants. Had they not provided their services, it is highly likely that Mr Byrne's farms would have become run-down and lost significant value over that 20 year period since his initial hospitalisation. Alternatively, he would have expended significant sums in hiring others to maintain the farm. In light of the Biphops' significant contributions to his property and the testator's promises, the Bishops could reasonably expect an interest in his farm and he could reasonably expect to yield an interest in the circumstances.

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121 *Welch v Stewart; Re Welch* [1989] 2 NZLR 1; *Re Welch* [1990] 3 NZLR 1. The claimant's mother had also provided financial contributions to establish the business and had significantly contributed to the home and business assets, but these contributions were considered in the claimants Matrimonial Property claim, in which he was awarded approximately half of the testator's estate.

122 Compare: *Giumelli v Giumelli* (1999) 196 CLR 101.

123 *Lankow v Rose* (1994) 12 FRNZ 682; [1995] 1 NZLR 277 at 282, per Hardie Boys J.

124 See: *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996; *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998, per Greig J.

125 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.

126 *Byrne v Bishop* [2001] 3 NZLR 780.

3. Conclusion

The development of Constructive Trusts does not render the TPA redundant.[127] A Constructive Trust cannot apply where there is no contribution to the testator's property, whether directly or indirectly. For this reason, it failed as an alternative cause of action in *Re Jopson*,[128] *Re Cooper*,[129] *Re Cunniffe*,[130] and *Rennie v Hamilton*,[131] despite a TPA claim succeeding in these cases. Constructive Trusts cannot adequately provide for persons such as Mr Stewart and the Atkinson family, or others who have provided intangible services to the testator that have no effect on the testator's property.[132] These services should nonetheless be recognised and rewarded because of their value to the testator. This can be achieved via the TPA provisions.

V. Restitution and Unjust Enrichment

The Law of Restitution relies on the general principle that one party should not be unjustly enriched at another's expense, and is concerned with restoring the parties to their prior position.[133] It comprises doctrines such as a *quantum meruit* and *quantum valebat*, which are concerned with providing reasonable remuneration where goods or services have been provided.[134] The general law of restitution has had less movement in New Zealand than Estoppel and Constructive Trusts, but the development of both these latter models depended on an acceptance of restitutionary principles.[135]

1. Quantum Meruit

Until 1970, a *quantum meruit* was available to recover reasonable remuneration for services rendered under an implied contract for payment.[136] On this analysis, the nature of the relationship between parties to a testamentary promise made it difficult to establish a *quantum meruit* claim. Such claims were only successful where the services were so extraordinary that they could not be reasonably expected to go unpaid. This contractual framework has been abandoned for one based on unjust enrichment

127 A constructive trust was considered and failed as an alternative cause of action to a TPA claim in *Re Jopson (deceased)* [1993] NZFLR 480; *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998; *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996; and *Rennie v Hamilton* [2004] NZFLR 270.
128 *Re Jopson (deceased)* [1993] NZFLR 480.
129 *Re Cooper (deceased)* HC Palmerston North CP15/96, 21 May 1998.
130 *Re Cunniffe* HC Whangarei CP39/94, 31 May 1996.
131 *Rennie v Hamilton* [2004] NZFLR 270, confirmed in *Rennie v Hamilton* CA157/04, 10 August 2005.
132 See: *Hawkins v Public Trustee* [1960] NZLR 305; *Re Moore* (1984) 1 FRNZ 337; *Heathwaite v New Zealand Insurance Co Ltd* [1951] NZLR 6; and *Samuels v Atkinson* [2010] NZFLR 980.
133 Ross Grantham and Charles Rickett "The Law of Unjust Enrichment in New Zealand" (New Zealand Law Society Seminar, November 1999) at 3.
134 *Daly v Gilbert* [1993] NZFLR 513 at 525; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.
135 *Re Jopson (deceased)* [1993] NZFLR 480.
136 *Thomas v Houston Corbett & Co* [1969] NZLR 151 at 174.

principles, which may lower the threshold for successful claims. An appropriate starting point for a *quantum meruit* is to first ask whether the defendant has received a benefit, and then consider whether it is unjust for the benefit to be retained without payment.[137]

Mrs Sutherland would clearly be covered under this unjust enrichment approach.[138] However, as with other causes of action, the case is less clear regarding intangible services which may not be recognised as a "benefit", especially when provided within a close relationship, as in *Re Welch, Byrne,* and *Samuels*. Where services were provided gratuitously, they are not compensatable under a *quantum meruit*.[139] Interestingly, the Court of Appeal's approach to assessing the TPA award in *Samuels v Atkinson* is essentially the same approach to assessing remuneration under a *quantum meruit*.

2. A Cause of Action in Unjust Enrichment

There is some uncertainty regarding whether Unjust Enrichment is a cause of action in New Zealand or merely an organising principle.[140] It has been rejected as an alternative cause of action in several testamentary promises cases because it is simpler to deal with such a claim under the TPA, which is considered capable of providing for any "unjust enrichment".[141] Unjust Enrichment has been recognised in other contexts however, and it will be useful to consider its ability to provide for a testamentary promises case.[142]

3. Essential Elements

An unjust enrichment claim requires: (1) that the defendant has received an enrichment, gain, or benefit; (2) this was provided at the expense of the claimant; (3) in all the circumstances, the enrichment is unjust; and (4) there are no defences available to the

137 See: *Goss v Chilcott* [1996] 3 NZLR 385; *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211; ; *Svatek (deceased)* HC Wellington CP387/94, 17 October 1996; *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; 69 ALR 577 and *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.

138 *Sutherland v Towle* [1937] GLR 509; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.

139 See: *Kshywieski v Kunka Estate* (1986) 21 ETR 229 (CA); *Milne v MacDonald Estate* (1986) 3 RFL (3d) 206 (CA); and *Daly v Gilbert* [1993] 3 NZLR 731; NZFLR 513.

140 See: *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124 at 155; *Fitness v Berridge* (1986) 4 NZFLR 243*; Rod Milner Motors Ltd v A-G* [1999] 2 NZLR 568; *Gillies v Keogh* [1989] 2 NZLR 327; *Re Jopson (deceased)* [1993] NZFLR 480; *Daly v Gilbert* [1993] NZFLR 513 at 523-525; Ross Grantham and Charles Rickett "The Law of Unjust Enrichment in New Zealand" (New Zealand Law Society Seminar, November 1999) at 3; *Wolzak v Proctor* HC Wellington AP143/00, 21 June 2001 at [6]-[7]; *Welsh v Housing New Zealand Ltd* HC Wellington AP35/2000, 9 March 2001; *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739.

141 See: *Re Jopson (deceased)* [1993] NZFLR 480; *Rennie v Hamilton* [2004] NZFLR 270 at 280; *Rennie v Hamilton* CA157/04, 10 August 2005; and *Svatek (deceased)* HC Wellington CP387/94, 17 October 1996, per Gendall J.

142 See: Andrew Burrows *The Law of Restitution* (2nd ed., Butterworths, London, 2002); Andrew Burrows, Ewan McKendrick and James Edelman *Cases and Materials on the Law of Resitution* (2nd ed., Oxford University Press, New York, 2007); Steve Hedley and Margaret Halliwell (ed) *The Law of Restitution* (Butterworths, London, 2002).

defendant.[143] Of all of the common law causes of action considered in this chapter, this is the widest, and encompasses both Estoppel and Constructive Trust cases.[144]

4. Application to Testamentary Promises

In 1996, the Law Commission introduced a proposal to codify all Laws of Succession, and outlined a draft Act to this effect.[145] This will be considered in the next chapter but is also relevant for the application of Unjust Enrichment to testamentary promises cases. This Act tailored the Law of Restitution to testamentary cases, intending it to apply as a code where the testator had made no testamentary promise but it was nonetheless unjust for the claimants services to go unrewarded. It has not been adopted but is a convenient way of considering the ability for Unjust Enrichment to provide for testamentary promises in this paper. Common law principles will still be a useful guide however.

Under the Law Commissions proposal, an unjust enrichment claim requires proof that: (1) the claimant had provided a benefit to the testator during his lifetime, (2) the deceased was aware of the provision of the benefit, or was not sufficiently competent to be aware; (3) the benefit is retained by the estate; and (4) that it is just that provision be made for the contributor in return for the benefit.[146] As with the common law, the relevant issue in a testamentary promises case will be whether a "benefit" had been provided at the claimant's expense, and whether it is "unjustly retained" by the estate.

(a) What is a recognised benefit?

A "benefit" is defined as meaning any "money, property, work, services, and any other benefit of value".[147] A benefit is "of value" objectively if it "adds value to the deceased's property or relieves the person from expenditure which would otherwise be necessary or desirable". In these cases, it is irrelevant that the testator did not accept the benefit or did not believe it would be remunerated.[148] Alternatively, a benefit is also "of value"

143 *BP Exploration v Hunt* [1979] 1 WLR 783 at 839; *Daly v Gilbert* [1993] NZFLR 513 at 524; *Gillies v Keogh* [1989] 2 NZLR 327 at 351; *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211; Ross Grantham and Charles Rickett "The Law of Unjust Enrichment in New Zealand" (New Zealand Law Society Seminar, November 1999) at 5.

144 See: *Gillies v Keogh* [1989] 2 NZLR 327 at 330-331, per Cooke P.

145 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at paras 312-325; Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at 106-107. See: s. 37 of the Draft Testamentary Claims Act in Appendix B. See also: s39 of the proposed Draft Succession (Adjustment) Act in R39 at 106. The Act was designed as a code to provide for all laws of succession, including testamentary promises.

146 Draft Testamentary Claims Act, s. 33(1)(a)-(c) in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B. For the purposes of the Act, a benefit is "retained by the estate" when there has been no change of circumstances since the benefit was provided that would make it inequitable to require provision to be made from the estate for the benefit (s33(4)).

147 Draft Testamentary Claims Act, s. 8(a). See: Appendix B.

148 Draft Testamentary Claims Act, s. 8(a)(i) in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B.

subjectively if it has no significant objective value, but is requested, or accepted as being valuable to the deceased.[149] However, a "benefit" does not include "services performed without a significant expenditure of time, effort or money".[150]

This definition of a "benefit" is consistent with the common law approach to Unjust Enrichment.[151] However, this scope is narrower than that of a TPA "service" because of the express requirement that "benefits" involve "significant time, effort, or money". In domestic contexts, this would likely be assessed in a similar way as in *Samuels*, but the bar is set higher than TPA standards, requiring a "significant" difference to qualify.

It is unclear whether Mr Welch's business services in *Re Welch* would qualify. The services were clearly a benefit, but may not have been "of value" or involved "significant expenditure of time and effort". The nature and extent of the business services are unknown, except that they were ocassionally provided over a four year period, and in Mr Stewart's free time. It is unclear whether Mr Stewart's services relieved the testator of the expenditure of hiring other staff, or whether the services were requested. The testator likely perceived the claimant's help as valuable however,[152] and in all circumstances they would probably qualify as a "benefit", in light of that subjective value and potential objective value. His companionship services would not apply however because there was no significant expenditure in their provision.

The Bishop family's services in *Byrne* were clearly a benefit of value, both objectively and subjectively. Although they were not requested, they were valuable to the testator, and relieved him of significant expense. The testator largely abstained from drinking for 12 years with the claimants' encouragement. This avoided the costs of having someone else manage his farm while he was incapacitated, or it otherwise being run-down in his absence. The Bishops also added direct value to his property by their assistance in building his home, and saved him the expense of providing his own meals.

In *Samuels,* Jennifer's caregiving services would clearly be included. Her services avoided Sammy significant expense in paying for required care. However, the Atkinsons benefit of being "surrogate children" to Sammy is unlikely to qualify. Although it was probably a benefit of subjective value in light of Sammy's inability to have children,[153] it was "performed without a significant expenditure of time, effort or money".

149 Draft Testamentary Claims Act, s. 8(a)(ii) in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B.
150 Draft Testamentary Claims Act, s. 8(b) in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B.
151 See: Andrew Burrows *The Law of Restitution* (2nd ed., Butterworths, London, 2002) at 15-25.
152 *Re Welch* [1990] 3 NZLR 1; (1990) 7 FRNZ 536.
153 See: *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980 at [61].

Thus, Mr Welch's business services, the Bishops tangible benefits, and Jennifer's caregiving are all likely to be recognised as qualifying benefits for Unjust Enrichment. However, intangible benefits such as the Atkinsons' services, which are currently recognised under the TPA, are unlikely to qualify as a "benefit" unless there was a significant disparity between what was provided, and involved the claimant investing significant time, effort, or money. Furthermore, a claimant cannot make a claim for a benefit for which they have already been fully remunerated,[154] as in the TPA.

(b) Was it retained ?

The claimant's benefit must be retained by the estate. However, a benefit is deemed to have been "retained by the estate" when there has been no change of circumstances since the benefit was provided which would make it inequitable to require provision to be made from the estate, in exchange for the benefit.[155] This is essentially the current common law defence available where the defendant had significantly altered his or her circumstances in reliance on the benefit and it would be unjust to require the benefit to be repaid.[156] If a benefit is recognised in the cases of *Re Welch, Byrne*, and *Samuels,* it would be retained by the testator's estate because there was no change of circumstances.

(c) Is it just for provision to be made for the benefit?

Under the proposal, an award will be "just" in four cases: (1) where the deceased knew of the contributor's hope or expectation to receive provision; (2) where the contributor was socially or morally obliged to provide the benefit; (3) where the benefit was required; or (4) in the special circumstances of the case, or other reason, it is inequitable for the estate to retain the benefit.[157] This is an extension of the current law of restitution.

The first of these cases is essentially an Estoppel or Constructive Trust, and the third is similar to *quantum meruit*. As with the current Law of Restitution, a contributor cannot make a claim if it was clear from the circumstances that no provision would be made in return for the benefit, or where it was conferred gratuitously.[158] Retention cannot be unjust in these circumstances. Under the current law, an enrichment at the claimant's expense is "unjust" if it is based on mistake, ignorance, duress, neccessity, exploitation, failure of consideration, incapacity, illegality, or other "unjust factor".[159] However, this must be causally related to the enrichment and corresponding expense.[160]

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154 Draft Testamentary Claims Act, section 29(2). See: Appendix B.
155 Draft Testamentary Claims Act, s. 33(4). See Appendix B.
156 See: Andrew Burrows *The Law of Restitution* (2nd ed., Butterworths, London, 2002) at 51 and 520-529.
157 Draft Testamentary Claims Act, s. 33(3). See Appendix B.
158 *Re Welch* [1990] 3 NZLR 1; (1990) 7 FRNZ 536; *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980; Draft Testamentary Claims Act, s. 33(2). See Appendix B.
159 See: Andrew Burrows *The Law of Restitution* (2nd ed., Butterworths, London, 2002) at 41-50.
160 Ibid.

In *Re Welch, Byrne*, and *Samuels,* the claimants' intangible benefits might have been conferred gratuitously but this is not "clear in the circumstances" so will not defeat their claim.[161] However, in *Re Welch* there is nothing making it "just" in the circumstances for Mr Welch to be remunerated for his business services. The testator did not know that the claimant hoped or expected to receive provision as a result of this benefit, and those services were not required. In contrast, the claimants in *Byrne* provided benefits that *were* required, and not willingly provided by anyone else. Therefore it would be just for them to receive provision in the circumstances. Similarly, in *Samuels,* Jennifer's caregiving services were provided in the expectation of benefit, to Sammy's knowledge, making it "just" for them to be compensated.

VI. Conclusions

Claimants such as Mr Stewart, and the Bishop and Atkinson families are currently provided for under the TPA. However Mr Stewart cannot succeed in either an Estoppel, Constructive Trust, or Unjust Enrichment claim for his business services or intangible benefits to the testator. The Bishops would similarly fail in Estoppel, but could potentially establish a claim in Constructive Trust or Unjust Enrichment based on their contributions. The Atkinsons would have no claim under Estoppel or Constructive Trust, but Jennifer may be entitled to remuneration under Unjust Enrichment for her caregiving services. None of the claimants are entitled to a contractual claim.

Thus, despite significant similarities between the TPA and common law, Mr Stewart and the Atkinsons (except Jennifer) would be unprovided for under the common law, suggesting that it is still inadequate and that the TPA still has a useful role in our law.

161 Draft Testamentary Claims Act, s. 33(2). See Appendix B.

CHAPTER FOUR: Should the TPA be abandoned for another model?

I. Introduction

The continued gap between the common law and TPA suggests the TPA should not be abolished in favour of a common law approach.[1] This would leave claimants such as Mr Stewart and the Atkinsons unprovided for.[2] The Law Commission proposed an alternative however. This chapter will focus on the desirability of their proposal.

II. The Proposal

As part of a comprehensive review of Succession Law in New Zealand, the Law Commission proposed that the existing law be simplified by replacing the current legislation with a Code providing for all laws of succession within a single Act. Their proposal included changes regarding the rights of widowers, de facto partners, adult children, and most importantly "contributors".[3] The new Act was designed as a code, repealing prior enactments and preventing claims from being made against an estate under the general law of Contract or Restitution.[4] This proposal was introduced 15 years ago and has not been adopted. Nevertheless, it is worthwhile to consider it in practice.

1. Criticisms of the TPA

The Law Commission criticised the TPA's uncertain remedies, and its limited application to only recipients of testamentary promises. They suggested that other "contributors" should also be provided for, and proposed that any person who had provided a "benefit" to a deceased during the deceased's lifetime could make a "contribution claim" against their estate, either on the basis of the testator's express promise for reward, or where the deceased's estate would be otherwise unjustly enriched.[5] This second ground has been considered in some depth in Chapter 3 and will not be re-examined in this chapter.

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1 See: Chapter 3; Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 302.

2 As discussed in Chapter 3, it might be possible for the Bishops to obtain a remedy by constructive trust or unjust enrichment but this would be much more difficult to establish than a TPA claim.

3 See: Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at paras 298-301, and 306-325; Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at paras 84-88, pp30-31 and 92-107.

4 See: Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at para 305; Draft Testamentary Claims Act, ss 36-37, Appendix B. These claims are not available unless the claimant proves that the contribution was made in a strictly commercial context between parties with no personal relationship. There is a presumption that parties who make such claims are closely related.

5 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 289. See s 29(1) of their proposed Act, provided in Appendix B. See also: s31(1) of the Succession (Adjustment) Act in Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at 92, with commentary on this proposed section at 93.

The Law Commission proposed that these distinct claims be treated differently, setting out how awards should be made in each case.[6]

2. Claims based on an Express Promise

The Law Commission proposed that in cases where a testator had expressly promised to make provision for a claimant for a benefit that he or she had provided, the claimant should be entitled to an award amounting to the value of the promise, unless this amount is unjust in the circumstances. To succeed, a claimant must prove that they had provided the testator with a benefit during his lifetime, and that the deceased expressly promised to make provision for the claimant in return for the benefit provided. In other words there must be a promise, benefit, and nexus. The promise is not limited to testamentary promises however, and includes provisions intended to take effect during the lifetime of the deceased as well as those intended to take effect on death.[7]

(a) Application to TPA cases

A "promise" has a very similar definition to that currently existing under the TPA, and "includes any statement or fact or representation and any expression of intention".[8] Furthermore, the promise can be to reward another person other than the contributor, and this nominated person is able to make a claim in the same manner.[9] Like the TPA, the promise can been made either before or after the claimant's benefit was provided.[10] However, unlike the TPA, the promise must be *express,* which the Law Commission suggests must be for a specified amount. Where no specified amount is promised, the award is to be determined according to Unjust Enrichment, rather than the promise.

On proof of an express promise, the Court must award the claimant the promised amount unless a lesser or greater award is justified in the circumstances, having regard to various listed factors.[11] These include any arrangement or understanding between the parties, and the fairness and reasonableness of its terms and operation.[12] It also includes the length of time since the benefit was provided, any relevant change in circumstances, and any other factors, including the effect to third parties.

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6 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 289. See ss 29-37 of their proposed Testamentary Claims Act, provided in Appendix B. This was adopted in ss31-39 of the proposed Succession (Adjustment) Act in Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at paras 84-88, pp30-31 and 92-107.

7 See: Draft Testamentary Claims Act, s 31, Appendix B.

8 See: Draft Testamentary Claims Act, section 8, Appendix B.

9 See: Draft Testamentary Claims Act, section 32, Appendix B.

10 Draft Testamentary Claims Act, s 31 in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B. In comparison, see: TPA 1949, s 3(2).

11 See: Draft Testamentary Claims Act, s 34(1) and s 34(3), Appendix B.

12 See: Draft Testamentary Claims Act, s 34(3)(a)-(c), Appendix B.

As with the TPA, a claimant cannot make a claim for a benefit for which they have already been fully remunerated.[13]

In *Re Welch,* the claimant was promised all of his stepfather's estate with the exception of three insignificant items. However, he would not be able to make a claim under this provision because the testator's promise was not made in return for the benefit that he had provided, but out of mere love and affection for the claimant. As discussed in Chapter 3, the claimant's business services were probably a "benefit", depending on whether it involved "significant expenditure of time and effort" by the claimant, but because there was no nexus between the promise and that benefit, he cannot succeed. His intangible services are not qualifying "benefits".

The testator in *Byrne* promised to reward the Bishop children with his two farms for the services rendered by the Bishops. Although the children had provided Mr Bryne with significant intangible benefits, most of the "benefits" received by him were provided by the parents. However, the children are able to bring a claim on the basis of their parents contributions,[14] as well as their own.[15] The benefits provided were both objectively and subjectively "of value" and involved significant time, effort, and money. There was an express promise, benefit, and nexus. Therefore, the Court must award the amount of the promise unless a lesser or greater amount is justified in the circumstances, having regard to any relevant factors including the fairness and reasonableness of the award, and any change in circumstances. None of these considerations would justify modifying the Bishops award in the circumstances. Therefore, they would be awarded both farms, as promised, wheras they were awarded only one under the TPA in *Byrne.*

In *Samuels*, the testator had promised to leave shares to the Atkinson boys and do "something else" for Jennifer. However, because the boys did not provide any recognised "benefit" to Sammy, their claim to enforce Sammy's promise cannot succeed. Don Atkinson had provided some valuation services to Sammy but these were provided only annually and did not involve "significant expenditure of time or effort", especially in light of reciprocal benefits received by him in the form of loans. The boys' intangible services cannot qualify either. Thus, there was no benefit by them. Furthermore, there was no nexus because Sammy's promise was not motivated by their "benefits" but his affections for the Atkinsons. The promise regarding Jennifer was not express, but she can be make a claim under the unjust enrichment principles in the Act.[16]

13 Draft Testamentary Claims Act, section 29(2). See: Appendix B.

14 Draft Testamentary Claims Act, section 32. See: Appendix B.

15 Draft Testamentary Claims Act, s 31. See: Appendix B. It is unclear whether the Bishops services could be considered together under the Law Commission's proposal, as was done in *Byrne* under the TPA. This would be more logical than making seperate claims, but the end result would be the same.

16 See Chapter 3, Part V, Section 4(a)-(c).

3. Claims based on Unjust Enrichment

Where there was no express promise, an award can only be made where it would be unjust for the testator's estate to retain the benefit of the claimant's services without providing compensation.[17] The application of this was considered in Chapter 3. This would clearly provide for Jennifer who expected provision to be made for her on the basis of Sammy's vague promises.

III. Comparisons to the TPA

Under the proposal, Mr Welch and the Atkinson boys would fail to make a claim. The Bishops' award would likely increase because departure from the promise is not justified in the circumstances. However, Jennifer's award for her caregiving would probably be similar, although her total award would be reduced because of the inability for the Atkinsons' intangible benefits to qualify as a "benefit" under the Act.

One advantage of the proposed Act is that a "benefit" is defined within the statute. Although the definition of a benefit is wider than services, it excludes any "services performed without a significant expenditure of time, effort or money".[18] This definition of a "benefit" will give rise to the same considerations for assessing "services" under the TPA, but merely sets the bar higher. The Law Commission recognised the difficulties regarding services provided by a person with a close, long-lasting relationship with the deceased, highlighting the need to look at the totality of the arrangement between parties and reciprocal benefits.[19] This was the principle highlighted in *Samuels*.[20] In each case, the benefits received by each party are to be considered and off-set against one another to determine whether an award is possible under the Act. As with the TPA, a contributor cannot make a claim for any benefits for which they have already been fully remunerated under the proposed provision.

IV. Conclusions

The Law Commission's proposals contained some insightful ideas about how testamentary promises cases can be resolved. The provision was drafted in much clearer language than the existing TPA, and is much easier to understand. The definition of a "benefit" under the Act was useful but still would not have been conclusive in difficult

17 Draft Testamentary Claims Act, s 29(1) in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B.

18 Draft Testamentary Claims Act, s 8 in Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122. See: Appendix B.

19 Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at para 316.

20 *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980. See: Part 2c in Chapter 2 of this paper.

cases such as in *Samuels*. Furthermore, the proposal contained some major limitations. First, it was designed to be a code and to limit the application of common law claims to testamentary contribution cases. However, because of the continuous development of the common law, this is highly undesirable. This might put contributors seeking contribution against a deceased's estate in a less desirable position than those making general contribution claims where there are any future developments in the common law. This would in fact revive the "inequitable distinction" that Parliament sought to avoid when enacting the original testamentary promises provision.[21]

Furthermore, there are few practical differences between the current law and the proposed provision, making the need for legislation unneccessary. Courts are already applying the general approach outlined for non-specified awards.[22] Furthermore, there is no convincing reason for awarding the amount of a promise by default. Doing so would result in unfair inconsistencies between claimants who might have provided the same services. For example, had the Atkinson boys claim succeeded, they would be entitled to the value of the promised shares, whereas Jennifer would only be entitled to the value of her contributions because Sammy's promise to her was not of an express amount. Also, although it is desirable that the Courts discretion be exercised in a more principled way, this can be addressed by judicial development alone, and may be forthcoming following the approach outlined in *Samuels*. Thus, the Law Commission's proposal is wholly unneccessary, and undesirable.

21 See: *Sutherland v Towle* [1937] GLR 509 at 510 and 511, per Ostler J; Parliament Debates (30 November 1944) 267 NZPD LC at 423; and (23 November 1944) 267 NZPD HR at pp 299-300.

22 See: *Samuels v Atkinson* [2009] NZCA 556; [2010] NZFLR 980.

CONCLUSIONS

In 1944, legislation was clearly required to prevent injustice to persons such as Mrs Sutherland, who had rendered services for many years in reliance on an unenforceable testamentary promise.[1] No remedy was available at common law.[2] However, since this time there have been significant developments in the Law of Estoppel, Constructive Trust, and Restitution, which would allow Mrs Sutherland to now obtain a remedy of her choice under the common law.[3]

However, persons such as Mr Stewart, and the Bishop and Atkinson families are covered under the TPA, but mostly cannot obtain remedies at common law for their intangible benefits.[4] In light of this continued gap between the common law and TPA, the TPA still has a useful role and should not be abolished.

Furthermore, it should not be replaced by a Code providing for all "contribution claims" against an estate.[5] It is undesirable to replace the common law in relation to testamentary claims because it inhibits any future developments in this area, and draws a sharp distinction between remedies available against a living person, and those available on death. The TPA was specifically designed to remove this "inequitable distinction".[6] Furthermore, it may result in unfairness between parties who were promised specified awards compared to those who were not.[7]

The TPA seems to be working. TPA awards can now be made according to clear principles, following *Samuels*.[8] It provides for many deserving persons, some of which will have no other remedy available. Where the common law may provide better remedies, it is available as an alternative cause of action. The TPA is providing more than adequate provision for testamentary promises claimants, and has been praised by judges and commentators in New Zealand, and overseas. Thus, the TPA should not be repealed, replaced, or amended. As a wise man once said, "If it aint broke, don't fix it".[9]

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1 See Chapter 1.
2 Ibid.
3 See Chapter 3. The only cause of action that she will fail on is Contract Law.
4 As discussed in Chapter 3, it might be possible for the Bishop family to obtain a remedy by constructive trust but this would be much more difficult to establish than a TPA claim.
5 Ibid. The provisions can only be avoided where a claimant can prove that the arrangement between parties was on a strictly commercial basis and there was no personal relationship between them.
6 See: Debates (23 November 1944) 267 NZPD HR at pp 299-300; (30 November 1944) 267 NZPD LC at 423; *Sutherland v Towle* [1937] GLR 509; and Brian Coote "Testamentary Promises Jurisdiction in New Zealand" in JF Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965).
7 See: Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122; Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at 92-107; and *Samuels v Atkinson* [2009] NZCA 556.
8 See: *Samuels v Atkinson* [2009] NZCA 556. See also: Chapter 2 in general.
9 US Politician Thomas Bertram Lance, advisor to Jimmy Carter, 1976. *Nation's Business* (May 1977).

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Appendix A

The Law Reform (Testamentary Promises) Act 1949

An Act to make better provision for the enforcement of promises to make testamentary provision in return for services rendered

1 Short Title

This Act may be cited as the Law Reform (Testamentary Promises) Act 1949.

2 Interpretation

In this Act, unless the context otherwise requires,—

Court means a Court having jurisdiction in the proceedings by virtue of section 5 of this Act

Promise includes any statement or representation of fact or intention.

Section 2 was substituted, as from 1 July 1992, by section 2 Law Reform (Testamentary Promises) Amendment Act 1991 (1991 No 64).

3 Estate of deceased person liable to remunerate persons for work done under promise of testamentary provision

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

(2) This section shall apply—
  (a) Whether the services were rendered or the work was performed before or after the making of the promise:
  (b) Notwithstanding anything to the contrary in subpart 2 of Part 2 of the Property Law Act 2007, or any other enactment.

(3) Where the promise relates to any real or personal propertywhich forms part of the estate of the deceased on his death, the Court may in its discretion, instead of awarding to the claimant a reasonable sum as aforesaid,—
  (a) Make an order vesting the property in the claimant or directing any person to transfer or assign the propertyto him; or

(b) Make an order vesting any part of the property in the claimant or directing any person to transfer or assign any part of the property to him, and awarding to the claimant such amount (if any) as in its opinion is reasonable in the circumstances.

(4) In awarding any amount on a claim under this section the Court may, if it thinks fit, order that the amount awarded may consist of a lump sum or a periodical or other payment.

(5) The incidence of any payment or payments so ordered shall, unless the Court otherwise determines, fall rateably upon the whole estate of the deceased, or, in cases where the authority of the Court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is situated in New Zealand.

(6) The Court shall have power, after hearing such of the parties as may be affected as it thinks necessary, to exonerate any part of the estate of the deceased from the incidence of any such payment or payments, to determine priorities as between any benefit awarded by the Court to the claimant under this Act and the beneficial interests of any other person or persons in the estate of the deceased person, and to make such provision as it thinks fit as to the incidence of the whole or any part of the debts, testamentary expenses, and duty in respect of the estate of the deceased. For the purposes of this subsection the Court may direct any executor or administrator to represent, or appoint any person to represent, any such party.

(7) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

(8) Nothing in this section shall affect any remedy which aclaimant may have apart from this Act in respect of any promise to which this section relates, and where a claimant has any such remedy he may at his option enforce that remedy or his remedy under this section, but not both:
Provided that nothing in this section shall prevent alternative claims in respect of those remedies from being made in the one action.

(9) Subsection (3) is subject to section 10(3) to (5) of the Succession (Homicide) Act 2007.

Compare: 1944 No 18 s 3
Subsection (1) was substituted, as from 1 January 1962, by section 2(1) Law Reform (Testamentary Promises) Amendment Act 1961 (1961 No 19).
Subsection (1) was amended, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3) by inserting the words "civil union partner," after the word "husband,".
Section 3(2)(b): amended, on 1 January 2008, by section 364(1) of the Property Law Act 2007 (2007 No 91).
Subsection (2)(b) was amended by section 5(2) Contracts Enforcement Act 1956 by inserting the words "or section 2 of the Contracts Enforcement Act 1956". Section 4 Statute of Frauds 1677 was repealed in New Zealand by section 2(6) of that 1956 Act.
Subsection (6) was substituted, as from 1 January 1962, by section 2(2) Law Reform (Testamentary Promises) Amendment Act 1961 (1961 No 19).
Subsection (8) was inserted, as from 1 January 1962, by section 2(3) Law Reform (Testamentary Promises) Amendment Act 1961 (1961 No 19).
Section 3(9): added, on 17 November 2007, by section 17 of the Succession (Homicide) Act 2007 (2007 No 95).

APPENDIX B: The Law Commission's 1996 Proposal

Relevant Sections of the DRAFT TESTAMENTARY CLAIMS ACT 199-[10]

8 Definitions

In this Act

award means a support award or a contribution award;

benefit

(a) means money, property, work, services, and any other benefit of value, and a benefit may be of value although

(i) the person to whom the benefit is provided does not accept it, or accepts it believing that it will not be remunerated, if the benefit adds value to the deceased's property or relieves the person from expenditure which would otherwise be necessary or desirable; or

(ii) the benefit has no significant objective value, but the person to whom it is provided requests or accepts the benefit as being of value to that person; but

(b) excludes services performed by a person without a significant expenditure of time, effort or money;

contribution award means an award made by the court under this Act in respect of a contribution claim;

contribution claim means a claim made under section 29;

contributor means a person who provided a benefit to a deceased person during the lifetime of the deceased;

promise includes any statement of fact or representation and any expression of intention;

provision, in reference to provision made or to be made by a deceased person, includes provision made or to be made before or after the death of the deceased and provision made by will or otherwise;

remunerate includes reward or recompense, by way of money or by the provision of any other benefit;

9 Who is a partner?

(1) A person is to be regarded as a partner of another person for the purposes of this Act if the person was at any time married to that other person or was at any time a de facto partner of that other person.

(2) A person is to be regarded as a de facto partner of another person for the purposes of this Act if the person lived in a relationship in the nature of marriage with that other person.

(3) For the purposes of this Act, a relationship in the nature of marriage includes a relationship between 2 persons of the same sex.

(4)

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10 This was never enacted by Parliament, despite the reccommendation of these provisions in PP24 and Report 39. See: Law Commission *Succession Law: Testamentary Claims* (NZLC, PP24, 1996) at 116-122; and Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC, Report 39, 1997) at 92-107 for more details on this proposal. These sections were adopted in ss 8-9 and 31-39 of the proposed Draft Succession (Adjustment) Act in R39.

PART 4: CLAIMS BY CONTRIBUTORS

29 Contribution claims

(1) A **contributor** who provided a **benefit** to a deceased person during that person's lifetime may make a **contribution claim** against the **estate** of the deceased in accordance with this Part if

(a) the deceased expressly **promise**d to make provision for the contributor in return for the **benefit**; or

(b) it is unjust for **the estate** of the deceased to retain the **benefit** without **provision** being made for the **contributor.**

(2) A **contributor** cannot make a **claim** in respect of a **benefit** for which the **contributor** has been fully **remunerate**d.

(3) A **contribution claim** may be made either by the **contributor** or by the **administrator** of the contributor's estate against the **estate** of the person on whom the **benefit** was conferred.

30 Limitation of contribution claims by partners

A person cannot make a **contribution claim** in respect of any **benefit** provided to a **partner** of that person if the **benefit**

(a) has been taken into account in a property division under the Matrimonial Property Act 1976 or under the law applying to the division of property of de facto partners during their joint lifetime; or

(b) has been or could be taken into account in any property division under this Act.

31 Contribution claim based on express promise

(1) A **contributor** who makes a **contribution claim** based on an express **promise** to make **provision** for the **contributor** in return for a **benefit** provided by her or him must satisfy the court that the deceased person expressly promised to make such **provision** to take effect either in the lifetime or after the death of the deceased.

(2) The promise may have been made either before or after the benefit was provided.

Origin: Law Reform (Testamentary Promises) Act 1949 s 3(2)

32 Contribution claim based on express promise to make provision for another person

(1) This section applies in respect of a **benefit** provided by a **contributor** where an express **promise** is made that the recipient of the **benefit** will make **provision** in return for the **benefit** to a person (other than the contributor) designated by name, description or reference to a class, whether or not the person was in existence when the benefit was provided or the promise made.

(2) Where this section applies, a **contribution claim** may be made against the **estate** of the deceased person by a person designated as a promisee under subsection (1) in the same way and to the same extent as if the **promise** had been made to make **provision** for the **contributor**; and the **promise** is enforceable by the designated person accordingly.

(3) This section does not apply to a **promise** which is not intended to create an obligation in respect of the **benefit** enforceable by the promisee.

(4) Schedule 1 applies to a promise to which this section applies.

Origin: Contracts (Privity) Act 1982 s 4

33 Contribution claim based on unjust retention of benefit

(1) A **contributor** who makes a **contribution claim** based on the unjust retention of a **benefit** must satisfy the court that

(a) the deceased person was aware of the provision of the **benefit** or was not sufficiently competent to be aware of the provision of the **benefit**; and

(b) the **benefit** is retained by the **estate**; and

(c) it is just that **provision** be made for the **contributor** in return for the **benefit**.

(2) A **contribution claim** cannot be made if,

(a) when the **benefit** was conferred, the deceased informed the **contributor**, or it was agreed between the deceased and the contributor, or it was otherwise clear from the circumstances, that no **provision** would be made in return for the **benefit**; or

(b) the contributor conferred the benefit gratuitously.

(3) The **court** can decide that it is just that **provision** be made to a **contributor** in return for a **benefit** if

(a) the **contributor** hoped or expected to receive **provision** in return for the **benefit** and the deceased knew of that hope or expectation; or

(b) the **contributor** was under pressure of a moral or social obligation to provide the **benefit**; or

(c) the deceased needed **the benefit** provided by the **contributor** and, if there was any other person who might reasonably have been expected to provide the benefit, that person unreasonably failed to do so; or,

(d) in the special circumstances of the case and for any other reason, it is inequitable that the **estate** should retain the **benefit**.

(4) A **benefit** which has been provided to the deceased is retained by the estate of that deceased if the circumstances of that deceased or the deceased's estate have not so changed since the benefit was provided that it is inequitable to require that provision in return for it be made from the estate.

34 Assessment of contribution award

(1) An **award** made on the basis of an express **promise** must be an award of the value of the promise unless a greater or lesser award is made under subsection (3).

(2) An **award** made in recognition of the unjust retention of **a benefit** must be an award of the value of the **benefit** unless a greater or lesser award is made under subsection (3).

(3) The **court** can make a greater or lesser **award** than that provided for by subsection (1) or (2) after having regard to

(a) an arrangement or understanding between the **contributor** and the deceased person; and

(b) the fairness and reasonableness of the terms of an arrangement or understanding between the **contributor** and the deceased; and

(c) the fairness of the operation of an arrangement or understanding between a contributor and the deceased; and

(d) the length of time that has passed since the **benefit** was provided by the **contributor** and any subsequent change in any circumstance the court considers relevant; and

(e) any other circumstances, including the possible implications of the **award** for third parties, that the court considers relevant.

(4) An **award** made to a **contributor** on a **contribution claim** may be of a sum of money or may direct the transfer to the contributor of specific property.

35 Illegal benefits

(1) A **court** may make an **award** to a **contributor** in respect of a **benefit** that was conferred unlawfully or was conferred under an unlawful agreement or arrangement.

(2) In considering whether to make an **award** to a **contributor** under subsection (1), the **court** must have regard to

(a) the conduct of the parties; and,

(b) in the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for a breach of it; and

(c) such other matters as the court thinks proper;

but the court must not make such an award if it considers that to do so would not be in the public interest.

(3) The court may make an order under subsection (1) notwithstanding that the **contributor** conferred the **benefit** with knowledge of the facts or law giving rise to the illegality, but the court must take such knowledge into account in exercising its discretion under that subsection.

Origin: Illegal Contracts Act 1970 s 7(2), (3)

36 Contractual claims by contributors

(1) If a **contributor** brings a proceeding under the law of contract against the estate of a deceased person in respect of a **benefit** provided by the **contributor** to the deceased in his or her lifetime, the court in which the proceeding is brought may order

(a) that the contractual claim be heard in the same manner as is followed for **contribution claim**s; or

(b) that the **contributor** make a **contribution claim** to be heard with the contractual claim.

(2) When making an order under this section, the **court** may further order that the proceeding be transferred to another court with jurisdiction to hear a proceeding under this Act.

(3) This section does not apply in respect of a contract for the provision of a **benefit** on a strictly commercial basis by a person with no close personal relationship to the deceased.

This Act is not to be construed so as to inhibit or prevent the **administrator** of the **estate** of a deceased from lawfully settling any contractual claim against the estate.

37 Contribution claim codifies restitution claims

(1) This Act codifies the law relating to claims made under the law of restitution (unjust enrichment) by **contributor**s who conferred **benefits** on persons who have subsequently died anticipating that the deceased person would make **provision** for them in return for the benefits.

(2) Subject to subsection (3), no claim other than under this Act can be brought in any court in respect of the unjust enrichment of a deceased as a result of any benefit provided by a contributor, whether by way of *quantum meruit*, *quantum valebat,* beneficial interest under constructive trust, proprietary estoppel or otherwise.

(3) A proceeding based on the law of unjust enrichment may be brought by special leave in any court if that **court** is satisfied that the enrichment occurred in the context of a strictly commercial transaction with a person who had no close personal relationship with the deceased.