

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2022-009-000075
[2023] NZFC 7758**

IN THE MATTER OF	THE ESTATE OF BARBARA ANNETTE ROWE
AND	THE LAW REFORM (TESTAMENTARY PROMISES) ACT, 1949
BETWEEN	JOYCE MARGARET MARTIN Applicant
AND	MARK CRADDOCK AND JOHN BUTCHARD In their capacities as Trustees and Executors of the Estate of Barbara Annette Rowe Respondents
AND	THE CATHOLIC DIOCESE OF CHRISTCHURCH Interested Party

Hearing: 21 – 22 February 2023

Appearances: K McDonald for the applicant
J Taylor and H Weston for the executors
A Fitzgibbon for the interested party

Submission's filed: Applicant's submissions filed 27/2/23
Respondent's submissions filed 2/3/23
Interested party's submissions filed 28/2/23

Judgment: 21 July 2023

RESERVED JUDGMENT OF JUDGE N A WALSH

Introduction

[1] The applicant, (“Joy”) seeks an order under the Law Reform (Testamentary Promises) Act 1949 (“the TPA”) with respect to the Estate of her sister Barbara Annette Rowe (“Barbara”) who died in Christchurch on 13 February 2021.

[2] Joy’s claim is that she had undertaken work and rendered services to Barbara during the last four and a half months of Barbara’s life (from 15 September 2020 until 1 February 2021).

[3] Joy’s case is that Barbara expressly promised to reward Joy for her work and services by leaving her entire estate to Joy.

[4] Barbara in her Will completed on 7 February 2020, left the bulk of her estate to the Catholic Diocese of Christchurch.

[5] Barbara’s Will also provided for the payment of specific bequests of \$15,000 to Mark Francis Craddock and John Francis Butchard, the executors and trustees of the Will, and a further bequest of \$50,000 to a niece, Genevieve Craddock.

[6] Joy is the sole surviving sibling of Barbara. Joy is not a beneficiary under Barbara’s Will.

[7] The Respondents, Mark Craddock, and John Butchard, in their capacity as the Trustees and Executors, adopted a non-neutral stance in the proceeding and filed a Statement of Defence.

[8] The three beneficiaries have been paid their entitlements, pursuant to a Deed of Indemnity, signed by the parties in October 2022. The Court accepts that the executors are not in a position of conflict.

[9] The remaining funds held in Wynn William’s Trust Account is **\$1,811,668.18**.

[10] The Respondents oppose Joy's TPA claim and deny that any express promise was made by Barbara to Joy.

[11] The Respondents further say that any work and services provided by Joy to Barbara were not beyond the norm and needed to be seen in the context of the family relationship between Joy and Barbara.

[12] Also, John Butchard stated in his affidavit that:¹

The Will reflects how Barbara wished to arrange her financial affairs upon death. The motivation behind this arrangement was a devotion to the Catholic Church. It is accepted that Mrs Martin provided assistance to her sister, however, it was open to Barbara to amend her Will, which she chose not to do.

[13] The interested party in these proceedings (being the Catholic Church, as the major beneficiary under Barbara's Will) filed a notice of appearance and took an active role in cross-examining the witnesses and making final submissions.

Summary of Background

[14] Barbara and Joy were born in Rochester, in rural Victoria, Australia. They were brought up in a strong Catholic faith. A Maternal Aunt was a Catholic Sister.

[15] After Barbara finished her secondary education, she lived in a Catholic Hostel in Melbourne where she met Richard Nicholas Rowe. They married on 3 April 1961.

[16] Richard Rowe studied for a PhD at Davis University, California, USA. In 1979 Barbara and Richard, after living overseas in various locations, moved to Christchurch as Richard accepted a position at Lincoln University. In New Zealand Richard promoted the viticulture industry in Canterbury, Central Otago, Hawkes Bay, and Marlborough. Before Richard's retirement he was a Professor of Horticulture at Lincoln University.

[17] Barbara and Richard had 5 children but only one survived to adulthood, namely, Diane Mary Rowe, born 6 January 1962.

¹ Bundle of Documents (BOD) vol 1 page 207 at [4].

[18] On 15 December 2019, Barbara discovered Diane dead in her bed at the home of Barbara and Richard in Christchurch. Barbara and Richard had no grandchildren.

[19] Joy left High School at 17 to commence Nursing Studies. Joy is the mother of five children. Joy's husband, Brian Martin, died in 2002.

[20] From about 2017, Richard's health started to decline as he suffered from diabetes, heart issues and his mobility decreased. Barbara took on the role of Richard's carer. It was Joy's evidence that this was tiring for Barbara because she was in her eighties. Joy believed, by the middle of 2019, that Barbara was exhausted. Furthermore, Barbara was deeply affected by the need to help and support her daughter, Diane, who had a number of issues in her life, including a diagnosis of Bipolar Disorder and excessive alcohol use.

[21] Barbara came to Brisbane on 16 August 2019, to have a holiday with Joy and Richard was placed in respite care. Joy describes Barbara as being "totally exhausted."²

[22] Joy arrived in Christchurch for a period of two days on 20 December 2019 to attend Diane's funeral, and she described Barbara and Richard as being:³

... absolutely distraught. Both looked extremely unwell. Richard and Barbara were suffering from this devastating loss.

[23] On 5 January 2020, Barbara was admitted to Christchurch Hospital with chest pain and was discharged on 9 January 2020. Barbara informed Joy that she had Broken Heart Syndrome – Takotsubo cardiomyopathy.

[24] On 7 January 2020 Barbara and Richard completed their Wills.

[25] Richard's health continued to decline and on 10 March 2020, Richard went into palliative care. He died on 12 March 2020, aged 85.

² Mrs Martin's affidavit dated 14/12/2021 page 7 at [42].

³ Mrs Martin's affidavit at page 11 at [78].

[26] Joy, her daughter Jo-Anne, and her sons, John, and Robert, booked flights to Christchurch to attend Richard's funeral. However, on 14 March 2020 as a result of the Covid-19 pandemic, the New Zealand government declared anyone entering New Zealand was required to hotel-quarantine for 14 days.

[27] Joy's flight to Christchurch was cancelled and therefore she and her family were unable to attend Richard's funeral.

[28] On 20 April 2020, Christchurch was placed into a Level 3 lockdown. During this period, Barbara stayed with Patricia ("Pat") Pilkington, who was a close friend.

[29] On 9 July 2020, Joy was advised that Barbara was admitted to Christchurch Hospital for multiple tests. Joy was told that Barbara had a series of debilitating headaches, increasing hearing loss, and was unsteady on her feet.

[30] On 13 July 2020, Barbara had a meeting with her doctors. She was told that she had Stage 4 Lung Cancer with extensive metastasis in her brain, liver, and bones. Barbara was told that she had months to live. Barbara then telephoned Joy from hospital to tell Joy about her situation.

[31] On 16 July 2020 Barbara was discharged from Christchurch Hospital and returned to Pat's home as there was no family available to care for Barbara due to the Covid-19 pandemic and international border closures.

[32] On 24 July 2020 Joy and her daughter, Jo-Anne, filed an application to the New Zealand Immigration Department, seeking permission to travel to Christchurch on compassionate grounds, in order to look after Barbara following her discharge from hospital. Their first application was declined. A second application was also declined.

[33] In August 2020 Joy says that Pat telephoned and emailed her seeking her help as Pat (aged 79) was finding it a strain looking after Barbara without assistance. Pat denies that this occurred.

[34] On 28 August 2020, Joy's third application for approval to travel to New Zealand was granted, but her daughter, Jo-Anne, was not granted permission to accompany her to Christchurch.

[35] On the day of Joy's departure from Brisbane to New Zealand, her daughter Marika turned 60 and she left behind in Australia, her five children, her ten grandchildren, three great-grandchildren and her friends.

[36] Joy deposed:⁴

I was very nervous about travelling to Christchurch. At the time the news was full of horrible stories about people dying from Covid. The reports emphasised how the elderly were vulnerable. I was 82 years old at the time.

I am not in good health. [Medical details deleted].

I was scared that my children, grandchildren or greatgrandchildren might become sick while I was overseas, and I wouldn't be allowed to come back to help care for them. I was also worried about what would happen to me if I became sick with Covid while I was in New Zealand. I knew that Barbara wouldn't be able to care for me if I became sick.

[37] Joy travelled from Brisbane to Christchurch alone on 1 September 2020. Joy, upon arrival at Christchurch was quarantined in a hotel for 14 days. She claimed that she found the experience "isolating and scary."⁵ Each day Barbara was brought to the outside of the wire fence around the hotel's exercise yard so that they could talk to each other.

[38] On 15 September 2020 Joy was released from quarantine and moved into Barbara's home at [address deleted]. Pat brought Barbara from her home to Barbara's home and Joy became Barbara's primary caregiver.

[39] Joy, before departing Brisbane, was asked by Barbara to lend her some money.

[40] Joy deposed:⁶

This was a very difficult thing for Barbara to ask me. Barbara was a proud person, who was quiet and reserved. Barbara did not complain. She simply

⁴ Mrs Martin's affidavit at [108] – [110].

⁵ At [111].

⁶ At [113].

got on with life. She was embarrassed that she had to do this. I told her that I would bring some money with me and I would give it to her when I arrived.

[41] Joy travelled to New Zealand with NZD\$5,000. She gave Barbara NZD\$3,000. Joy said that there were many overdue accounts that had not been paid by Barbara, and she struggled to get Barbara to pay the overdue accounts.

[42] Joy's case is that the first time Barbara informed her that she would be the primary beneficiary was on 25 September 2020 after they both watched Joy's Granddaughter's wedding in Australia via a video-link.

[43] The second occasion was on 15 December 2020, being the first anniversary of Diane's death.

[44] The third occasion was on 17 December 2020, the day before Joy's youngest grandson's 21st birthday party in Brisbane.

[45] On 1 February 2021, Barbara was admitted to hospital level of care at Russley Village in Christchurch where she died on 13 February 2021.

Issues

[46] The Court was advised that parties counsel agreed that the factual issues requiring determination are:

- (a) Was an express or implied promise made to Joy by Barbara, to reward Joy for her services or work by provision in her Will?
- (b) Did Joy render services to Barbara or perform work for Barbara during Barbara's lifetime?
- (c) What sacrifices, if any, did Joy make in order to provide the services or work for Barbara?
- (d) Was there a nexus between the services and the promise?

- (e) Did Barbara fail to make the promised testamentary provision or otherwise remunerate Joy?

[47] Counsel further submitted that the legal issues that the Court must determine are:

- (f) Did the services provided by Joy exceed what could be expected by a family member in the circumstances?
- (g) Relief as to be granted, and the amount of any such reward?

THE LAW

The Law Reform (Testamentary Promises) Act 1949 and its requirements

The Legislative Framework

[48] The provision on which Joy relies in making her claim is section 3 of the TPA:⁷

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.

⁷ The Law Reform (Testamentary Promises) Act 1949, section 3.

- (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.

...

[49] Section 2 of TPA defines a “promise” as:

...any statement or representation of fact or intention.

[50] Dr Lindsay Breach, opined:⁸

To establish a claim under the TPA, the onus of proof is on the claimant to prove the requirements laid down in the Act. Corroboration of the promise, although desirable, is not essential but the claim will be examined with care and formerly even with suspicion. It has been said, for example:⁹

Also one requires to approach with great care, and even suspicion, everything the plaintiff says in support of the amount and the value of the services which are said to be rendered, and the inadequacy of the remuneration. Now possibly greater caution and care and suspicion are required at this stage of the enquiry than earlier, for this reason, that it is no uncommon observation that a person who sense of honesty and decency is such that he or she would not face stepping up into the witness box and inventing a promise or promises which were never made at all, she would not face perjury as brazenly as that, or not be prevented by conscious from exaggerating where self-interests so prompts.

However, in *Re Archer*¹⁰, the Court referred to *Patterson*¹¹ and reiterated:

... the learned author states:

Relaxation of the *cautious* approach. It is clear that as experience in administering the Law Reform (Testamentary Promises) Act 1949, has grown the Courts have felt able to reduce, at least in some degree, the emphasis on a need for suspicion and for corroboration while continuing to scrutinize a claimants evidence carefully.

And it now seems the approach today as taken by Cooke J in *Bearman v Dunn*:¹²

⁸ Nevill’s Law of Trusts, Wills and Administration, 14th Ed, 19.3.5.

⁹ *McAllister v Public Trustee* [1947] NZLR 334 at 338 per Smith J.

¹⁰ *Re Archer* [1990] 3 NZLR 737.

¹¹ *W Patterson and S Clapham Estate Claim and Testamentary cases* (Paper presented to the Auckland District Law Society, 27 August 2002) at [17.16].

¹² *Bearman v Dunn* [1974] 2 NZLR 405 at page 410.

At least since the Jones case there may have been rather less emphasis on the need for caution and scrutinizing claims against the estate of the deceased person and rather more emphasis on merits. But caution is still needed.

[51] Oral statements attributed to the deceased are therefore treated with great caution by the Courts.¹³ Former Wills, evidencing the Will-maker's intention in respect of prior promises are not privileged from production. Frequently their examination proves a valuable aid in ascertaining where the truth lies.¹⁴

[52] Katz J in the High Court in *PH v GH* stated:¹⁵

A degree of caution has to be exercised in relation to Testamentary Promises claims, as they are easy to assert but difficult to disprove. (Given that the alleged promisor is deceased).

The Principles

[53] For Barbara to mount a successful claim under s 3 of the TPA the four following questions must be answered in the affirmative:

- (a) Has there been an expressed or implied promise by Barbara to reward Joy?
- (b) Has Joy rendered services to, or performed work for, Barbara in Barbara's lifetime?
- (c) Is there a nexus between services or work and the promise?
- (d) Has Barbara failed to make the promised provision or otherwise remunerate Joy?

[54] In *Byrne v Bishop* the Court of Appeal observed:¹⁶

The term "promise" under the Act covers declarations which might not fall within a dictionary definition of that word and certainly goes beyond any contractual context (*Jones v Public Trustee* [1962] NZLR 363). It includes a

¹³ *Hawkins v Public Trustees* [1960] NZLR 305.

¹⁴ *Re Moore* (Dec'd) [1965] NZLR 895.

¹⁵ *PH v GH* [2013] NZHC 443.

¹⁶ *Byrne v Bishop* [2001] 3 NZLR 780 (CA) at [8].

statement or representation of present fact (“I have done X for you in my will”) or intention (“I will do X for you in my will”) made either before, during or after the services or work occur (s3(2)).

[55] Such a promise can be expressly made, or can be implicit, a promisor need not do a lot to make a promise. In *Gibson v Gibson* the mere nodding of the head was enough.¹⁷ It has also been held that promises to someone other than a beneficiary can be sufficient.¹⁸

[56] However there has been a tendency of the Court to treat claims of promises with at least some degree of scepticism, although the position has relaxed, with corroboration of claims preferred, although not required.

[57] Context is also relevant in determining whether a promise has been made.

[58] Finally, adverse credibility findings in such cases do not preclude a finding that a promise has been made, where this is supported by other evidence.

[59] What constitutes ‘work’ and ‘services’ has been considered by various authorities but it is currently clear that the terms are to be given liberal interpretations, and as the Court of Appeal stated in *Byrne v Bishop*:¹⁹

Services can include not only things done for the deceased but also companionship, affection and emotional support exceeding what is normally to be expected of a relative, a member of the same household, a neighbour or a friend.

[60] Neither of the terms ‘work’ or ‘services’ are defined in the TPA. The term ‘work’ generally is to have its ordinary everyday meaning. The term ‘services’ has been the subject of some conjecture.

[61] However, for the present case, it was submitted that the term has a broad meaning and that ‘something extra’ is required outside the bounds of normality within the relationship of the same genus.

¹⁷ *Gibson v Gibson* HC Dunedin CP 9/90, 15/4/1992.

¹⁸ *Byrne v Bishop* at [9].

¹⁹ *Byrne v Bishop* at [6].

[62] It is also a requirement that a nexus exists between any promise and any work or services performed. The essential requirement is that the promise is made to reward services rendered or work performed and are simply not gratuitous. Such a nexus can either be expressed or, more commonly, inferred from the circumstances.

[63] As to relief, Sir Robin Cooke's conclusions in *Re Welch* remain relevant.²⁰

So it is plain, considering s 3(1) as a whole, that whenever a claim to relief is made out under it the criterion as to the relief to be granted is reasonableness. That is always the result at which the Court is to aim, no matter whether the award is of money or specific property. If the deceased promised a certain sum or a certain property, that is a relevant consideration but not necessarily decisive.

[64] In terms of quantifying relief in many situations the nature of the work or services will not be readily amenable to rigid arithmetical calculations and must be assessed in the round. However, it is important that any award do no more than compensate for those services rendered or work performed. The award must be fair recompense.²¹

Was an expressed or implied promise made to Joy by Barbara to reward Joy for her services or work?

[65] This is a fundamental issue in dispute in this proceeding.

[66] The Executors' position is that they consider it very unlikely if any promise was made. The Executors' position is that there is an absence of corroboration to support Joy's claim and all circumstantial evidence points away from Barbara making the promise to Joy.

²⁰ *Re Welch* [1993] NZLR 1.

²¹ *Byrne v Bishop* at [8].

[67] Counsel for the Executors submitted that:

- (a) No one was ever told of the promise, either by Barbara or, indeed it appears, by Joy;
- (b) Barbara had strong reasons for arranging her affairs as she did, and would not have lightly departed from those;
- (c) Barbara knew it was likely that her sister would provide care to her as she aged, even before she signed her February 2020 Will, and she did not elect to include provision for Joy in that Will; and
- (d) Barbara was astute and organised and would and could have updated her Will if she had wished to.

[68] Furthermore, the Executors' position was that the services provided by Joy were only what Joy would have done for her sister. It was submitted that her services were not over and above what Joy would have done even if the promise was not made.

Credibility

[69] Therefore, the Court must make findings as to Joy's credibility bearing in mind the need for caution.

[70] On some matters, the Court is not always able to determine which party is more credible than the other and if that occurs I readily say so. On this occasion I have reached a very distinct view as to Joy's credibility.

[71] Heath J in *L v W (No.2)* said:²²

[38] To the extent that the learned Family Court Judge has made findings of fact based on whether he believes, or give greater weight to, particular evidence I am not entitled to interfere unless it is clear that the Judge was wrong. In deciding whether to intervene I must have proper regard to the advantage of seeing and hearing witnesses which the Judge enjoyed.

²² *L v W (No. 2)* [2004] NZFLR 36 at [38].

[72] In *Kelly v Police* I said:²³

[21] Anyone who has had an involvement with the trial process recognises that findings of credibility turn on the demeanour of witnesses and the impressions made by them as the actual words they utter. Impressions of the evidence are gathered by a Judge during the course of trial by a process akin to osmosis. The written words contained in the formal Notes of Evidence represent a body into which the atmosphere and human dynamics of the trial process breathe life. This is why findings of credibility, even where extensive Notes of Evidence are available, will rarely be overturned on appeal ...

[22] To reinforce my comments in para [21] above I refer to the observations of Lord Wright in *Powell v Streatham Nursing Home* at 267 where his lordship said:

...where the evidence is conflicting and the issue is one of fact depending evidence, any judge who has had experience of trying cases with witnesses cannot fail to realise the truth of what Lord Sumner says: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse.

Judges who sit on appeal simply do not enjoy the advantages possessed by the trial judge who sees and hears the witnesses. In those circumstances, it is entirely appropriate that appellate judges should defer to a trial judge's findings of credibility.

[73] The Court finds unequivocally that Joy was a credible, convincing, and straightforward witness. Contrary to Mr Taylor's closing submissions,²⁴ the Court finds that Joy did not take the opportunity, particularly under cross-examination, to embellish or overstate her endeavours in providing care for Barbara during her time in Christchurch.

[74] The Court does not accept Mr Taylor's closing submission that, in effect Joy overstated the intensity and level of nursing care she provided for her sister. In contrast, Ms Fitzgibbon, in her closing submissions, described Joy's services, as "intense and onerous".²⁵

²³ *Kelly v Police* HC Whangarei, AP 41/01, 23/8/2022 at [21] & [22].

²⁴ Mr Taylor's submissions dated 2/3/23 at [31].

²⁵ Ms Fitzgibbon's submissions dated 28/2/23 at [92].

[75] Mr Taylor submitted that Barbara’s medical records from Russley Village show that not only was Mrs Rowe’s pain perhaps not as severe as contended by counsel for Mrs Martin at the time of her admission but also the notes also contain an assessment of her capabilities (both mental and physical) as of 1 February 2021. In that assessment, Mrs Rowe is stated to be competent in understanding and planning her care, she only requires ‘some assistance’ with dressing, and no assistance with eating. It is noted that whilst Barbara used a mobility aid she was able to get out of her bed.

[76] However, Madeline Maglanigt, the Registered Nurse at Russley Village, who completed the Initial Assessment/Care Plan for Barbara on the date of admission on 1/2/2021 noted the following:²⁶

<i>Sensory Pain</i>	
<i>Pain current</i>	Yes
Pain	Chronic <i>(Emphasis added)</i>
Location of Pain	Headache
<i>Able to express discomfort / Pain effectively</i>	Yes
<i>Prescribed regular analgesia</i>	Yes

[77] Madeline Maglanigt in her Pain Assessment circled 1-2 for “the maximum and the minimum intensity of pain experienced in the last 24 hours.” The faces on the form range from “No Pain, Mild, Moderate, Severe, Very Severe to Overwhelming”.

[78] Madeline Maglanigt further noted in her report:

<i>Pain as experienced by the resident on 1/2/2021</i>	
<i>When did the pain start?</i>	Chronic
<i>What time of day does the pain generally occur?</i>	Varies
<i>Is the pain there all the time or does it come and go?</i>	On/off intermittent
<i>How long does the pain generally last?</i>	Varies
<i>Does the pain radiate and move / travel?</i>	Yes

²⁶ Exhibit C E & affidavit of CMU Lee dated 15/2/23 page 2 of 3. f 3.

<i>What makes the pain decrease?</i>	Pain relief
<i>What makes the pain worse?</i>	Movement
<i>Does the pain you experience alter your ability:</i>	
<i>To look after yourself?</i>	Yes
<i>To sleep or rest?</i>	Yes
<i>To eat or drink?</i>	Yes
<i>To participate in physical activity?</i>	Yes
<i>To participate in social activities?</i>	Yes

[79] Madeline Maglanigt in her notes of 8 February 2021 recorded:²⁷

Pain Management

<i>Pain score</i>	6
<i>Pain is described as being</i>	Chronic
<i>Medication Alerts</i>	Chronic Pain Prescribed regular analgesia Prescribed controlled drugs for pain
<i>Location of pain if experienced is</i>	Headache Hip/back pain
<i>Pain Management Interventions</i>	Staff to monitor pain and signs of distress (restless, grabbing her head and knees) Staff to monitor syringe pump and break through pain relief as needed Staff to reposition Barbara on bed to relieve pressure and pain on hips

[80] Madeline Maglanigt, in her very first admission notes on 1 February 2021, records “on chronic pain, mostly headache and prescribed with regular pain medications provided by her sister, Joy. GP Dr Mark Cohen followed up on the documents.”²⁸

[81] Therefore, after assessing all of Madeline Maglanigt’s records, the Court rejects the submissions that the records show Barbara’s pain was “not as severe as contended” by Joy.

²⁷ Exhibit C page 3 of 6.

²⁸ Exhibit C page 1 of 14.

[82] The unchallenged evidence is that Barbara’s pain was described by the health professionals as chronic on 1 February 2021.

[83] Seven months earlier, on 9 July 2020, multiple tests revealed that Barbara had a series of debilitating headaches, increasing hearing loss, and was unsteady on her feet.

[84] It is also material that Barbara’s pain score on 8 February 2021 was “6” even though she was prescribed analgesia pain relief medication at the date of assessment. In fact, four days before Barbara was admitted to Russley Village, an “End of Life” assessment was undertaken by Kim Beattie, a Needs Assessor at Nurse Maude which disclosed the pain management medication was “BD Oxycodone and PRN Oxynorm and Paracetamol/ TDS.”²⁹

[85] There is conflicting evidence of two Nurses, viz, Madeline Maglanigt and Marichu Quipaes with respect to the submission that Barbara required “no assistance with eating.” At one stage of Madeline Maglanigt’s assessment the issue of Barbara’s nutrition is noted:³⁰

<i>Level or type of assistance</i>	Independent
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And then further on:³¹

<i>Is the resident unable to eat without assistance?</i>	No
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[86] However by 8 February 2021, and only 7 days after being admitted to Russley Village, Madeline Maglanigt goes into much more detail and records:³²

Nutrition

<i>Level of Independence</i>	Some assistance with eating and drinking
<i>Special diet</i>	Nil currently
<i>Dietary alerts</i>	Swallowing difficulties Prone to hydration

²⁹ Exhibit C page 4 of 11.

³⁰ Exhibit C page 2 of 3.

³¹ Exhibit C page 2 of 2.

³² Exhibit C page 2 of 6 and 3 of 6.

	History of recent weight loss
<i>Fluids</i>	Unsteady hands Risk of spilling hot fluids
<i>Dietary modifications</i>	Assistance with cutting up meals Thickened fluids, mildly thickened fluids
<i>Upper teeth</i>	Partial plate
<i>Lower teeth</i>	Partial plate
<i>Nutrition and Hydration interventions</i>	Staff to assist Barbara with food and fluid intake. To encourage Barbara to have some intake. (Emphasis added)

[87] Marichu Quipaes, a Registered Nurse at Russley Village on 3 February 2021 (just two days after Barbara's admission) noted:³³

Mobility

<i>Level of independence</i>	One to assist (Emphasis added)
<i>Potential for injury</i>	Requires set-up with aids Restricted range of movement Lacks insight into safety Unsteady fait History of falls in past 90 days Recent change in mobility
<i>Aids used</i>	Walking stick Low walking frame
<i>Mobility interventions</i>	Staff to supervise with mobility to ensure safety as high risk for fall (Emphasis added) Sensor mat in place Encouraged to ring the bell for assistance Monitor for change in mobility, complaints of pain while mobilizing.

³³ Exhibit C page 1 of 6

[88] Marichu Quipanes also noted:³⁴

Continence

<i>Level of independence</i>	Some assistance with pad placement
<i>Urinary Incontinence</i>	Incontinent
<i>Bowel Incontinence</i>	Prone to constipation Prone to loose bowels
<i>Continence Interventions</i>	Needs assistance for toileting (<i>Emphasis added</i>) Prone for constipation and bowel obstruction Staff to check pads regularly as prone for skin breakdown

[89] Marichu Quipaes further noted:³⁵

Self-Care, ADLS and Skin Care

<i>Level of independence</i>	Some assistance with hygiene and grooming
<i>Types / level of assistance</i>	Assistance with fastenings Assistance with clothing choices
<i>Skin care / condition</i>	Fragile skin, prone to skin breakdown Prone to bruising
<i>Hygiene / shower support</i>	Needs one in attendance while showering for safety
<i>Self-cares, ADLS and Skin Care Interventions</i>	Staff to assist Barbara with regular turns, every 3-4 hours to prevent pressure injuries. Check correct setting of air mattress and make sure Barbara is using the roho cushion when sitting on her chair Staff to apply barrier creams on bony prominent area Staff to report any bruising to RN for protective dressing

³⁴ Exhibit C page 1 of 6

³⁵ Exhibit C page 2 of 6.

[90] The Court notes that within 24 hours of Barbara’s admission to Russley village the Progress Notes record.³⁶

2/2/21 04:49:27

Staff reported faecal incontinence all over her bed tonight

2/2/21 16:37:18

Faecally incontinence this morning. Regular pain relief given as per blister pack

[91] In summary, the Court rejects the submission on behalf of the Executors that Joy:³⁷

...painted a picture which suggests that Mrs Rowe was perhaps less capable when she was being cared for at her home by Mrs Martin than she was at Russley village in the two weeks prior to her death.

[92] The Court’s reasons include the following:

- (a) Madeline Maglanigt on Barbara’s first day of admission to Russley Village on 1 February 2021 described Barbara as “On chronic, pain mostly headache and prescribed with regular pain relief. Medications provided by sister Joy;”
- (b) Madeline Maglanigt’s pain assessment of Barbara on 1 February 2021 put her in the range of 1 – 2 (i.e. “no pain – mild”) and must be considered in the context that this was a mere snapshot of Barbara’s health over the “last 24 hours”, her pain was described as “on/off – intermittent” and Barbara was taking regular pain relief medication;
- (c) Four days before Barbara’s admission, her pain management medications comprised BD Oxycodone, PRN Oxynorm and Paracetamol administered to Barbara by Joy.

³⁶ Exhibit C page 1 of 14.

³⁷ Mr Taylor submissions dated 2/3/23 at [26].

- (d) Pat's evidence is that although Barbara suffered from terrible headaches, she did not have to provide nursing cares such as bathing or dressing before Barbara went into Joy's care. This may well have been the case for Pat, up until 15 September 2020, when Pat brought Barbara from her home to Barbara's home after Joy was released from quarantine. However, the Court finds Joy, as a trained nurse provided a more skilful and knowledgeable level of care for Barbara at a time when Barbara's health was steadily declining in a situation where Joy knew that Barbara's prognosis was terminal.
- (e) The Court does not accept Pat's evidence that she did not request Joy's help in caring for Barbara. The Court prefers Joy's evidence that Pat was no longer in a position where she could meet Barbara's needs and, "This is no criticism of Pat, she is of advanced years as am I."³⁸

Joy's position on this point was not directly cross-examined. The closest cross-examination came to this issue was during the following exchange between Joy and Ms Fitzgibbon:³⁹

Q: Okay, again I'm not trying to trip you up, where I'm asking for information on is when they asked you, if that's what happened to come over to New Zealand because Patricia could no longer sort of assist Barbara with her cares, do you remember how that came about, who asked you?

A: Patricia rang me to say how long was I going, and I was: "Well how long does the government let me in? It's your government, not me."

- (f) Barbara's medical history records⁴⁰ Joy's involvement with Ilam Medical Centre on 12 and 13 October 2020, about getting a prescription to address Barbara's itchy rash over her trunk, legs and arms and a "plan if anything was to happen to Barbara during the night." By 22 January 2021 the medical records note "wt reduced 35kg, pain well controlled, plan visit Monday, ? carer stress."⁴¹

³⁸ BOD page 54 at [205].

³⁹ Notes of Evidence (NOE) page 28 lines 25 – 30.

⁴⁰ BOD Exhibit B page 60 at [70 – 72].

⁴¹ BOD page 70.

[93] The Court is further fortified in rejecting the Respondents' submission after an objective assessment of Joy's 31 page diary that she kept between 1 September 2020 until 12 February 2021. Joy's diary entries from 11 September 2020 refer to "Barbara has a bad head again." Three days before Joy left quarantine on 13 September 2020 she noted, "Barbara had a bad morning but Pat brought her over in the afternoon."

[94] On 19 September 2020, Joy noted "Barb had breakfast but suffering with a very bad headache" and, on 20 September "her head was so severe she spent the morning in bed. No better but she had a very light lunch and back to bed. Barbara up about 4pm for Pat to give us Communion. She still had a bad head."

[95] On 23 September Joy recorded "Barbara suffering today. I cancelled our luncheon date. Barbara is reluctant to take extra pain relief. I cannot get a reason so I'll ask the Specialist next Monday."

[96] On 23 September Joy noted "Barbara another bad head and back to bed... I need to get a script from the doctor for more pain relief...?"

[97] Joy was not challenged during cross-examination, about the accuracy or integrity of her diary entries concerning Barbara's state of health.

[98] The Court finds that Joy did not overstate the intensity and level of care she provided for Barbara. The Court further finds that Barbara's intermittent head pain was a continuing and deteriorating health issue from the time Joy took over as Barbara's caregiver.

[99] The indisputable fact is that two months before Joy assumed the role of being Barbara's caregiver the doctors, on 13 July 2020, advised Barbara that she had Stage 4 Lung Cancer with extensive metastasis in her brain, liver, and bones.

[100] The Court rejects the submission that Joy, in effect, was over-effusive in describing the level of Barbara's pain and the care she provided.

Privacy

[101] Mr Taylor submitted:⁴²

The diary notes record a number of discussions, events, and happenings but do not mention the alleged promises made by Mrs Rowe. For Mrs Martin to be told she would be left everything Mrs Rowe owned and not record that in her diary or tell any other family member must tell against a finding that any promise was made.

[102] However, I accept Joy's spontaneous explanation, under cross-examination by Mr Taylor for the Executors, that she chose not to tell anyone else about Barbara's promise as; **“we were brought up that you don't touch, you don't discuss what's private is private.”**⁴³ (Emphasis added).

[103] I find that the theme of privacy was consistent throughout Joy's evidence.

[104] There was the following exchange between Joy and Mr Taylor:⁴⁴

Q: All right, thank you. The next topic I just want to turn to Joy is the promises that you say were made by Barbara on various occasions, so I think on one of those occasions you've said the words and then you've said it was repeated several times, but the words you've used is: “It's all yours Joy, I leave everything to you to do what you want,” that is right?

A: She was saying that many times to me.

Q: Mmm. You say in one conversation on 17 December that you had a long conversation, don't you?

A: That was the day after Diane's anniversary.

Q: Yeah, the anniversary of Diane's death, wasn't it?

A: Mmm, first death, her death, the first.

Q: And you asked Barbara then what she wanted to do with the house and the estate, didn't you?

A: I did.

Q: And then that's when you say she said: “It's all yours, Joy.”

A: She did, many times.

⁴² Mr Taylor's submissions dated 2/3/23 at page 20.

⁴³ NOE page 13 lines 19-20.

⁴⁴ NOE page 12 line 15 – page 14 line 25.

- Q: And then on another occasion you mention 25 September, a couple of weeks after you've come out of quarantine, you also said that she would be the primary beneficiary or you would be sorry, the primary beneficiary in her Will, that's right, isn't it?
- A: That was the date of my granddaughter's wedding that I missed.
- Q: Mmm, yes, and I saw a reference to that in the diary. But you, so you say on that day that she said you would be the primary beneficiary in her Will?
- A: She did.
- Q: But haven't you already told us that Barbara, that you asked Barbara what she wanted to do with her Will two months later and – or three months later in December?
- A: I was checking, I was checking what she wanted me to do with her belongings. If I ever thought this diary that I wrote for my children would ever be sitting up here in a court, it was just to tell my children how I was dealing with a very sick, dying person as to have it put back in my face all the time.
- Q: I'll come to the rest of the diary later, but in terms of others you've told about – I mean I think you accept, don't you, that **you haven't told anyone else contemporaneously or at the same time that Barbara had said these things?** (Emphasis added)
- A: Do you tell your private things to friends?
- Q: Again, I'm just –
- A: No, but you're asking me no you don't. **We were brought up that you don't touch, you don't discuss what's private is private.** (Emphasis added)
- Q: So you didn't even discuss it with your family?
- A: They were over in – no, I didn't.
- Q: But you were in regular contact with your family?
- A: Not about business, not about – it was all about care I was in touch with and I've got nurses at home as well. I'm asking them the best way to cope.
- Q: And you did ask Mr Craddock if she had a Will?
- A: I just checked one day. He said yes, he was the, what's, executor of it, so.
- Q: And so you did know that Mr Craddock was the executor of the Will, and –
- A: No, he told me.

- Q: So after he told you you were aware of that?
- A: Yes and I – that was the end of it. Barbara kept telling me I was the sole beneficiary, so, who else was I to ask?
- Q: She told you that you were the primary beneficiary, you say?
- A: Mmm?
- Q: You say that you were the primary beneficiary.
- A: Yes, sorry, yes.
- Q: So you did know that there were other, that she had made specific other guests?
- A: I did know 'cos Barbara had already told me she was leaving – and she was worried about not leaving enough to Genevieve.
- Q: And so you didn't confirm with Mr Craddock what the Will said at that point?
- A: No. It was no business of his.
- Q: Well he's the executor of the Will, he knows what it says.
- A: Yes, but that's the end. That's the end results.
- Q: And are you aware that the role – I just want to go to those, what my learned friend Mr McDonald was discussing with you before about dealing with some family chattels. You're aware that the role of the executor in the Will is to gather in the estate, are you aware of that, and deal with the assets?
- A: Well he was there when everything was going.
- Q: And you said you did discuss it with him.
- A: I didn't.
- Q: You didn't discuss it with Mr Craddock?
- A: No.

[105] And further:⁴⁵

- Q: And so you said that Barbara said to you you'd be the primary beneficiary and you say that was because of the support you gave her in coming to New Zealand and –
- A: She also talked about coming back to live with me.

⁴⁵ NOE page 15 line 20 – page 16 line 25.

- Q: Yes, I'm just trying to ask whether – you say that Barbara said you would be the primary beneficiary because of the support that you'd given her in coming to New Zealand.
- A: It wasn't just because of the support. She was the end of a line.
- Q: Right. So you say that it was because you – she didn't have any children?
- A: No.
- Q: And so did she say that she was giving it to you because you were the last family member?
- A: She didn't describe. She just was very, very grateful. **I gave up an awful lot to come over to Christchurch and at my age, it was very, very hard. I did request a daughter to come with me but was refused, and after having [medical details deleted] the year before it was very, very hard work.** (Emphasis added)
- Q: I can appreciate that, I'm not questioning that, I am just saying that am I right in saying, tell me if I'm not that you say Barbara told you you'd be the primary beneficiary because of the support in coming to New Zealand that you gave her?
- A: She didn't say because I came to New Zealand.
- Q: Right, so she just made a statement that she would –
- A: Yes.
- Q: Yes.
- A: You're flowering it.
- Q: Well I'm wanting to drill down on –
- A: Okay, that's it, sorry.
- Q: – what she said and as I said, tell me if I'm wrong in any of this. You said she was grateful though, expressed gratitude you say –
- A: Extremely grateful.
- Q: – for you coming over and so you thought there was some link between that gratefulness and the assistance you were providing and her promise?
- A: No. There was just love and she was just doing what she thought best.
- Q: Right, so it wasn't related to you coming over at all?
- A: She was extremely grateful she had me there.
- Q: You say the promise wasn't related to that? And when I say the promise –

A: I don't know what was in her mind, I don't know what was in her mind.

[106] The Court accepts Joy's evidence that:⁴⁶

Barbara was a very private person, and we always cherished the fact that we could act as one another's confidant.

[107] The Court is fortified in making this conclusion with the unchallenged, independent evidence of Madeline Maglanigt, the Registered Nurse who completed an Initial Care Plan for Barbara at Russley Village on 1 February 2021. She noted:⁴⁷

Psycho-social

Is a very private person. Prefers one-on-one rather than group interactions.
(Emphasis added)

[108] In conclusion, I find the fact that Joy did not record Barbara's promises in her diary does not indicate that no qualifying promise was made. Furthermore, I place no weight on the fact that when Joy asked Mr Craddock whether Barbara had a Will, she did not mention Barbara's promise.

[109] The Court finds that "privacy", particularly over financial matters was a sacrosanct value held dear by the two sisters and in their dealings with others.

Patricia Anne Pilkington

[110] Patricia Anne Pilkington ("Pat") an 81 year old retired Primary School Teacher and widow, gave evidence of her very close friendship with Barbara and Richard, and their mutual involvement in the St Mathew's Catholic Parish.

[111] Pat agreed to Barbara living with her in Pat's Merivale home after Richard's death on 12 March 2020. They were together for about two months including during the period of New Zealand's Covid Level 4 Lockdown.

[112] Barbara returned to her own house after lockdown ended in May 2020. However, Barbara self-admitted to Christchurch Hospital three times over the next

⁴⁶ BOD page 31 at [21].

⁴⁷ Exhibit C page 4 of 6.

month. A scan revealed that Barbara had terminal Cancer around the base of her skull and the top of her spine.

[113] On 16 July 2020, Pat (after visiting Barbara in hospital) found to her dismay that Barbara was being discharged. Pat again took Barbara into her home for a further two months until September 2020 when Joy left quarantine and took over Barbara's care in Barbara's home in [address deleted].

[114] Pat deposed:⁴⁸

A no point during my friendship with Barbara, including the extensive time we spent together in 2020 while she was staying at my house, did she mention that she intended to leave any of her estate to Joy. (Emphasis added)

The only thing Barbara mentioned in relation to her Will was that she would like to give some money to her favourite niece Madonna. She mentioned this to me three times. The first occasion in which she mentioned this was while she was staying with me during the lockdown between March - May 2020. The next two occasions were after she had been discharged from hospital in July 2020 and was again staying with me. Barbara made a comment to me that she knew she wasn't supposed to have a favourite niece, but she did, and that was Madonna. She did not give any indication that she wanted to provide for any other family member.

[115] There was the following exchange between Pat and Joy's counsel, Mr McDonald:⁴⁹

A: Money wasn't of any interest at all really. When she really started getting serious about her money was at the end when Mark and Marion's daughter was doing such a terrific lot and she said: "I'm going to leave Genevieve some money." Because I mean, Genevieve put many, many hours into selling all the stuff in Di's house on Trade Me.

Q: So she didn't really talk about Wills and things either to you, did she?

A: No, see the little bits of chitchat, I mean, two bedrooms there in my house at the end of the house. Only one big bathroom here and another bedroom, smaller bedroom there, and as we sort of flitted backwards and forwards with cleaning teeth and so on, three times she said, **three times she said: "I'm not going to leave Joy any money. She's got plenty. I'm going to leave", twice, she said, the beginning, first and last time, she said, "I am going to leave some to Madonna. She's my favourite niece. You're not supposed to**

⁴⁸ BOD page 3 at [17] – [18].

⁴⁹ NOE page 96 lines 29 – page 98 line 25.

have a favourite but I've got a favourite niece", and she'd said that one other time to me to. So I think – (Emphasis added)

- Q: Just – right. Are you saying she said she was not going to leave anything to Joy?
- A: She said several – she'd said several times before that if we were talking about my going on a cruise ship or something like that. She would say: "Oh, Joy goes on that one, she's got lots of money." And it was never with any envy. I mean, they had a wonderful relationship those two sisters. She did say three times, plotting backwards and forwards between the bathroom and bedrooms that she was, yeah. She was going to leave some to Madonna twice, she said.
- Q: Yes. This was before she went to live with Joy, of course, she was at Joy's house.
- A: That's, yes, it was, yeah, Joy came to live with her in Barbara's house, yes.
- Q: I'm sorry, yes. So she left your house, back to her house, and Joy looked after her.
- A: Yeah, when Joy could get over from Australia, she picked her up from my house so that she could look after Barb at home.
- Q: So these conversations were before she went home in Joy's –
- A: Yes, yeah. We've –
- Q: Pat, just do you mind looking at paragraph 17?
- A: Yes.
- Q: And just have a read of that to yourself.
- A: Well that's right.
- Q: Yes. So I think, am I correct in saying, at no time did she say she was going to leave things to Joy, rather than saying what you just said before that she wasn't going to leave anything to her?
- A: Yeah, she said: "I won't leave any money to Joy, she's got plenty of money", or "she's got lots of money." She said different things.
- Q: But have a look at number 17, because –
- A: Well, that says the same thing to me, that's she's not going to leave any of her estate to Joy.
- Q: Well what you're saying in 17 is that she didn't mention to you that she was going to leave something to Joy. Do you see the difference?
- A: I don't understand what you're saying. All I'm telling you is that's what she said to me. If that's not the same as those words are then I don't get it.

- Q: What you're saying in the written affidavit is that she didn't say anything about giving Joy something.
- A: I can't hear you now.
- Q: Sorry. In paragraph 17.
- A: Mmm.
- Q: It's saying at no time did she mention leaving something to Joy. You've now –
- A: Well isn't that what I'm saying? I don't get the difference.
- Q: Okay. So what I'm suggesting is that it simply wasn't discussed.
- A: **She said three times as we flitted between bedrooms and bathroom: "I'm not going to leave any money to Joy. She's got plenty of money." So that's all I can tell you.** (Emphasis added)

[116] Pat, under cross-examination by Ms Fitzgibbon, counsel for the interested party, was asked:⁵⁰

- Q: I know there's been a discussion with my friend and I don't want to get back into that, around the meaning of what you may have instructed what's in your affidavit and what your evidence is today.
- A: See that to me isn't a discussion, just a flippant sort of comment that we didn't – weren't having any discussion. Barbara was throwing a thought at me that when she'd been cleaning her teeth or in the shower she just fired it at me, so it wasn't an in-depth, no conversation after it, so it's not a discussion.

[117] As Pat strongly supports the legitimacy of Barbara's Will, the Court questions why Pat did not disclose this significant conversation with Barbara in her affidavit completed almost 12 months ago on 23 March 2022.

[118] Pat was adamant in her oral evidence that, on three occasions while she and Barbara were living together and were "flitting" between their bedrooms and the bathroom, there were "little bits of chit chat" and Barbara said, "I'm not going to leave Joy any money as she has got 'plenty of money'."

⁵⁰ NOE page 105 lines 5-12.

[119] Pat, in cross-examination by Mr McDonald, was asked:⁵¹

Q: So you didn't mention in your written one about Joy having plenty of money either. You – it's not there.

A: No, that didn't get written down obviously. I mean, I probably thought that meant the same thing.

[120] Unfortunately, it was the Court's indelible impression that Pat, an intelligent and astute witness, took the opportunity to enlarge or embellish her evidence in the witness box.

[121] Pat had the opportunity at paragraph [17] of her affidavit dated 23 March 2022 to disclose Barbara's conversation with her. The Court's clear impression of paragraph [17] is that Pat is representing that Barbara never had any discussion with Pat about leaving any of her estate to Joy. The other important point is that Pat's discussions with Barbara occurred before Joy assumed the caregiving role.

[122] The Court finds it inexplicable that such an important piece of evidence about Barbara's conversation with Pat was omitted from Pat's affidavit, particularly when Pat was at pains to record Barbara's expressed wishes concerning Madonna.

[123] Therefore, the Court regards Pat's evidence about the three alleged conversations with Barbara with great caution and places no weight on this aspect of Pat's evidence.

[124] Pat, in her affidavit actually addressed the matter of Barbara's gratitude towards her for caring for her between July – September 2020 and deposed:⁵²

Barbara regularly expressed gratitude towards me for having her to live with me during this period. Barbara purchased a nice woollen jersey from Akaroa for my birthday to say thank you. She also regularly contributed money towards food. Other than this contribution **Barbara and I did not discuss money.** (Emphasis added)

⁵¹ NOE page 98 lines 30-34.

⁵² BOD page 204 at [13].

[125] The Court finds Pat’s evidence that she and Barbara “did not discuss money” to be inconsistent with her subsequent oral evidence that Barbara told her “I’m not going to leave Joy any money.”

John Francis Butchard

[126] John Francis Butchard (“John”) in his role as an Executor and Trustee, deposed that the Executors defended Joy’s application on the basis that Barbara’s Will reflected how she wished to arrange her financial affairs upon death.

[127] John has a BComm degree in Accountancy and Economics from Canterbury University and MAgr Sci (Hons) degree in Agricultural Economics from Lincoln University.

[128] John knew Richard and Barbara since about 1979. He, his wife Catherine, and family together with Richard and Barbara were members of St Matthew’s Catholic Parish, Bryndwr, Christchurch. John explained that Richard and Barbara were members of the Passionists Family Group Movement, a lay movement within the Catholic Church.

[129] John acted as Richard and Barbara’s accountant from 1980, not only personally but also for their family trust, the RN and BA Rowe Family Trust. It was John’s practice to meet with Richard and Barbara approximately twice per annum to review their affairs including the preparation and filing of their annual Inland Revenue returns.

[130] John, after Richard’s death, had a lengthy discussion with Barbara on 3 April 2020 regarding the financial affairs of Richard, Barbara, and their daughter Diane.

[131] John spoke to Barbara by telephone on 20 April 2020, and at her home in Christchurch on 6 July 2020. On both occasions the matter of revising Barbara’s Will was discussed, together with other matters relating to Barbara’s financial affairs.

[132] John deposed:⁵³

(31) I made sure that Barbara understood her unique position, being the sole surviving family member with no direct family of her own. I made it very clear to Barbara that the trust capital was of a significant amount and that it would be distributed solely to her. It was on this basis that I felt the need to reiterate to her on two occasions that if she wanted to favour anyone specifically in her Will (in addition to those already provided for), she would need to change her Will accordingly.

(32) Barbara was an astute, intelligent person. I am confident that she fully understood what I said to her on these occasions. Barbara said in the course of our discussion of 20 April 2020 that they (Barbara and Richard) believed that the surviving siblings, nieces and nephews of both Richard and Barbara, were in sound financial positions or would be in time. Therefore, as faithful Christian people of the Catholic tradition, they made the joint decision to leave the major portion of their estates to the Catholic Church.

...

(34) My last direct contact with Barbara was a meeting with her at her home on 6 July 2020. Even though she was not well she was of clear mind. Barbara said very clearly that she and Richard had considered their affairs very carefully following the death of Diane, their only daughter. When I raised again with Barbara the matter revising her Will when I met with her, Barbara reminded me that I had advised her previously in this regard and that she did not wish to change her Will.

...

(39) In light of my only professional relationship with Barbara and discussions I had with her regarding what she needed to do if she wished to change her Will, I am confident that if she wanted to make a testamentary promise or if in fact she did make a testamentary promise, she would have told me about it. She did not.

(40) **Richard and Barbara wanted to support the Catholic Church. Their faith was very important to them. The fact that the Catholic Church had major capital requirements to repair and replace buildings damaged by the earthquakes would, I believe, have been in their minds when they made their decision to make the Catholic Church their major beneficiary.** (Emphasis added)

[133] John with respect to Joy's claim, disclosed that it had always been the intention of the Executors to compensate Joy for all costs incurred by her, in relation to the nursing care Joy provided to Barbara, including the cost of travel from Australia, and returning to Australia.

⁵³ BOD pages 210 – 212.

[134] John also deposed:⁵⁴

(52) Mrs Martin did not, as far as I am aware, come to New Zealand or stay in New Zealand because of this alleged promise made by Barbara. Mrs Martin was Barbara's sister and came to look after her when she lost her husband and subsequently was diagnosed with a terminal illness.

(53) While I find it hard to believe that Barbara made any promise to give her entire estate to Mrs Martin I also do not believe that any promise of that nature was the reason for Mrs Martin's continued presence in New Zealand.

(54) Barbara and I had discussed the process that would need to be followed if she wished to leave something for someone in her Will and she understood that this required an alternative to her Will as she had done previously.

[135] John, under cross-examination by Mr McDonald, disclosed that Joy's son who is a Lawyer requested a copy of Barbara's Will. Therefore, on 3 April 2021, John emailed Joy and copied in her son, stating:⁵⁵

Joy

I refer to your email below.

I have attached Barbara's last Will. It is dated 7 February 2020. Richard and Barbara updated their respective Wills then, following Diane's death in December 2019. They did not seek any advice from me when these Wills were prepared.

You will see that you are not a named beneficiary. The major beneficiary is the Catholic Church. After some named bequests, the Church is the residual beneficiary.

Mark Craddock and I have discussed the situation, and comment from Barbara's solicitor, Annabel Sheppard, has also been obtained. **Mark and I believe you should have been named as a beneficiary, particularly so in light of the very significant and selfless nursing care that you provided to Barbara in the 7 months (approximately) leading up to her death. We are examining how this can be achieved. We know that to achieve this, the agreement of the Church as the residual beneficiary is required. We also seek a meeting with Bishop Paul Martin to discuss this.** (Emphasis added)

Regarding the expenses that you have incurred while caring for Barbara, Madonna has advised a \$ figure. Mark and I will need to sight documentary evidence in order to provide an audit trail. The Church, as the residual beneficiary, is likely to require this. Entries on copies of monthly credit card statements will be sufficient. If you have any invoices of receipts, please send these as well. Please include full details for Jodi's forgone wages.

⁵⁴ BOD page 214.

⁵⁵ BOD page 76 Exhibit E.

You have asked about the contents of Barbara's Estate. Barbara's Estate includes all assets that were previously owned by Barbara, Barbara and Richard, the Rowe Family Trust and also Diane's Estate. The main components of the Estate are the house situated at [address deleted], the proceeds of the sale of Diane's house, an investment portfolio with Forsyth Barr and balances in various bank accounts. The house is now ready for sale. It is intended that sale instructions will be issued next week.

I will be in contact again once the outcome of the meeting with Bishop Martin is known.

[136] John, under cross-examination by Mr McDonald, agreed that Joy thought she was a beneficiary.⁵⁶ John conceded that his observations of Barbara occurred up until 6 July 2020, but not after her diagnosis of terminal cancer on 13 July 2020.

[137] There was the following exchange between John and Mr McDonald:⁵⁷

Q: You're saying that you felt the last part of that paragraph says you felt the need to reiterate to her, which I think was in your phone and face-to-face meetings in April that she needed, if she wanted to change her Will, if she wanted to add people she would need to change her Will?

A: Yes.

Q: That is, I put it to you that that would suggest that perhaps there was a discussion with you and her or it was raised that she did want to do something more?

A: No she didn't raise it, I raised it with her. I raised with her that because she was in what I believed to be a unique position, in that she once had her own close relatives, her own family and all of whom had died, so she had no survivors within her family, she's in a unique position. I raised with her that if she did wish to favour people in addition to those or if she did wish to change her Will in favour of other people, she needed to do it in the correct way and I described what she needed to do and I told her that on the 20th of April and I told her that on the 6th of July.

[138] John acknowledged, under cross-examination, that he had talked to Barbara about making provisions for cash legacies in her Will, and explained:⁵⁸

A: No she didn't mention any names at all. In fact on both occasions that this matter was talked about she said: "Richard and I had made our decisions with regard to our Wills following Diane's death and we're very happy with them." And the second time I spoke to Barbara about this matter, I just wanted to be sure in my own mind that she

⁵⁶ NOE page 66 line 10-11.

⁵⁷ NOE page 68 line 26 – page 69 line 8.

⁵⁸ NOE page 70 lines 1-12.

understood the position she was in. So I spoke to her again about this matter. It was a very brief discussion; it was me talking to her and I said: “Now Barbara you understand that you can change your Will if you want to?” And she said straightaway: “Look John you’ve already spoken to me about that and I do not wish to change my Will.” And I said to her: “That’s fine Barbara, I will not talk to you again about this matter every again”, and I never did.

[139] I find John’s evidence about his discussion with Barbara supports Joy’s evidence that Barbara and herself were raised in their family to keep such matters private. I also find that Joy’s position is supported by Pat’s affidavit evidence that “Barbara and I did not discuss money”.⁵⁹

Mark Francis Craddock

[140] Mark Francis Craddock (“Mark”) is the other Executor and Trustee of Barbara’s Estate. Mark Craddock obtained a BA degree from Canterbury University. He worked as a Social Worker for the Department of Social Welfare for ten years, from 1976 – 1985. He then worked as a field social worker for the Royal New Zealand Foundation for the Blind from 1986 – 1991.

[141] Mark and his wife, Marion Craddock, first met Richard and Barbara Rowe through attending St Mathew’s Catholic Church, Bryndwr; and became close family friends. They also spent many summer holidays together at a family bach in the Pelorus Sounds. When Mark and Marion’s third daughter, Genevieve Craddock was born, Diane became Genevieve’s Godmother.

[142] Mark’s evidence was that Barbara and Richard asked if he would become their trustee upon the sudden and unexpected death of Diane. Barbara never discussed the contents of her Will with Mark, and he did not inquire about the contents of her Will.

[143] Mark’s evidence was that Richard and Barbara were heartbroken at Diane’s death, their only daughter.

⁵⁹ BOD page 204 at [13].

[144] Mark mowed the lawns and maintained the gardens at Diane's home until it was sold. He then mowed Barbara's lawns and maintained her property in [address deleted], Christchurch.

[145] Mark escorted Joy to Barbara's home after Joy was allowed out of quarantine. It was Mark's evidence that Joy as a trained nurse, assisted with Barbara's medications and care.

[146] Mark deposed:⁶⁰

After Richard's death I spent a lot of time with Barbara, and she never raised the terms of her will or that there should be any payment to Joy. Nor did I enquire as to what the terms were.

[147] Mark in his evidence in chief, stated that Joy was, effectively, in charge of the process of tidying up the contents of Barbara's home with guidance from his wife, Marion Craddock, Barbara's solicitor, Annabel Sheppard and Amanda Patterson.

[148] Mark disclosed that about a week after Barbara died he met John Butchard at St Matthew's Church and they were:⁶¹

... of one accord that certainly Joy should be acknowledged for her care, her magnificent care of Barbara during Barbara's illness, and the sacrifices that she made, leaving family and coming across ...

[149] Mark said that at one stage Joy enquired as to "Is there a Will?" He confirmed that there was a Will in existence, but there were no discussions about the content of the Will.

[150] Mark explained:⁶²

She didn't ask me for clarification and I was relieved, really, because I knew that she wasn't included.

⁶⁰ BOD page 235 at [28].

⁶¹ NOE page 110 lines 12-15.

⁶² NOE page 111 lines 17-18.

Marion Therese Craddock

[151] Marion Therese Craddock, the wife of Mark Craddock, confirmed that she first met Barbara, Richard, and Diane Rowe in 1978 through the parish of St Matthew's, Bryndwr, Christchurch. She, Barbara, and Richard were in the church choir together and formed a great friendship.

[152] Marion said that after Joy, in August 2020, arrived to look after Barbara in Barbara's own home, "We were all so relieved as Joy was a wonderful nurse and sister to Barbara at this time."⁶³

[153] Marion explained that she visited Barbara and Joy every week, but after some months, Barbara's health deteriorated significantly. Joy then arranged for Barbara to be admitted to Russley Village for some respite care and after only two days Barbara's status changed to palliative care. Marion said that Joy informed her that she was going to get Barbara's jewellery after Barbara died, and Joy received Barbara's jewellery after Barbara's death.

[154] It was Marion's evidence that she believed "most strongly" that had Barbara wanted to change her Will she most certainly would have done so, in the knowledge that her lawyer, Annabel Sheppard, a trusted friend, and advisor, lived close by in Bryndwr, Christchurch.

[155] Marion said that in January 2020, prior to Richard's death, she visited Richard and Barbara in hospital. She said that Barbara was:⁶⁴

... quite agitated about the fact that she needed to change her Will, because Richard's health had declined. I told Barbara to contact her lawyer so that they (sic) lawyer could come in. Barbara was clearly aware that if she wanted to change what was in her Will, she needed to do so formally, through a lawyer. She understood what was required to change the Will.

[156] Marion deposed:⁶⁵

If Barbara had said these things to Joy she would have changed her Will. She had previously said to me that she knew she needed to change her Will after

⁶³ BOD page 240 at [15].

⁶⁴ BOD page 241 at [27].

⁶⁵ BOD page 241 at [28].

Diane died. I am sure that Barbara knew what needed to be done to effect a change of her Will.

[157] Marion said that Barbara never mentioned anything to her about giving anything to Joy in her Will. Marion, agreed with Mr McDonald under cross-examination, that “Barbara wasn’t the person to talk about her private financial matters.”⁶⁶

[158] Marion’s position is that:⁶⁷

As a family we are heartbroken that the Martin family are contesting the Will.

[159] Marion concluded:⁶⁸

If Barbara had wanted to change the decision, made jointly, she would have had every opportunity and mental capacity to do so.

[160] Marion under cross-examination by Mr McDonald, agreed that Barbara was often very unwell in the mornings and often stayed in bed until at least lunch time.

[161] Marion agreed that Joy suffered from “terrible headaches.” She observed Barbara on two occasions holding her hands to her head as the pain was so intense. However, Marion also agreed that Barbara was stoic when visitors came and did her best to chat and be sociable.

[162] Mr McDonald cross-examined Marion about a statement in her affidavit that “In my opinion, at this time she was very alert and had good cognitive function until the last three days of her life.”⁶⁹ Mr McDonald put to Marion the contents of various medical documents from Russley Village that disclosed that, as at 1 February 2020, approximately two weeks before Barbara died, the caregivers at Russley Village recorded with respect to Barbara’s cognitive function, that she had “memory loss, short-term memory loss, confusion is intermittent.” She was also described as

⁶⁶ NOE page 87 lines 8-10.

⁶⁷ BOD page 241 at [33].

⁶⁸ BOD page 242 at [39].

⁶⁹ BOD page 241 at [30].

suffering from chronic pain. Marion readily agreed that this was a correct assessment of Barbara “at the very end, yes.”⁷⁰

[163] Furthermore, Marion pointed out that when Barbara went to Russley Village she “certainly went downhill very fast.”⁷¹ Marion under cross-examination by Ms Fitzgibbon, was adamant that Barbara, if she wished to change her Will, could have done so by instructing Annabel Sheppard who was so accessible, as they had a good relationship.

[164] Marion under re-examination by Mr Taylor, explained that at the time that Barbara and her dying husband, Richard were in hospital together, Marion had a discussion with Barbara and:⁷²

... Yes Barbara was very anxious because they were both in hospital together so soon after Di died and she said to my daughter and I: “I really am worried that Richard and I need to change our Wills.” And I said to her: “Well I’m sure a lawyer would come to you or arrange something”, not even knowing her lawyer was at that time. I just said: “I’m sure a lawyer would come and see you here and you could arrange something.” I left it at that and to this day I don’t know whether Annabel went to them there or she saw them at home, I don’t know.

[165] I find Joy’s unchallenged actions after Barbara’s death in taking and retaining Barbara’s jewellery and disposing of Barbara’s household contents and personal effects, without any opposition by the Executors, supports Joy’s claim that she had an expectation that she was the primary beneficiary in her sister’s estate.

[166] The Court accepts Joy’s evidence that Barbara, on 25 September 2020 after watching Joy’s grand-daughter’s wedding in Australia by video-link, during a conversation with Joy, informed Joy that she would be the primary beneficiary of her Will.

⁷⁰ NOE page 86 line 27.

⁷¹ NOE page 86 line 32.

⁷² NOE page 93 lines 11-18.

[167] The Court accepts that Barbara told Joy:⁷³

...I was her only family left. She said she would leave everything in her Will to me with some gifts for a few others. Barbara said that was her way of being a part of our family future.

[168] The Court further accepts Joy's evidence that, on 17 December 2020, the day before Joy's youngest grandson, Zachary Smith, turned 21 and had his 21st birthday party in Brisbane, Barbara and Joy had a conversation about Barbara's estate and her house and Barbara said:⁷⁴

Its all yours Joy. I leave everything to you to do what you want.

[169] Joy's diary notes for 17 December 2020 record:

Early night after a long chat with Barb, feeling exhausted.

[170] Ms Fitzgibbon, in cross-examination of Joy, asserted that there was an inconsistency between what Joy described in her affidavit about travelling to New Zealand being an 'isolated and scary experience' compared to the positive comments in her diary. However I accept Joy's explanation that:⁷⁵

I was trying to send home to my family that I was going to be managing on my own and I was right. I didn't expect any of this to be coming up. Its just an invasion of privacy.

[171] Joy was unmoved by cross-examination and did not resile from what she stated in her affidavit, namely:⁷⁶

Yes and I still agree with it, it was a very taunting (sic) thing, sitting up by yourself in the lounge where you're not allowed to talk to people. I did on the plane, sit with this girl who I'm still in contact with in Tassie, and my daughters when they went down there have been in touch with her too, to thank her for looking after this old girl.

⁷³ BOD page 44 at [121] – [124].

⁷⁴ BOD vol 2 page 266.

⁷⁵ NOE page 30 lines 8-10.

⁷⁶ NOE page 30 lines 12-16.

[172] Ms Fitzgibbon in her closing submissions accentuated that:⁷⁷

Counsel is concerned with the fact that no diary entries record the promise. Given this is such a significant promise one would think that this might have noted in Joy's daily diary.

[173] However, the Court does not find it out of the ordinary that Joy makes no reference to the promises by Barbara in her diary notes and accepts Joy's evidence that:⁷⁸

The diary was a happy account for my children. (Emphasis added)

[174] Mr Taylor emphasised that there was an absence of corroboration in that no one else was told of the promise, either by Barbara, or by Joy. However, the Court accepts that Barbara and Joy were brought up in their family to value 'privacy' in particular about financial matters. Therefore, the Court is not surprised that no-one else was told about the promises.

[175] The Court concurs with Mr McDonald's submission that neither counsel for the Estate nor the Church put it to Joy during cross-examination that she lied about the promises, exaggerated, embellished, or was even mistaken in some way about what Barbara said to her. Mr Taylor in his closing submissions asserted that Joy, based on claimed inconsistencies, embellished her evidence.

[176] The Court concurs with Mr McDonald's closing submission and finds it relevant that there was no direct challenge by the Estate or the Church to Joy's evidence about Barbara's promises during cross-examination.⁷⁹

[177] The Estate's Notice of Defence at paragraph [5] explicitly denies that a testamentary promise was made and that was reinforced in the Estate's opening submissions.⁸⁰

[178] In the Court's opinion, the absence of cross-examination is not totally fatal to the defence. There were certainly questions put to Joy about the context of the two

⁷⁷ Ms Fitzgibbons submissions 28/2/23 at [35].

⁷⁸ NOE page 46 line 23.

⁷⁹ Applicant's submissions dated 27/2/23 page 10 – 11 at [5(e)].

⁸⁰ Executors' submissions dated 20/2/23 page 2 at [1.4b].

conversations with Barbara when Joy says promises were made. However, the cross-examination did not go further to actually impugn Joy's account.

[179] The Court finds Joy's explanation significant and relevant that, if she thought she was not a beneficiary, she would have immediately returned to Australia after Barbara's funeral to avoid the risk of being locked down (because of Covid) in New Zealand again.

[180] Counsel for the Respondents also submitted that Barbara had strong reasons for arranging her affairs as she did and would not have lightly departed from these. It was submitted that Barbara was astute and organised and could have updated her Will if she wished to. Furthermore, it was submitted that Barbara knew it was likely her sister would provide care to her as she aged, even before she signed her Will in February 2020 and she did not elect to include a provision for Joy in that Will.

[181] However, when Barbara made her Will in February 2020, she was completely unaware that five months later in July 2020 she was going to be diagnosed with terminal cancer resulting in her death in February 2021.

[182] The Court accepts that Barbara, in conjunction with Richard had "strong reasons" for making new Wills on 7 January 2020, only 18 days after Diane's death.

[183] The Court also accepts that Barbara could have updated her Will if she had wished to.

[184] As Fogarty J observed:

Persons do not always tell their family what is going to be in their Will or that provision will be made for them in their Will.⁸¹

[185] It is the Court's view that, even taking into account the Respondents' submissions, overall the evidence on balance establishes that Barbara, on at least three occasions made express testamentary promises to Joy.

⁸¹ *Masters-Stoddart v Public Trustee* [2012] NZHC 1168 at [44].

[186] The email from John Butchard to Joy following discussions with Mark Craddock and Barbara's solicitor, Annabel Sheppard, certainly indicates that from their perspective Joy "should have been named as a beneficiary...".⁸² Barbara had also talked about making provision for Madonna. However, for reasons best known to Barbara she never got around to updating her Will.

Did Joy render qualifying services to Barbara or perform work for Barbara during her lifetime?

[187] It was the essence of the Executors' case and the interested party, that any work or services provided by Joy to Barbara were not beyond the norm and needed to be seen in the context of their family relationship as sisters.

[188] Mr Taylor accepted that services for the purpose of the TPA includes not only things done for Barbara, but also companionship, affection, and emotional support.⁸³

[189] However, Mr Taylor submitted that services must go beyond "what is normally expected of a relative, a member of the same household, a neighbour or friend." What is required is "something extra."⁸⁴ Services are assessed from Barbara's point of view.⁸⁵ The services are to be judged in the context of what would be normal within the particular family, not some objective standard.⁸⁶

[190] The Court was referred to *Ace v Guardian Trust and Executives Co Ltd*, and the need for the Court to exercise caution and even suspicion with respect to Joy's evidence of the amount and value of services Joy claimed to have provided.⁸⁷

[191] Counsel submitted that a claim under the TPA must involve a promise to reward Joy for services rendered, during Barbara's lifetime.

[192] It was further submitted that services performed in the ordinary passage of life cannot support a claim under the TPA. It was submitted that what is ordinary, is

⁸² BOD pg 76, Exhibit "E".

⁸³ *Byrne v Bishop* [2001] 3 NZLR 780 (CA) at [6].

⁸⁴ *Samuels v Atkinson* [2009] NZCA 566 at [53].

⁸⁵ *Smith v Public Trustee* 27/9/2002 Priestly J, HC Auckland.

⁸⁶ *Halewood v Public Trust* Family Court Blenheim FAM-2008-002-1095 10/5/2011 at [89].

⁸⁷ *Ace v Guardian Trust & Executives Co Ltd* [1948] NZLR 103, Callan J.

determined by reference to the particular family in the case. Furthermore, it was submitted that Joy's sense of duty to provide care indicates that Joy felt at the time that what she did was expected of her in their particular family.⁸⁸

[193] The Court finds that this is not a situation of Joy merely providing a level of care and support for her sister as "expected in the normal course of family life" as submitted by the Executors.

[194] Ms Fitzgibbon submitted that Joy's submissions were "emotive" by portraying a "helpless older woman sacrificing her own life to come to New Zealand as so (sic) other options were available."⁸⁹ The Court will deal with the issue of 'other options' later in this judgment.

[195] The Court agrees that this was an 'emotive' case (for a number of reasons) but finds nothing improper or untoward in Joy's Counsel's submissions.

[196] The Court's reasons in agreeing that this was an 'emotive' case are based on the sensitive and traumatic issues experienced by both sisters, viz:

- (a) Barbara and Richard had five children, but only one, Diane survived to adulthood;
- (b) On 15 December 2019, Barbara found Diane dead unexpectedly, in her bed, at Barbara and Richard's home;
- (c) Richard's health declined from 2017 and his care took a great toll on Barbara. He died on 12 March 2020;
- (d) Barbara's declining state of health and the diagnosis of terminal cancer on 13 July 2020;
- (e) Joy's husband, Brian died in 2002; and

⁸⁸ Executors' opening submissions at [5.1], [5.2], [5.3], and [5.8].

⁸⁹ Ms Fitzgibbon's submissions 28/2/23 at [19].

(f) Joy suffered [medical details deleted].

[197] Joy, at 82 years of age, potentially put her own future life in peril by travelling from Brisbane to New Zealand to care for Barbara, given her own significant health issues, in the knowledge that Covid was adversely affecting the elderly and infirm in New Zealand at that time.

[198] The Court finds that Joy could not have been reasonably criticised if she elected to remain in Australia as Barbara was dying and she had the financial resources to go into supported care in Christchurch.

[199] Mr Taylor for the Executors submitted (inter alia):⁹⁰

The Executors do not deny that Mrs Martin provided assistance to Mrs Rowe in the final months of her life. However some level of care by a sister to her terminally ill older sister for a limited period before her death **is expected in the normal course of family life**. Mrs Rowe and Mrs Martin had previously travelled together after the death of Mrs Martin's husband. **It is what family do**. (Emphasis added)

[200] With respect, the Court disagrees with the generalised nature of Mr Taylor's submission. The Court finds that **"it is what family do"** is a utopian view contrary to some of the Court's experiences in cases particularly in jurisdictions concerning the Family Protection Act, 1955; the Protection of Property and Personal Rights Act, 1998; and Mental Health (Compulsory Assessment and Treatment) Act, 1992; concerning the care and support of the aged who are incapacitated, terminally or mentally unwell.

[201] It is the Court's experience that some families desist from, abdicate or are unwilling to provide support to an elderly or terminally unwell person in Barbara's situation.

Other Care Options?

[202] Joy, under cross-examination by Ms Fitzgibbon was asked:⁹¹

⁹⁰ Synopsis of submissions for the Executors page 2 dated 20/2/23.

⁹¹ NOE page 40 line 32 – page 41 line 16.

Q: In the event that you didn't come over and care for Barbara what would have happened? Would she have entered a care facility?

A: **She would have had to go to a care place. There was nobody putting their hands up and nobody who – who can take on an elderly person.**

Q: **Do you accept that if she had have been put in that, in the care facility, that the same amount of support in terms of her wider network, apart from you, that that would have been the same?**

A; **No. You go into care and there are a shortage of nurses, you have to wait your turn whether you sit there in a wet chair or whether you're in a wet bed or what. You haven't got what a family will give.** (Emphasis added)

Q: No, I absolutely acknowledge that. What I mean there is in terms of all the visitors and all of her wider support. So taking you – I'm not doubting the tremendous care you gave your sister. What I'm saying is if you weren't here and she was in a care facility that all of that wider support, so the Marion and the Patricia and everyone, the Genevieves, everyone that was continuing to support Barbara would have continued to do that whether she was in her home or whether she was in a care facility?

Q: I'm sure they would have. They probably would have got a roster going.

[203] Ms Fitzgibbon in her closing submissions said that:⁹²

... it would seem on the evidence that Barbara's immediate network (not including Joy) were there for her in an intensive way.

[204] Ms Fitzgibbon pointed to Pat and Marion being at Barbara's medical appointments to receive her diagnosis of having a terminal illness.

[205] Notwithstanding Joy's well-intentioned concession and Ms Fitzgibbon's submissions, there was no evidence that any of Barbara's circle of friends (apart from Pat) expressed an actual willingness to care for Barbara. (There is no evidence that any of these persons had nursing training.) The Court finds on the evidence that Pat, in August 2020, indicated that it was a strain on her continuing to look after Barbara without assistance.

⁹² Ms Fitzgibbon submissions dated 28/2/23 at [17].

[206] The Court infers that Barbara's supporters in Christchurch were content in relying on Joy taking over Pat's role in physically caring for Joy in her house, notwithstanding Joy's age and own health issues. The network of friends certainly visited Barbara regularly and provided companionship, food, flowers, and gifts, and Mark Craddock continued to mow the lawns at Barbara's home. The Court finds that it is overstating the situation to describe their support as "intensive."

[207] The Court finds that Joy, in her evidence, was measured and she did not attempt to overstate or embellish the tasks she undertook in caring for Barbara.

[208] Joy, under careful cross-examination by Ms Fitzgibbon, was adamant that no other trained nurses came to Barbara's home during the period of time that Joy was present to perform actual nursing cares for Barbara.

[209] Joy explained that Nurse Maude came once per week but the nurse was not directly involved in bathing or dressing Barbara. The Nurse was simply checking in to see how Barbara and Joy were managing.

[210] The Court finds, in the absence of any other credible evidence, that Joy during the four and a half months before Barbara went into Hospice care, was solely responsible for Barbara's nursing and physical cares.

[211] Furthermore, Joy gave evidence about advocating on Barbara's behalf with the medical clinicians whom she considered were not providing Barbara with an adequate level of pain relief.

[212] With respect, the Court disagrees with Ms Fitzgibbon's closing submission that:⁹³

The applicant's submissions are emotive and set to portray a helpless older woman sacrificing her own life to come to New Zealand and assist Joy as so (sic) other options were available.

This is simply not the case Barbara was already being cared for by Patricia, the evidence is not clear as to how Joy was asked to come to New Zealand as this was disputed by Patricia. It is also the case that in the

⁹³ Ms Fitzgibbon's submissions 28/2/23 at [19].

event that Joy could not have come or chose not to, Barbara had the funds to pay for a private carer either in her own home or in a residential care facility. It is submitted that the strong network that surrounded Barbara in her final months would have remained unchanged – she would have had companionship every day, people bringing food, flowers, and gifts. Mark would have continued with his maintenance and gardening of the home. (Emphasis added)

[213] The Court infers from Ms Fitzgibbon’s submissions that Pat was still prepared to continue caring for Barbara if Joy was not permitted to enter New Zealand.

[214] Joy, under cross-examination by Mr Taylor said that Pat:⁹⁴

...phoned me to say she couldn’t do it anymore.

[215] Joy deposed:⁹⁵

In August 2020 Pat telephoned and emailed me. She was asking for help because Barbara wasn’t well enough to return home by herself. Pat was finding it a strain looking after Barbara. By way of background Pat was 79 years old at the time. (Emphasis added)

[216] Joy also deposed:⁹⁶

Previously Barbara had been cared for by Pat during the earlier Covid lockdown. Pat was no longer in a position where she could meet Barbara’s needs this is no criticism on Pat, she is of advanced years as am I.

[217] In conflict with Joy’s evidence there was the following exchange between Pat and Ms Fitzgibbon during cross-examination:⁹⁷

Q: Was there a time when you made a phone call or an indication that you could no longer care?

A: **I never would have. I would never have needed to have said that.** (Emphasis added)

Q: So that you could no longer care for Barbara and Joy needed to come to New Zealand?

A: Never. That’s ridiculous, absolutely. I’m actually a really strong person to the end. I mean, I would never have gone to live in the remote Māori communities to work if I hadn’t been able to – or take

⁹⁴ NOE page 10 line 28.

⁹⁵ BOD page 42 at [104].

⁹⁶ BOD page 27 at [205].

⁹⁷ NOE page 104 lines 17-25.

on a really difficult foster kid if I couldn't cope with things, so that's just nonsense.

[218] The Court again questions why Pat did not dispute Joy's evidence about making the telephone call or sending the email in her affidavit completed 3 months after the filing of Joy's affidavit dated 14 December 2021. There is no other evidence before the Court disputing Joy's evidence about Pat telephoning and emailing her in August 2020.

[219] Furthermore, Joy was not challenged about this issue under cross-examination. There is no evidence before the Court that discovery of Pat's email to Barbara was ever sought.

[220] The Court has already treated Pat's evidence with caution about her conversations with Barbara. The Court rejects Pat's evidence about not seeking Joy's help. Pat had every opportunity to dispute this issue in her affidavit. Pat elected not to do so.

[221] The Court prefers Joy's version of events and finds as a fact that, in August 2020, Pat telephoned and emailed Joy seeking Joy's help as she could no longer continue caring for Barbara.

[222] The Court is fortified in making the above finding as Marion deposed:⁹⁸

In August 2020 Joy arrived to look after Barbara in her own home. We were **all so relieved as Joy was a wonderful nurse and sister to Barbara at this time.** (Emphasis added)

[223] The fact that Marion says "we were all so relieved" persuades the Court that Pat required relief in continuing to care for Barbara and contrary to the submission that Pat was one of the options for caring for Barbara after August 2020.

[224] Clearly, Barbara had the funds to pay for private care in her own home or in a residential care facility, but there is no evidence before the Court that this option was seriously considered or pursued by Barbara or her Christchurch network of supporters.

⁹⁸ BOD page 240 at [5].

[225] There is a complete absence of any evidence from Pat, Marion, John, or Mark about any plans to put Joy into private care either in her own home or in a residential care facility if “Joy could not have come or chose not to.”⁹⁹

[226] The Court accepts that Mark continued with maintenance and gardening at Barbara’s home and that Barbara had a strong network in Christchurch which would have remained unchanged in providing “companionship every day, people bringing food, flowers and gifts.”¹⁰⁰

[227] However, the Court finds ‘companionship’ is a very different sort of support compared to the 24/7 physical support and nursing cares provided by Joy to her sister, as well as her personal companionship.

[228] Notwithstanding Pat’s denial that she directly sought Joy’s assistance in August 2020, the Court finds there was an expectation by Barbara’s supporters that Joy would come to New Zealand and assume the role of being Barbara’s home-based caregiver.

[229] The Court finds compelling evidence that the cumulative effect of Joy’s personal circumstances and services to her sister were *over and beyond* what one would expect in a family context where two elderly sisters enjoyed a close relationship with one another for the following reasons:

- (a) Joy physically cared for and comforted Barbara during the Covid pandemic in Christchurch, 24 hours a day, 7 days a week, from 15 September 2020 to 1 February 2021;¹⁰¹

Ms Fitzgibbon submitted that this was for “very short periods of time” but conceded that Joy’s care “may have been intense”¹⁰² and “Joy did an outstanding job of caring for Barbara.”¹⁰³

⁹⁹ Ms Fitzgibbon’s submissions dated 28/3/23.

¹⁰⁰ *Supra*.

¹⁰¹ BOD page 50 at [172], page 51 at [181] and [182].

¹⁰² Ms Fitzgibbon’s submissions 28/2/23 at [26].

¹⁰³ Ms Fitzgibbon’s submissions 28/2/23 at [19].

John Butchard in his email to Joy and, on behalf of Mark Craddock described Joy's care as **“very significant and selfless nursing care that you provided to Barbara.”**¹⁰⁴

- (b) Joy provided a unique companionship to Barbara as her only living sister during a pivotal time in their senior years with both sisters having serious health issues;¹⁰⁵
- (c) Joy gave Barbara \$3,000 upon request;¹⁰⁶
- (d) Joy took Barbara to and from all of her medical appointments and attended every medical appointment as a support person;¹⁰⁷
- (e) Joy picked up Barbara's medication and ensured that Barbara was taking the correct medications at the correct time;¹⁰⁸
- (f) Joy liaised with Barbara's doctors when the medication she was taking caused significant side effects and arranged with Barbara's doctors for alternative medication to be prescribed;¹⁰⁹
- (g) Joy cared for Barbara when she fell,¹¹⁰ when she was unsteady on her feet, or she was sick.¹¹¹ This included attending to Barbara's needs when she was incontinent or when she vomited;¹¹²
- (h) Joy acted as Barbara's driver;¹¹³
- (i) Joy picked up Barbara's shopping and paid for some of it;¹¹⁴

¹⁰⁴ BOD page 79 Exhibit E.

¹⁰⁵ BOD page 52 at [184], and page 54 at [206] and [207].

¹⁰⁶ BOD page 43 at [113] and [115], being \$3,000.

¹⁰⁷ BOD page 46 at [132], page 50 at [175] and [176], and page 108 at [33].

¹⁰⁸ BOD page 51 at [177], page 52 at [187], and page 108 at [34].

¹⁰⁹ BOD page 106 at [14] and [15], and page 51 at [183].

¹¹⁰ BOD page 45 at [129] and [130].

¹¹¹ BOD page 51 at [181].

¹¹² NOE page 48.

¹¹³ BOD page 50 at [175].

¹¹⁴ BOD page 51 at [178], [177], and page 53 at [193] and [194]. Under cross-examination Joy accepted that Barbara did pay some expenses NOE page 38 lines 19 to 28.

- (j) Joy paid for some, if not most, of her and Barbara's food and entertainment.¹¹⁵ Joy estimates that she spent approximately \$17,000 on food, travel, and other items while she was caring for Barbara;¹¹⁶
- (k) Joy ensured that Barbara remembered to eat;¹¹⁷
- (l) Joy cooked, cleaned, and did Barbara's laundry and gardening for her;¹¹⁸
- (m) Joy washed Barbara and helped her dress;¹¹⁹
- (n) Joy helped Barbara finalise Barbara's daughter's estate;¹²⁰
- (o) Joy helped Barbara pay her outstanding bills;¹²¹
- (p) Joy dealt with all of Barbara's visitors;¹²²
- (q) Joy was at Barbara's side throughout her illness.¹²³
- (r) Joy's care of Barbara was described by Mr Craddock as "marvellous" and "magnificent."¹²⁴ Mrs Craddock agreed that Joy's care of Barbara was "sterling;"¹²⁵
- (s) Joy's evidence was that the level of care she provided to Barbara was superior to that provided by a care facility because Barbara never had to wait when she needed assistance;¹²⁶

¹¹⁵ BOD page 51 at [178], 53 at [193], page 111 at [58], and page 112 at [65].

¹¹⁶ BOD page 53 at [195] to [197].

¹¹⁷ BOD page 108 at [34].

¹¹⁸ BOD page 51 at [180], and page 52 at [185] and [187].

¹¹⁹ BOD page 51 at [179], and page 52 at [187].

¹²⁰ BOD page 52 at [186].

¹²¹ BOD page 43 at [116], and page 112 at [72].

¹²² BOD page 52 at [186].

¹²³ BOD pages 53 to 55 at [199] to [207].

¹²⁴ NOE page 111 lines 26 to 32.

¹²⁵ NOE page 83, lines 11 to 24.

¹²⁶ NOE page 41 lines 1 to 10.

- (t) Joy's evidence was that she did not receive any assistance with nursing care. When Nurse Maude visited, they would only assess Barbara's condition. They did not assist with bathing, changing, or dressing.¹²⁷ The only assistance Joy received is that sometimes friends would drive them to the hospital due to the cost of parking.¹²⁸

[230] Ms Fitzgibbon for the interested party, submitted that Joy's services were:

within what would be reasonable between the two sisters, when consideration is given to the death of both Barbara's husband and daughter, the closeness of the two sisters, the applicant's nursing expertise, and the period of care being six months.

[231] Ms Fitzgibbon submitted that "Joy was Barbara's sister and could be expected to provide some work and services for her sister, without hope of remuneration."¹²⁹

[232] Ms Fitzgibbon, with respect to Mr McDonald's submission that Joy cared for and comforted Barbara by herself, during the Covid pandemic, 24 hours a day, 7 days a week, from 15 September 2020 until 1 February 2021, reminded the Court that Barbara also stayed with Pat during the lockdown period for four months.

[233] Ms Fitzgibbon also submitted that:¹³⁰

There seems to be differing accounts as to how or why Joy was asked to care for Barbara. What is clear is that she wanted to come and care for her sister and took pride in being able to do so.

[234] The Court, having rejected Pat's evidence that she never telephoned or emailed Joy seeking help to care for Barbara in August 2020, unequivocally finds that it was always patently clear to Pat and her supporters, that Joy was coming to New Zealand to care for Barbara; and this was the situation even before Pat sought Joy's assistance.

[235] Ms Fitzgibbon submitted that:¹³¹

¹²⁷ NOE page 33 lines 25 – page 36 line 12.

¹²⁸ NOE page 33 lines 15 to 22.

¹²⁹ Ms Fitzgibbons submissions of 28/2/23 at [28].

¹³⁰ At [29.2].

¹³¹ [29.3] and NOE page 33 line 25-26; page 34 lines 1-5.

Joy did not care for Barbara by herself. Barbara had regular visitors that were assisting and District Nurses that were completely overseeing Barbara's medical care, as well as the general practitioner, all visiting the home.

[236] There is no evidence that the District Nurses actually provided physical care for Barbara. The Medical History for Barbara from Ilam Medical Centre records that on 18 November 2020 there was a request from 'Claudia' of Healthcare New Zealand to the GP that Barbara "would like home visits". Therefore the Court infers that the home visits by the GP did not start until after that date.¹³² However, the Court accepts Joy's evidence that Barbara's General Practitioner subsequently came to Barbara's house once per week, but "other times he missed."¹³³

[237] There was the following exchange between Joy and Ms Fitzgibbon:¹³⁴

A: There was Nurse Maude, they came once a week to just check how she was going and **they never bathed her or did anything, I did all the bathing, all the changing, all the dressing.** (Emphasis added)

Q: So when they come in, what was their role, what were they doing?

A: They assessed Barb, to see if she needed to get – if they needed, as well as me, to get in touch of the doctor to increase her medications because she was mainly in bed for their visits because she went down, down, down and by lunch, you know, 1 o'clock, 2 o'clock some days, she never got up till – she'd had morning tea, breakfast in bed, sometimes lunch in bed.

[238] The Court accepts Joy's evidence that she was solely providing the physical care for Barbara in her home. The Court rejects the submission that "Barbara had regular visitors that were assisting..." and finds as a fact that the 'regular visitors' were not providing actual physical care such as attending to Barbara's bathing, cooking, doing laundry and ensuring she took the correct medications at the correct time. The Court finds that the 'regular visitors' were providing companionship, gifts, food and baking etc.

[239] Therefore, the Court does not accept the submission that "Barbara would have had the same support from a very close network of friends whether she had been in a

¹³² BOD page 71.

¹³³ NOE page 34 line 5.

¹³⁴ NOE page 33 lines 26-34.

care facility or at home.”¹³⁵ There is no evidence that any member of the ‘close network of friends’ was a trained nurse like Joy. The Court finds that this is a significant difference.

What sacrifices, if any, did Joy make in order to provide the services or work for Barbara?

[240] The Court finds that it is highly relevant that Joy made the following sacrifices in order to provide these services or work for Barbara:¹³⁶

- (a) Joy left her home, family and friends in Australia and moved to New Zealand to live with Barbara in order to care for her. By doing so, Joy put her own life on hold for Barbara. Travelling a great distance to keep a person company is a service for the purpose of the Act;¹³⁷
- (b) Joy made her first request to travel to New Zealand on 24 July 2020. It was not until 28 August 2020, on her third attempt, that Joy was granted permission to travel to New Zealand.¹³⁸ Joy was waiting on permission to travel and could not make any other plans during this period;
- (c) Joy provided the services during the Covid pandemic, when she was 82 years old and while she had [medical details deleted];
- (d) Joy was particularly vulnerable health-wise.¹³⁹ Had Joy contracted Covid while she was in Christchurch, the consequences for her could have been fatal. Joy described that Covid was a major issue for her and under cross examination she detailed the steps she took to protect herself and Barbara from becoming infected;¹⁴⁰

¹³⁵ Ms Fitzgibbon’s submissions 28/2/23 at [93.4].

¹³⁶ Mr McDonald’s submissions dated 27/2/23 pages 4 – 7.

¹³⁷ *Re Archer* [1990] 3 NZLR 737 at 743 lines 20 to 30. BOA at [10].

¹³⁸ BOD page 42 at [103] to [106].

¹³⁹ BOD page 42 at [109].

¹⁴⁰ NOE page 40 lines 9 to 22.

- (e) Joy knew that if her health deteriorated while she was in Christchurch, it would be difficult, if not impossible, for her family to travel from Australia to care for and support her;¹⁴¹
- (f) Joy had to endure 44 days isolation in quarantine in order to travel to and from New Zealand in order to provide the services to Barbara;
- (i) Joy spent 14 days in quarantine in order to travel to New Zealand;¹⁴²
- (ii) Joy had to spend 17 days in quarantine in a hotel in New Zealand by herself before she was permitted to leave the country;¹⁴³
- (iii) Joy was required to spend 3 days in isolation in quarantine in Sydney before she was released;¹⁴⁴
- (iv) Joy was forced to wait for a further 7 days before the Queensland border reopened to enable her to return to her home and family;¹⁴⁵
- (g) Joy, at age 82, in caring for Barbara so intensely, left Joy exhausted.¹⁴⁶ Joy arranged for Barbara to stay at Russley Village on 1 February 2021 as caring for Barbara “took a terrible toll and (sic) me... because I knew I’d had an abscess in an eye and I knew if I didn’t get myself rested I’d be in a box going home.”¹⁴⁷ The Court finds Joy’s evidence is corroborated by the Ilam Medical Centre notes on 22 January 2021 (i.e. 8 days before Barbara’s admission to Russley) which succinctly records; “? carer stress;”¹⁴⁸

¹⁴¹ BOD page 50 at [173] to [174].

¹⁴² BOD page 43 at [112].

¹⁴³ BOD page 49 at [163].

¹⁴⁴ BOD page 49 at [160].

¹⁴⁵ BOD page 49 at [167].

¹⁴⁶ BOD page 48 at [151] and [152].

¹⁴⁷ NOE page 49 lines 2 to 5.

¹⁴⁸ BOD page 70.

- (h) Joy was to be assisted by her daughter when caring for Barbara. However, Joy's daughter applied but was refused permission to travel to New Zealand, and Joy was left to care for Barbara by herself;¹⁴⁹
- (i) The services Joy provided to Barbara were extensive;
- (j) Caring for Barbara meant that Joy was away from her friends and family for a total of seven months. During this period, Joy missed the emotional, physical, and personal support her family would have otherwise been able to provide her had she been living in Brisbane;
- (k) Caring for Barbara meant Joy missed significant family events. At age 82, these events and celebrations are of a particular importance to Joy:
 - (i) Joy missed her grand-daughter's wedding, which was held on 25 September 2020;¹⁵⁰
 - (ii) Joy missed the birth of her great-grandson, which occurred on 1 October 2020;¹⁵¹
 - (iii) Joy missed her grand-daughter's engagement and the subsequent engagement celebrations;¹⁵²
 - (iv) Joy missed the christening of her great-grandson on 17 October 2020;¹⁵³
 - (v) Joy missed her youngest grandchild's 21st birthday celebrations;¹⁵⁴

¹⁴⁹ BOD page 42 at [105] and [106].

¹⁵⁰ BOD page 44 at [120].

¹⁵¹ BOD page 45 at [125].

¹⁵² BOD page 45 at [126].

¹⁵³ BOD page 45 at [127].

¹⁵⁴ BOD page 46 at [133].

- (vi) Joy missed spending Christmas, New Year and the summer holidays with her friends and family;
- (l) Joy had to give up her Christmas cake business that she operated in Brisbane in order to travel to New Zealand to care for Barbara. Joy had been running this business for more than 20 years. Joy would earn approximately AUD \$5,000.00 each year from her business;¹⁵⁵
- (m) Travelling to New Zealand during a pandemic to care for Barbara was a fearful experience for Joy.¹⁵⁶ When Joy was asked about the account in her diary not matching up with her affidavit evidence, Joy's response was that in her diary she was trying to "send home to my family that I was going to be managing on my own and I was right."¹⁵⁷ The Court accepts the integrity of Joy's explanation and rejects the submissions that Joy's evidence was inconsistent; and
- (n) Joy's evidence is that it has taken her 2 years to fully recover from caring for Barbara.¹⁵⁸

[241] Standing back and considering the totality of the evidence, the Court finds that Joy's services rendered to Barbara were, indeed, beyond the norm of what could be expected from a very close elderly relative with her own serious health issues living in another country during the rigours of the Covid lockdown.

Was there a nexus between the services and the promise?

[242] The Court accepts that there must be a nexus between the promise and the services rendered. In *Jones v Public Trustee* the Court of Appeal observed:¹⁵⁹

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

¹⁵⁵ BOD page 52 at [191].

¹⁵⁶ BOD page 42 at [108]; NOE page 30 lines 0 -10.

¹⁵⁷ NOE page 30 lines 0 to 10.

¹⁵⁸ NOE page 43 lines 21 to 29, page 51 lines 19 to 32.

¹⁵⁹ *Jones v Public Trustee* [1962] NZLR 363 at 346.

[243] Ms Fitzgibbon referred to the case of *Re Welch* where the Court found little evidence of a nexus.¹⁶⁰ The testator made a promise principally out of love and affection for his stepson, not to reward him for services rendered.

[244] Ms Fitzgibbon also referred to *Chapman v HP* where the deceased promised that his two extra-marital children would get the house where they had lived during the deceased's relationship with their Mother, and the Court found that the promise was made out of love and affection for those children rather than a reward for services.¹⁶¹

[245] In *Tombes v Macassey*, the Court reached the same conclusion, where assurances given to a nephew that he will inherit a substantial portion of the wife's estate were made mostly for family reasons, not as a reward for services.¹⁶²

[246] Ms Fitzgibbon submitted that Barbara's case was similar to *Tombes v Macassey* in that Barbara made a promise out of love and affection for Joy. She submitted that Joy made plans to come to New Zealand as soon as she found out about Barbara's terminal diagnosis and the exemptions (for travel during Covid lockdown) were requested on that basis. She referred to the fact that Joy, under cross-examination conceded that Barbara did not promise her estate because she came over to New Zealand,¹⁶³ Joy when asked if she thought there was some link between Barbara's gratefulness, the assistance she was providing, and Barbara's promise said:¹⁶⁴

No, there was just love and she was just doing what she thought best.

[247] Therefore, Ms Fitzgibbon submitted that there was no connection to the services and Joy ultimately, chose to come to Christchurch to care for Barbara out of love and affection:¹⁶⁵

¹⁶⁰ *Re Welch* [1993] NZLR 1.

¹⁶¹ *Chapman v HP* HC Wellington CIV-2007-485-1372 2/7/2009.

¹⁶² *Tombes v Macassey* CA 174/02, 18/6/2003.

¹⁶³ NOE pages 15 & 16.

¹⁶⁴ NOE page 16 lines 4-12.

¹⁶⁵ Ms Fitzgibbons submissions dated 28/2/23 page 51.

... an arrangement that was made well before any purported promise. The decision was based on her love and affection for her sister following a tumultuous time in her life.

[248] Ms Fitzgibbon pointed to the fact that Joy in cross-examination stated:

A: She was extremely grateful she had me there.¹⁶⁶

...

A: I don't know what was in her mind¹⁶⁷

[249] Therefore, Ms Fitzgibbon submitted that while the services provided by Joy were indeed appreciated by Barbara, she would not have viewed any bequeathment to Joy as an exchange for her services or care.

[250] However, the Court makes the overwhelming inference that the evidence establishes that there is a nexus between the services rendered by Joy to her sister and Barbara's promises. Barbara clearly recognised and understood the significant sacrifices Joy made by putting her own health in jeopardy, given Joy's significant health issues, at a time when the Covid pandemic was rampant in New Zealand. The Court is satisfied that Joy's services were not gratuitous – notwithstanding Joy's motivation and tenacity to come to New Zealand to care for her dying sister given their mutual love and affection.

[251] The Court accepts that Barbara expressed her repeated promises to Joy as her only surviving sibling for the "family" and that "**Barbara said that was her way of being a part of our family future**"¹⁶⁸ (emphasis added).

[252] The Court finds that Barbara, being acutely aware that Joy was a retired trained nurse, opted to rely on Joy's skills and services in nursing to physically care for her in her own home during the last months of her life. Barbara (given her knowledge that her illness was terminal) could have elected to tell Joy not to come to New Zealand given the level of risk to Joy. Barbara elected not to do so.

¹⁶⁶ NOE page 16 lines 23.

¹⁶⁷ NOE page 16 lines 25.

¹⁶⁸ BOD page 44 at [121] – [124].

[253] In the Court's opinion, there was a clear nexus between Barbara's promise and Joy's services or work. In conclusion, the Court finds that Barbara made her promises not only out of love and affection but also to reward Joy for her outstanding services.

Failure to fulfil the promise

[254] The Court finds that Barbara failed to make the promised provision or otherwise remunerate Barbara, by not making any provision for Joy in her Will.

Quantum

[255] Section 3(1) of the Act gives the Court a broad discretion to award such amount as is reasonable to recompense the claimant for the services provided, which have not otherwise been rewarded.

[256] If the claimant was fully rewarded during the deceased's lifetime, no award will be made.¹⁶⁹ Where the claimants and the deceased derived mutual benefits from the services, only the unremunerated part should be the basis for assessing quantum.¹⁷⁰

[257] Ms Fitzgibbon submitted that Joy would have received a mutual benefit in caring for her sister and she would have had personal satisfaction caring for Barbara as Joy was a nurse for over 60 years. In cross examination, Joy said she was thrilled that she was able to come over and help Barbara through her illness.¹⁷¹

[258] The Court of Appeal in *Powell v Public Trustee* set out the relevant factors to be considered when assessing what is reasonable provision from the estate; namely:¹⁷²

- (a) The circumstances in which the promise was made, and the services rendered or work performed;
- (b) The value of the services or work;

¹⁶⁹ See for example *Klein v Klein* [2013] NZFC 8915.

¹⁷⁰ *Samuels v Atkinson* [2009] NZCA 556.

¹⁷¹ NOE page 40 lines 23-26.

¹⁷² *Powell v Public Trustee* [2003] 1 NZLR 381.

- (c) The value of the testamentary provision promised;
- (d) The amount of the estate;
- (e) The nature and amounts of other claims on the estate; and
- (f) Other relevant circumstances including the issue of reciprocal benefits.

[259] In *Cain v Nyhan* the Court noted:¹⁷³

[22] If the applicant establishes that a testamentary promise was made the Court has a discretion as to the reasonableness of the award. I take account of the approach in *Re Welch* above, where the Privy Council said:

“In all cases where a claim lies it is enforceable as if there had been 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 certain listed factors in particular.”

[260] Ms Fitzgibbon submitted that *Masters-Stoddart v Public Trust* supports the assertion that traditional concepts of contractual law are incorporated into the assessment of valuing services in the testamentary promises claim such that “provided there is consideration, it is left to the parties to assess the merit of the benefits being exchanged.” And in the context of a testamentary promise “an assessment, even a general one, by a promisor able to exercise sound judgement would not lightly be departed from.”¹⁷⁴

[261] In considering the relationship between contract and testamentary promises claims, the Court of Appeal in *Samuels v Atkinson* noted:¹⁷⁵

One difficulty is that a testamentary promises claim is quite distinct from a claim in contract. There, provided only there is some consideration, the remedy is to give effect to what is promised. The present type of claim looks not only to what was promised but to its reasonableness measured against other factors.

¹⁷³ *Cain v Nyhan* [2007] NZFLR 1055.

¹⁷⁴ *Masters-Stoddart v Public Trustee* [2012] NZHC 1168 at [54].

¹⁷⁵ *Samuel v Atkinson* at [74].

[262] The Court will now address each of the relevant factors as prescribed in *Powell v Public Trustee* by the Court of Appeal in assessing what is a reasonable provision.¹⁷⁶

(a) ***The relevant circumstances in which the promise was made and the services rendered or work performed.***

[263] It is clear on the evidence that if a promise is found, then regarding how the promise came about is important.

[264] Ms Fitzgibbon submitted that the purported promise was made at a time that Barbara was terminally ill, physically unwell and at this time Barbara was “**very vulnerable.**”¹⁷⁷

[265] The Court rejects the generalised assertion that Barbara was “very vulnerable” as there is no evidentiary foundation to support such a claim. Certainly, Barbara was very unwell and intermittently suffering from chronic pain during the periods of time Joy cared for her. Marion Craddock, in fact deposed:

Barbara’s Will and her state of mind prior to her death

(25) Barbara was in her right mind – of that I am sure. I have known Barbara as a close friend for over 40 years. I visited Barbara regularly in the time up until her death.

[266] Marion Craddock described Barbara as a “generally astute and intelligent woman.”¹⁷⁸ She also deposed that Barbara was “very alert and had good cognitive functions until the last three days of her life.”¹⁷⁹

[267] The Court entirely rejects the underlying inference that Joy impelled Barbara at a time of declining health to express the promises.

[268] The circumstances at the time the Barbara’s promises were made occurred in Barbara’s home coinciding with important family-related events that Joy missed out

¹⁷⁶ *Powell v Public Trustee* [2003] 1 NZLR 381.

¹⁷⁷ Ms Fitzgibbon’s submissions dated 28/2/23 at [67].

¹⁷⁸ BOD page 250 at [25] and [26].

¹⁷⁹ BOD 241 at [30].

on in being directly physically present back in Australia. Barbara was acutely aware of Joy's self-sacrifices.

(b) *The value of the services or work*

[269] Ms Fitzgibbon submitted that in the event qualifying services were found, they can only have occurred between 15 September 2020 and 1 February 2021 (i.e. the actual dates when Barbara physically was in Joy's care).

[270] Ms Fitzgibbon further submitted that the value placed on Joy's service must reflect:

- (a) The nature of awards in TPA cases (i.e. based on the table in *Kite v May*) even where there have been significant services were modest;
- (b) The relatively short period in which qualifying services could have been found;
- (c) The family context in which the services were provided, in that Joy and Barbara enjoyed a close and loving relationship; and
- (d) The overall estate value.

[271] Ms Fitzgibbon did not dispute Joy's direct expenses e.g. the \$5,000 cash that she brought to New Zealand, \$5,000 lost income from Christmas cake sales, \$1,000 telephone expenses and \$17,000 in day-to-day expenses over the period she was in New Zealand.

[272] Ms Fitzgibbon referred to the case of *Annett v Nurmela* where a caregiver provided services for the deceased for 7 ½ months prior to his death.¹⁸⁰ In that case Downs J. in the High Court found that the evidence of the hourly rates in 2014 for a caregiver:

is not determinative but is helpful. (Emphasis added)

¹⁸⁰ *Annett v Nurmela* [2018] NZHC 2841 at [11].

[273] There was no evidence tendered in Joy’s case about the financial value of the services she provided or the professional caregiving. In any event, I distinguish *Annett v Nurmela* from the current case as Joy, unlike Ms Annett, was a blood relative, in fact Barbara’s only living sibling. Ms Annett had a longstanding friendship with the deceased from the 1970s being neighbours in a block of flats. Downs J. described Ms Annett’s services as “intermittent care by for example visiting with meals and organising appointments.” Joy’s services, in particular, her nursing cares were at a different intensive level.

[274] The value of the services that the applicant provided were indeed considered by Barbara as meaningful, but following *Samuels v Atkinson*, while the value is to be assessed from Barbara’s perspective, it must be reasonable in the circumstances.¹⁸¹

[275] Mr Taylor submitted that the level of the award Joy was seeking (i.e. \$1,080,000) was unjustified in the circumstances having regard to the various authorities (i.e. schedules A & B of his submissions). He emphasised that Joy’s services did not go beyond what would be expected in the sister’s relationship. Furthermore, even if it did then the Court should only be considering compensating Joy for the extent the services went above what was expected.

[276] Mr McDonald submitted that, in valuing a service as required by the TPA, the sacrifices incurred in providing the service has to be allowed for. He also submitted that the value of Joy’s services for Barbara particularly intangible benefits, is to be assessed from Barbara’s perspective rather than Joy’s.

[277] When valuing a service, the sacrifice incurred in providing the service has to be allowed for. Mr McDonald submitted that it is difficult, but the Act requires to Court to attach a value to:¹⁸²

- (a) Joy at 82, placing her life on hold for 7 months in order to care for Barbara;

¹⁸¹ *Samuels v Atkinson* [2009] NZCA 556.

¹⁸² Mr McDonald’s submissions dated 27/2/23 page 36 & 37.

- (b) The fact that Joy had to leave Brisbane and travel to New Zealand during a global pandemic in order to care for Barbara;
- (c) The isolation Joy had to endure in order to travel to and from New Zealand;
- (d) Joy's concerns about her own health given her age and [medical] issues;
- (e) The risk Joy took in travelling to Christchurch. Given her age, contracting Covid could have been fatal to Joy;
- (f) Joy's concerns about who would care for her if she became sick while she was caring for Barbara;
- (g) Joy's inability to provide care and support to her family and friends in Australia while she was caring for Barbara in Christchurch;
- (h) The emotional support from her family and friends that Joy missed because she was not in Brisbane;
- (i) The significant family events that Joy missed because she was in Christchurch caring for Barbara;
- (j) Joy's evidence was that caring for Barbara took a terrible toll on her health, and it has taken her 2 years to recover;

[278] Mr McDonald further submitted, and the Court agrees, that the true value of the services that Joy provided to Barbara were intangible benefits; viz:

- (a) Joy provided Barbara with care, love, and support 24 hours a day, 7 days a week from 15 September 2020 until 1 February 2021, when Barbara moved to Russley Village to give Joy some respite;
- (b) Barbara benefitted from having a close family member care for her, as opposed to a stranger;

- (c) Barbara and Joy had a shared history. Joy's presence meant that Barbara could reminisce with her about their life together;
- (d) Joy tried to fill in Barbara's day so that each day was enjoyable for her;
- (e) Due to Joy's presence, Barbara got to share in Joy's family celebrations, such as Joy's grand-daughter's wedding, the birth of a great grandchild, a christening, and an engagement;
- (f) But for Joy's presence, Barbara would have been isolated from her own surviving family; and
- (g) When Barbara's health deteriorated while she was at Russley Village, Joy was at Barbara's side until her death.

[279] The Court accepts Mr McDonald's submissions that:¹⁸³

- (a) It would have been difficult, if not impossible, for Barbara to obtain private home care 24 hours a day, 7 days a week. During the period that Joy was caring for Barbara, New Zealand health services were subject to extreme pressure caused by the covid pandemic;
- (b) Barbara could no longer rely on her friends to physically care for her. The Court's finding is that Joy was asked to come to Christchurch because Pat was unable to carry on caring for Barbara;
- (c) Joy's presence as a live in full time caregiver meant that Barbara avoided the need to be placed in a residential care facility. This reduced the risk of Barbara being exposed to Covid, which was a significant concern for such facilities at the time in question in Christchurch. Instead, Barbara was able to spend time in her own home and garden, which was a familiar environment for her;

¹⁸³ Mr McDonald's submissions dated 27/2/23 page 37 & 38.

- (d) As an ex-nurse, Joy was able to provide services to Barbara to a high standard;
- (e) Joy paid for most of their living costs as well as buying any special items Barbara needed;
- (f) There is nothing in the TPA that requires the Court to apply an objective test to determine the value of services or reduce it to a dollar value; and
- (g) Barbara's statement to Joy that she was going to receive her estate less a few bequests indicates the value Barbara placed on Joy's service and sacrifices.

(c) *The value of the testamentary provision promised*

[280] It is submitted that identification Barbara's promises were given effect to, Joy would receive approximately \$1,811,668.18.

(d) *The amount of the Estate*

[281] Barbara's Estate is worth \$1,811,668.18

(e) *The nature and amounts of other claims on the Estate.*

[282] Mr McDonald submitted that:¹⁸⁴

- (a) The only other claimant is the Church. Under Barbara's Will the Church is to receive all of Barbara's residuary estate, worth approximately \$1,811,688.18;
- (b) If Barbara's promises to Joy are given full effect the Church will receive nothing;
- (c) While the promise made by the deceased for a certain sum is a relevant consideration for the Court, it is not necessarily decisive;

¹⁸⁴ Page 38.

(d) Where the estate is large, the Court is justified in taking a liberal approach to quantum where the promise has been expressed in broad terms; and

(f) Other relevant circumstances including the issue of reciprocal benefits

[283] In *Cain v Nyhan* the Court observed:¹⁸⁵

[24] Reciprocal benefits received by the applicant are relevant in determining whether the claimant has been remunerated sufficiently (*Powell & The Public Trust v Public Trustee* [2003] 1 NZLR 381):

“The claim can only be made to the extent to which the deceased has failed to meet the promise to make testamentary provision or otherwise remunerate the claimant. A claim for services or work which has already been partly remunerated in money can succeed only to the extent of the shortfall.”

[284] The Court of Appeal in *Samuels v Atkinson* noted:

...and critically, for there to be a claim at all, there has to be a "netting off" of the respective benefits and burdens. As was said by this Court in *Powell* (at [31]), "a claim can succeed only to the extent of the unremunerated balance".

[285] The legislation and case law clearly show that further enquiry and a netting off assessment of reciprocal benefits is to be undertaken.

[286] Evaluating the reciprocal benefits received by the parties requires an analysis of the benefits and burdens of the relationship.

[287] Ms Fitzgibbon submitted that the benefits Joy had received during her lifetime from Barbara have more than remunerated her for the services she alleges to have provided to Joy during her lifetime. Ms Fitzgibbon submitted that **jewellery was given and it would seem on the evidence this was significant.**¹⁸⁶ (Emphasis added)

[288] Joy explained that she received costume jewellery, pearls and three or four rings. Joy under cross-examination explained that whilst she was in Christchurch Barbara bought her lipstick and “that was all she ever bought me.”¹⁸⁷

¹⁸⁵ *Cain v Nyhan* [2007] NZFLR 1055.

¹⁸⁶ NOE page 41 lines 26-34.

¹⁸⁷ NOE page 42 line 17.

[289] Without any detailed or itemised valuation of Barbara’s jewellery, the Court does not accept the submission that the financial benefits Joy received from Barbara during her lifetime “have more than remunerated her for the services provided by Joy to Barbara.”

[290] If indeed the jewellery had a ‘significant’ value then it is noteworthy that there is no reference to the jewellery in John Butchard’s email to Joy.¹⁸⁸ The Court is satisfied that if the jewellery had some value then there would have been some mention of this.

[291] Therefore, the only financial reciprocal benefits Joy received from Barbara comprised Barbara’s jewellery, a lipstick and Barbara paid for some of their food, groceries, and pharmacy costs when they were living together.

[292] Undoubtedly, the emotional attachment between the sisters during their last few months together was a significant reciprocal benefit. The Court finds that throughout the sisters’ lives, each provided support to the other (e.g. when Joy’s husband died.)

[293] The Court accepts that this mutual support was consistent with the close relationship they had to each other as sisters and these mutual services would have balanced out between them.

[294] The Court accepts Mr McDonald’s submission that the services Joy provided to Barbara in 2020 and 2021 described by Ms Fitzgibbon as “onerous and intensive” went far beyond any reciprocal benefits that Barbara had previously provided to Joy.

Quantum

[295] When assessing the amount of any award that the Court might make, the Court must decide in the light of all the circumstances “such amount as may be reasonable, having regard to all the circumstances of a case.”

¹⁸⁸ BOD page 76 Exhibit E.

[296] As in the case that was before Fogarty J, the circumstances of the current case are submitted by Mr McDonald to be unique. There is no precedent which is “on all fours”, or which is even similar.

[297] However, Mr Taylor, in contrast submitted:¹⁸⁹

9.25 This is not an extraordinary case which calls for any sort of uplift in award. Mrs Martin’s services performed were not extraordinary when considering the cases before the Court set out at schedule A. In post covid climate, stories like Mrs Martin’s, where family members have had to make sacrifices to just reach their family are not uncommon.

9.26 Mrs Martin has sought to rely on her evidence that the process of travelling to support Mrs Rowe was difficult on her. Given the decisions in *Powell* and other cases discussed above, we submit that the relevant factor to be considered is the value of the services from Mrs Rowe’s perspective. Not the difficulty experienced by Mrs Martin in providing the service.

[298] Mr McDonald submitted that Barbara’s promises to Joy were expressed in broad terms. And as such a “large and liberal” construction to quantum is justified, and “it would be wrong to be parsimonious.”¹⁹⁰

[299] Mr McDonald submitted that an award of \$1,080,000.00 is reasonable in the circumstances as it recognises the extraordinary services Joy provided and the sacrifices that Joy made in order to care for Barbara, as Barbara’s time of need, in the middle of a global pandemic.

[300] Furthermore, Mr McDonald submitted that such an award would acknowledge the significant risk Joy exposed her own health to, in order to care for Barbara including:

- (a) At 82 years old, with [medical] issues, had Joy caught Covid, the consequences for Joy could have been fatal.

¹⁸⁹ Mr Taylor’s submissions dated 2/3/23 at page 30

¹⁹⁰ *Samuels v Atkinson* [2010] NZCA556 at [95].

- (b) Due to Covid travel restrictions, if Joy had become sick, it would be very unlikely that Joy's family could travel to New Zealand to care for her. This is a fear that played on Joy's mind.

[301] Mr McDonald submitted that such an award would recognise Joy's bravery in traveling to New Zealand.

- (a) Joy was scared that if her own children, grandchildren or great grandchildren became sick she wouldn't be allowed to return to Australia to care for them;
- (b) Joy found traveling to New Zealand to be "an isolating and scary experience."

[302] Such an award would recognise that Joy placed her own life on hold for seven months to care for Barbara.

[303] Mr McDonald submitted that such an award will ensure Barbara's desire is given effect to, viz, that the testamentary promise "was her way of being part of our family future."

[304] There are no competing claims brought against Barbara's estate by either her family or friends. This is not a case where there is any suggestion that Barbara owed anybody a moral duty for the purposes of the Family Protection Act 1955.

[305] The only beneficiary of Barbara's last Will is the Catholic Church. Aside from the provision in her Will, the Church has no claim against Barbara's estate.

[306] Mr McDonald submitted that given Barbara changed her mind about how her estate should be distributed in recognition of Joy's actions, the Church's interest in Barbara's estate is greatly diminished. However, the relief sought, viz 60 percent will still result in the Church receiving a generous donation of approximately \$731,668.18, being 40% of the residue of Barbara's estate.

[307] Mr McDonald further submitted:¹⁹¹

- (a) Under the Act, the Court is required when assessing the value of the services provided, to set off any reciprocal advantages received by the claimant;
- (b) During Joy and Barbara’s life, it is clear that each provided services to the other. Joy described their relationship as always being there for each other. The mutual support was consistent with the close relationship they had to each other as sisters. These mutual services would have balanced out between them (quid pro quo);
- (c) However, the services that Joy provided to Barbara during 2020 - 2021 went far beyond any reciprocal benefits that Barbara had previously provided to Joy; and
- (d) In the circumstances, this is not a case where it is appropriate for the Court to reduce any award that it might make in favour of Joy by way of a ‘set off’ for reciprocal services.

[308] Ms Fitzgibbon helpfully referred to *Kite v May*, where the Court examined a range of cases to assess an award where the claimant had taken over responsibilities for running a farm and cared for the deceased when he became ill.¹⁹² The estate had a value of approximately \$4 million at the time of the deceased’s death. The claimant had commenced work for the deceased as a housekeeper but a de facto partnership later developed. The Court had to consider the time period when services were rendered between 1991 to 1995.

[309] I replicate the table of comparative awards reproduced in the above judgment from p 48, p 526:

Decision	Length of relationship	Service	Value of Estate	Awarded

¹⁹¹ At page 39

¹⁹² *Kite v May* [2001] NZFLR 514.

Benson (1993)	10 years	Farm assistance and contribution of joint savings	\$115,000	\$30,000
Bramley (1995)	14 years	Care of deceased while ill 9 years, renovated deceased's property, meeting outgoings, assistance with business	\$240,000	\$95,000
Cooper (1998)	8 years	Care of deceased [while] ill 3 years, contributions to household	\$420,000	\$10,000
Crombie (1989)	5 years	Assistance with business, meeting household outgoings, maintained family future together	\$147,000	\$40,000
Cunniffe (1996)	10 years	Care of decease while ill 4 years, contribution to household expenses, maintained grounds renovated home	\$175,000	\$30,000
Dedden	2 years	Assistance with business, care of deceased during periods of alcoholism	\$800,000	\$30,000
Jecentho	22 years	Assisted on farm, care of deceased over a number of years	\$315,000	\$200,000
Lowe (1991)	4 years	Renovation of deceased's rental properties, financial contributions to home, future together, child of relationship	\$200,000	\$55,000
McDougall (1990)	8 years	Assistance with pastimes, assistance in business, assistance on farm	\$3,100,000	\$200,000
Newman (1992)	14 years	Assistance on farm, contribution of capital, contribution of stock, care of deceased – 6 moths	\$140,000	\$21,000
Steffens (1993)	7 years	Gave up security of home, contribution to household outgoings, care of deceased, transport	\$250,000	Life Int
Stowers (1991)	6 years	Provision of home	\$68,000	\$15,000
Thwaites (1993)	2 years	Assistance in renovation of home, contribution of household expenses	\$290,000	\$20,000
Whelan (1996)	13 years	Gave up employment, cared for deceased for 18 months, assistance in business	Several million	\$350,000
Wright (1995)	14 months	Gave up employment, contributed capital to partnership, worked in business, agreement to marry	\$358,000	\$75,000

[310] Ms Fitzgibbon submitted that the above table demonstrates that services even when found to have been significant, attract modest awards.

[311] The Court is grateful for these cases being drawn to the Court’s attention as well as the cases referred to by Mr Taylor and Mr McDonald. However, each case turns on its own facts.

[312] The Court agrees with Mr McDonald’s submission that:¹⁹³

the facts of the present case are unique. This makes the assessment of quantum challenging because other are no comparable cases that are of any assistance.

[313] Therefore, Joy seeks 60 percent of the balance of the Estate. Ms Fitzgibbon submitted that this would be an **“extraordinary reward in the context of similar cases. The services claimed were over a very short period of time – six/seven months.”**¹⁹⁴ (Emphasis added)

[314] Mr Taylor submitted that Joy’s claim was “grossly excessive.” She had provided no evidence of the financial value of the alleged services if they were to be provided by a paid professional. He further submitted that Joy’s costs incurred were around \$25,000 and she provided five months of care. Furthermore, Mr Taylor submitted that “It was unclear how Mrs Martin considers she should receive \$1,080,000.”¹⁹⁵

[315] With respect to Mr Taylor’s submissions about Joy providing no evidence of the value of professional services, the Court adopts Fogarty J’s approach in *Masters-Stoddart v Public Trustee* where he observed:¹⁹⁶

“The value” might suggest some kind of objective measurement. Depending on the context, it can be quite objective. Take the case of Mr Harry Neill. He was the handyman. There is a market for his work. He was paid for his work as he did it. If one assumes he was not paid, a Court could reasonably compute a fairly reliable value for that work, by way of quantum meruit. **There may well be an emotional support dimension which would also need to be valued as a service. In that case it would be harder to put a monetary value on. But there is nothing in the phrase “the value” which requires**

¹⁹³ Final submissions of the applicant dated 27/2/23 page 29 & 30.

¹⁹⁴ At [71].

¹⁹⁵ Mr Taylor’s submissions dated 2/3/23 at 9.24 and 10.5.

¹⁹⁶ *Masters-Stoddart v Public Trustee* [2012] NZHC 1168 at [63].

the Court to apply an objective test, let alone reduce this to a dollar value. The paradigm perfect contract provides for an exchange of benefits with each party deciding whether the benefit to be received is worth the benefit to be transferred. It is ancient common law wisdom that it is inherently dangerous for a Court to presume what ought to be a reasonable exchange. Reasonable exchanges can be judged with confidence only if the transaction is in a competitive market, where there is no need for any particular relationship between the party and the counter party. (Emphasis added)

[316] In the Court's view there is no requirement in the TPA or in case law for Joy to provide financial evidence to justify her claim.

[317] Ms Fitzgibbon specifically referred to *Masters-Stoddart v Public Trustee* where the deceased left his entire estate to the Canterbury Museum. The deceased's sister and niece brought claims against the estate. Ms Fitzgibbon submitted that the current case is distinguishable as in *Masters-Stoddard* there was a promise corroborated on the back of an envelope, frank-marked 4 months before death and found in the glove box of the deceased's car indicating a desire to change the Will.

[318] Furthermore, the estate was large (\$12 million) and the claimants were requesting less than ten per cent each, to be awarded for services spanning over ten years. Fogarty, J. awarded \$1 million to the deceased's sister and \$250,000 to the niece.

[319] Ms Fitzgibbon submitted that in Barbara's case the estate is not large, so it is not appropriate that a larger sum be awarded. She also submitted that:¹⁹⁷

The Church whilst viewed as an external institution was important to Barbara over her entire life – this is also a distinguishing feature of this case.

[320] Ms Fitzgibbon submitted that:¹⁹⁸

the ultimate beneficiary in our case is the Church; an institution that was overwhelmingly important and a cornerstone of the deceased's life. (Emphasis added)

[321] Ms Fitzgibbon submitted that:¹⁹⁹

¹⁹⁷ Ms Fitzgibbon's submissions 28/2/23 at [73].

¹⁹⁸ NOE page 77 lines 14-21; page 92, lines 23-29.

¹⁹⁹ NOE page 26 line 4.

It became clear in evidence that the applicant was of the view that the Church did not do enough or deserve the money. Joy stated:

“pity they didn’t rally around at the end ...”

[322] It was submitted that Joy, when asked if she was a little bit annoyed that the Church didn’t give more support stated:²⁰⁰

Well if you had a daughter die, a husband die and you saw the priest once in the next eight months, they didn’t do much. Only for a parishioner coming and bringing communion, the church did not support her. Richard and Barbara supported the church all their life as we all do. We send our children to catholic schools, we pay, pay, pay, pay, pay, pay. But what did she get back in the end? One parishioner coming.

[323] Ms Fitzgibbon therefore submitted that it is not for the Church to prove why it was left the estate but for Joy to prove that she now should be awarded the majority of the estate for services conducted over a short period of time.

[324] With respect, the Court does not find that Joy was expressing the view that ‘the Church did not deserve the money.’ In the Court’s opinion, Joy was fairly and frankly stating, from her point of view as a very committed Catholic, that the Church did not do enough during Barbara’s final months to provide direct pastoral support to her sister, given her tragic family circumstances and Barbara’s lifetime devotion to the Church.

[325] I adopt the approach taken by Mr Lester, counsel for the Sister and Niece in *Master-Stoddard v Public Trustee*, that the correct approach to reasonableness is to examine the worth of services Barbara received from her only surviving sibling from Barbara’s perspective.²⁰¹

[326] In my opinion, Barbara put a very high value on Joy’s services that Barbara recognised were extraordinary in an unparalleled situation where her 82 year old sister with [medical] issues came to New Zealand during a global pandemic putting her own personal health in jeopardy. The Court is fortified in its finding by the fact that Barbara promised most of her estate to Joy.

²⁰⁰ NOE page 26 line 20-25.

²⁰¹ At [15].

[327] Mr McDonald submitted that:

- (a) Parliament via Section 3 of the Act has conferred upon the Court a wide statutory discretion. While Section 3 of the Act lists the factors that the Court must consider when exercising the discretion, ultimately any relief granted must be “reasonable, having regard to all the circumstances of the case, ...”;
- (b) The facts of this case make it unique, given the circumstances in which the services were provided. This is not a case where there are analogous cases that might assist the Court. Rather, the Court must be guided by the principles that have developed in the case law when exercising the discretion conferred upon it;
- (c) While any award must be reasonable, what is reasonable is assessed in the context of case before the Court for determination. In the context of this case, given the lack of competing claims, the services rendered by Joy, the sacrifices incurred by Joy, and the size of the estate, a large, generous award is justified;
- (d) Joy’s case is best summarised by her statements at paragraph [206] and [207] of her second affidavit:

I made the last six months of Barbara’s life as comfortable and pleasant for her as I could. She had my undivided full attention. made her feel loved, cherished and valued.

I sat by Barbara’s side for the last hours of her life and held in hand. Because of me Barbara was not left alone during the last phase of her life. Caring for Barbara came at a great personal cost to me - it left me physically and emotionally drained.

[328] Mr Taylor in closing submitted that:²⁰²

...the focus is the value of the services submitted to Mrs Rowe. Mrs Martin has placed much emphasis in her submission on the detriment to Mrs Martin. However, the focus needs to be on the reasonable value given to the services through the lens of Mrs Rowe and the benefit to her. With respect his does not qualify for the sums being sought.

²⁰² Mr Taylor’s submissions dated 2/3/23 page 31 at 9.24(e).

[329] Mr Taylor also submitted:²⁰³

This is not an extraordinary case which calls for any sort of uplift in award. Mrs Martin's services performed were not extraordinary when considering the cases before the Court as set out in schedule A. In a post-covid climate, stories like Mrs Martin's where family members have had to make sacrifices to just reach their family are not uncommon.

[330] A useful observation about "extraordinary circumstances" was made by Judge P von Dadelsen in *BDD v IBG*.²⁰⁴

... the phrase 'extraordinary circumstances' refers, I think to circumstances that must not only be remarkable in degree but also unusual in kind ...

[331] When I consider and assess the value of the services from Barbara's perspective I find, on the evidence, that Barbara attributed a very high value to her aged and unwell sister's services at a crucial time in her life, significantly compromised by a world-wide pandemic. I find that there were extraordinary circumstances "remarkable in degree" and "unusual in kind" which must reflect the quantum of the award.

[332] Sir Robin Cooke in *Re Welch* held that under the TPA a "liberal approach" to the question of assessing the award "is fitting, and especially so when there are no competing moral claims ...".²⁰⁵

Conclusion

[333] Taking into account the express promises made by Barbara as found in this judgement, the significant services and work rendered, the nexus between the services and the promises the Court finds that a fair and reasonable outcome is to award Joy the sum of \$750,000 and the balance of Barbara's Estate is to go to the Catholic Diocese of Christchurch. Any accrued interest is to be divided between the parties in terms of the percentage of the award.

²⁰³ At page 32 at [9.25].

²⁰⁴ *BDD v IBG* [2006] NZFLR 862 at [20].

²⁰⁵ *Re Welch* [1993] NZLR 1 at page 8.

Costs

[334] As the applicant has been successful, the Court's initial indication is that costs on a 2B category is appropriate.

[335] In the event counsel cannot agree over costs, the applicant is to file a memorandum (limited to 6 pages) within 14 days and the other parties are to file a reply memorandum within 14 days of receipt (also limited to 6 pages) for the Court to make a decision on the papers.

Judge N.A. Walsh

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 21/07/2023