PROPERTY LAW AND EQUITY REFORM COMMITTEE

WORKING PAPER

ON

Proposals for reform of the Law Reform (Testamentary Promises) Act 1949

1. The Law Revision Commission referred to this Committee a letter from Professor Brian Coote of the University of Auckland containing three proposals for reforming the Law Reform (Testamentary Promises) Act 1949.

2. Professor Coote's basic thesis is that the Act "started as a reform of the law of contract but has now become something more akin to the Family Protection Act". That thesis is developed in the article which Professor Coote himself wrote for the A.G. DAVIS ESSAYS IN LAW (1965) and seems to be well-founded. It is enough to compare the language of the original s.2 of the Act with that of the present s.3 (substituted by s.2 of the Law Reform (Testamentary Promises) Amendment Act 1961). In the original section a successful claimant was entitled to an order for payment "of the amount specified in the promise": in the substituted section those words are omitted, their place being taken by the phrase "of such amount as may be reasonable". Furthermore it is now the Court's duty in all cases to have regard to all the circumstances of the case including (inter alia) the claims of other persons in respect of the estate.

PROPOSAL I

3. The first of Professor Coote's proposals is:

> "That a party claiming under a testamentary promise be enabled to bring action during the testator's lifetime if the testator should dispose of his estate in such a way as to defeat the promise. If the Family Protection analogy is strictly adhered to, perhaps no such right

should exist. But if the contractual analogy is taken there clearly should be such a right. (cf. Parker v. Clark [1960] 1 W.L.R. 286. Synge v. Synge [1894] 1 Q.B. 466, 470).

As Professor Coote recognises, no such right should exist under the present philosophy of the Act. But even if the contractual analogy were still valid, there would be strong arguments against granting primacy to contractual or equivalant claims as against the need to have regard to all the circumstances of the case including the rights of other persons in respect of the estate. The cases mentioned by Professor Coote support the proposition that "a proposal to leave property in a will can be the subject of a binding contract": Parker v Clark [1960] 1 W.L.R. 286, 292: see also Lee, "Contracts to Make Wills" (1971) 87 L.Q.R. 358. But that proposal has been considered chiefly in relation to marriage contracts: Synge v Synge [1894] 1 Q.B. 466, and in Parker v Clark Devlin J. treated the case before him (an agreement by two families to live together for the rest of their joint lives) as not dissimilar to a contract of marriage.

4. It is not clear what precedence should be accorded to contractual rights to receive testamentary provisions and the duty of personal representatives to administer an estate according to law. It would not seem to be right in principle to allow the assertion in the lifetime of a defaulting promisor of a claim to make testamentary provision, and at that stage it would be impossible to take into account the future claims of other persons to the estate.

The Committee's tentative view in respect of this proposal is that it should be rejected.

PROPOSAL II

5. The second of Professor Coote's proposals is as follows:

> "That the upward limit on the amount recoverable by a claimant (at present, the amount of the promise - Section 3(1) be removed.
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> The point here is that the Court now has a discretion to award something less than the provision promised (i.e. an amount which is reasonable in all the circumstances - Section 3(1)). Since the promisee must take the risk of recovering less than he was promised if the principle of reasonableness so requires, it seems both fair and consistent that he should have the chance of recovering more if, in all the circumstances, it would be reasonable that he should. This would seem to be a case, in other words, where the contract analogy has been rejected where it would have helped the claimant but adhered to where it hinders him. This result runs counter to the shift in the purpose of the reform which has taken place since its first enactment.

Under s.3(1) of the Act the Court is to have regard to "the circumstances in which the promise was made and the services were rendered or the work performed, the value of the service or work, the value of the testamentary provision promised, the amount of the estate" and the possible claims of other persons. That being so, the Court's power to order the payment of "such amount as may be reasonable" ought not to be restricted to the amount of the promise. In many cases that amount will be less than the value of the testamentary provision provided, but there may be cases where work is done or services rendered over a longer period than had originally been expected at the time of the testamentary promise and where adherence to the amount of the promise would be less than just.

The Committee is evenly divided as to the justification for this proposal.

PROPOSAL III

6. The last of Professor Coote's proposals is:

> "That promises to reward the claimant by benefiting his dependants be brought within the ambit of the legislation.
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> The present law requires that the promise be to reward the claimant by making some testamentary provision for him (Section 3(1), but, as Hutchinson J. pointed out in McMillan v N.Z. Insurance Co. [1956] N.Z.L.R. 353, 357, there is a real sense in which provision for one's dependants can be a reward to oneself. An example would be a promise to make provision for the claimant's wife or husband. It seems less than just that this sort of promise should be excluded on merely technical grounds."

The difficulties in an ordinary contractual situation of enforcing a claim on behalf of a stranger to the contract have been diminished to some extent since the decision of the House of Lords in Beswick v Beswick [1968] A.C. 58. In the circumstances described by Professor Coote the promisee may very well derive a benefit arising out of the making of testamentary provisions for another, and other cases could no doubt arise. But whether he does nor not, the rendering of services by him or the performance of work could reasonably be regarded as raising an equity under the statute to make testamentary provisions for the claimant or for any person or purpose upon whom (or which) the claimant and the promisor might agree.

The Committee's tentative view is that this proposal should be endorsed.

SUBMISSIONS

The Committee would welcome comments and suggestions on the above proposals. At the same time the Committee invites submissions for reform in respect of any aspect of the Law Reform (Testamentary Promises) Act 1949. It's brief is to review the entire Act.

Submissions should be sent to:

The Secretary,
Property Law & Equity Reform Committee,
C/o Department of Justice,
Private Bag 1,
Government Buildings,
WELLINGTON

on or before 31 May 1974.