EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV 2012-035-000052
[2016] NZDC 20578

	BETWEEN	STEVEN COURTENEY Plaintiff
	AND	THE ESTATE OF WILLIAM RONALD COURTENEY Defendant

Hearing: 10 November 2015

Appearances: P W Michalik for the Plaintiff
D D Vincent for the Defendant

Judgment: 24 March 2016

JUDGMENT OF A I M TOMPKINS

Introduction

[1] The plaintiff, Steven Courteney, is the eldest son of Ron and Joan Courteney. He has a younger brother, Stuart Courteney.

[2] On 31 March 2010, an elderly and unwell Ron Courteney was taken to Wairarapa hospital in a state of delirium. Steven alleges that the treatment his father received there was sub-optimal. Irrespective of whether it was or was not, Ron did not do well. Both staff and his wife Joan, herself elderly, struggled to care for him. His day to day quality of life was very poor.

[3] Subsequently, Ron Courteney was transferred to Kandahar Rest Home, where Elder Family Matters (EFM) provided appropriate elderly care services to assist and support him. His quality of life immediately and significantly improved. These services were paid for by Steven.

[4] Steven now wants to be repaid the money he paid EFM.

[5] Steven advances two grounds for repayment. He says, first, that the expenses incurred were agreed to on Ron Courteney's behalf by Steven's wife, Karen Courteney, exercising retrospectively a pre-existing enduring power of attorney. Alternatively, he says that the debt arises by virtue of the supply of the necessaries of life pursuant to restitutionary principles.

[6] Steven seeks judgment in the amount of $36,869.39 plus costs. The estate, essentially on behalf of Stuart, resists this claim.

[7] During the hearing of this case, I heard much evidence, both in affidavits and orally, concerning different views of, and versions of, often disputed events during the difficult time when Ron Courteney was first hospitalised and then transferred to the rest home. Much of this evidence was not relevant to the issues I have to determine in this case. It revealed strongly divergent views as to what happened, what should have happened, and what didn't happen.

[8] Clearly, relationships between members of the immediate and extended family became strained during this difficult period, and remain strained if not completely sundered. At least in part this occurred as a result of the inevitable stresses and emotional difficulties encountered when an aged parent becomes unwell, another parent, who herself was both elderly and unused to the demands of caring for her unwell husband, is struggling to maintain the hitherto independent life previously lived by both, and the fraught and challenging decisions that must unavoidably be made regarding how best to provide care and assistance to the unwell parent, exacerbated in this case because both sons were resident overseas.

[9] In this judgment I have endeavoured strictly to confine consideration to the limited issues that arise, and require determination, in order to decide Steven's claim.

Did Karen Courteney validly exercise an enduring power of attorney to enter into a loan agreement on Ron Courteney's behalf?

[10] On 15 January 1997, so some years before the directly relevant events, Ron Courteney validly granted Karen Courteney an enduring power of attorney for the purposes of Part 9 of the Protection of Personal and Property Rights Act 1988

('the Act'). This gave Karen Courteney general authority to act on Ron Courteney's behalf in respect of his affairs relating to property.

[11] It is accepted that Karen Courteney held that enduring power of attorney over Ron Courteney's property at the time the EFM arrangement was entered into, and that those powers ceased on his death[1]. Karen Courteney accepts that she had completely forgotten about the existence of these powers until some time after Ron Courteney had died.

[12] The sole and determinative issue in this part of the claim is whether Karen Courteney can now be said retrospectively to have exercised those powers on Ron Courteney's behalf to enter into a loan transaction with Steven Courteney, in respect of the money paid by Steven to provide Ron's EFM care, notwithstanding that she was unaware of the enduring power of attorney at and after the relevant time.

[13] There are two immediate difficulties that Steven Courteney faces in this situation, based on the obligations owed by an attorney under the Act:

a. Section 99A requires an attorney to, as far as is practicable, consult with the donor when exercising an enduring power of attorney. Karen Courteney was on the evidence a largely passive observer to the payment to EFM by her husband Steven Courteney. She did not ascertain Ron Courteney's views on any potential loan. Indeed, it would probably have been practically impossible for her properly to do so, as she was overseas at the time the entirely appropriate decision to move Ron Courteney to the Kandahar Home, with care and support services to be provided by EFM, was made;

b. Section 99C requires an attorney exercising power over a donor's property to keep records of each financial transaction entered into on their behalf[2]. There are no formal records of any loan agreement entered into between Ron Courteney and Steven Courteney.

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[1] Pursuant to s 106(1)(b) of the Act.
[2] Failure to do so is a criminal offence under s 99C(2).

[14] The need to adhere to these requirements is fundamental. Before the Act, there was no such thing as an "enduring" power of attorney at common law, and any powers delegated to an attorney under the laws of agency were lost once the donor lost mental capacity.[3] As a result, the agency relationship came to an end at a time when the donor most required assistance. To rectify this problem, the Act implements a statutory regime, under Part 9, which specifically governs the ability of an attorney to act for a party in circumstances where they have become mentally incapable.

[15] However, following the Act's enactment, it became apparent that people who enjoyed enduring powers could abuse them. In 2001 the Law Commission issued a report entitled *Misuse of Enduring Powers of Attorney,*[4] which highlighted a number of problems with the statutory regime.

[16] The Commission recommended that a number of further safeguards be introduced to curb misuse of the Act. Many of these were adopted with the passage of the Protection of Personal and Property Rights Amendment Act 2007.

[17] This short (and incomplete) history emphasises the close Parliamentary scrutiny afforded enduring powers of attorney, the ongoing legislative attempts both to regulate that relationship and to ensure that the system is not abused, and the strict obligations and duties that an attorney must adhere to as a result. The High Court has said that: [5]

> The justification for greater scrutiny under the Act must be that the donor who is mentally incapable is unable to "supervise" the actions of his or her attorney in the way a person who is mentally capable might.

[18] A person exercising an enduring power of attorney must do so consistently with the Act, as this is the enabling instrument that gives them jurisdiction to act whilst the donor is mentally incapable. An enduring power of attorney is a special form of agency, but "is a creature of statute; there is no equivalent common law instrument".[6] Enduring powers must be governed by the principles stated or implicit

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[3] Chris Kelly "The EPA property attorney – an unguided missile?" (2003) 4 BFLJ 185.
[4] Law Commission *Misuse of Enduring Powers of Attorney* (NZLC R71, 2001).
[5] *Read v Almond* [2015] NZHC 2797 at [267].
[6] *Read v Almond* [2015] NZHC 2797 at [265].

in the Act, and there is "no logical reason" to follow the common law rules governing ordinary powers of attorney.[7]

[19] Thus the common law principles underpinning the agency relationship are of limited assistance. Specifically, Steven Courteney argued that an agent could ratify an act through acquiescence and in circumstances where they were unaware of their power. This might be the case at common law, but it is inherently inconsistent with the strict statutory duties placed on an attorney under the Act.

[20] The Court should be slow to allow a person retrospectively to invoke an enduring power of attorney, in circumstances where that person was unaware (for whatever reason) at the relevant time both of the existence of the power of attorney and of the corresponding statutory obligations that accompany it. That is all the more so when a ruling in the attorney's favour, as a result of that post-facto invocation, will result in judgment in excess of $36,000 in favour of her husband.

[21] Steven Courteney did not argue that Karen Courteney discharged her obligations under s 99A to consult with Ron Courteney. It would be odd for the Court now to say that her enduring power of attorney was nevertheless validly, albeit retrospectively, exercised - especially when failure to comply with the s 99A obligation is a ground for the Court to revoke an enduring power of attorney pursuant to s 105. Similarly, the Court should not allow Karen Courteney retrospectively to invoke her powers, when to do so would prima facie involve the Court in substance ratifying a transaction in circumstances where a failure to document the transaction could itself potentially attract criminal liability under s 99C.

[22] I therefore conclude that Karen Courteney did not and cannot, on Ron Courteney's behalf, exercise her enduring power of attorney so as to enable recovery by Steven Courteney of the money paid to EFM. That ground of claim therefore fails.

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[7] *Re Tony* (1990) 5 NZFLR 609 at 624.

Provision of the Necessities of Life

[23] Steven Courteney here relies on an infrequently visited corner of the law of unjust enrichment. He claims to be able to recover on the basis of being a 'necessitous intervener'. Put simply, Steven says that because he supplied his father with the "necessaries of life", by paying for the services provided by EFM, he is entitled to recover.

[24] This kind of claim is one of a number of disparate causes of action that exist at common law under the broad category of necessitous intervention. The existence of a claim of the type relied on here can be traced to the English Court of Appeal decision in *Re Rhodes v Rhodes* [1886-90] All ER Rep 871.[8] There Cotton LJ held that:

> […] whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of that person to pay for such necessaries out of his own property.

[25] In the same judgment, Lopes LJ held at 871:

> If a person provides necessaries for a lunatic, and intends to be repaid for so doing and to constitute a debt against the lunatic's estate, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries. It seems to me strange that the law to this effect could be doubted.
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> […]
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> Then the question arises whether these payments were for necessaries. I should not myself have felt any difficulty as to that, because what are necessaries has to be determined according to the circumstances of each particular case, and things may well be necessaries in one case which would not be so in another. The question what are necessaries must always be considered with reference to the reasonable requirements of the person under disability, having regard to his means and station in life

[26] The Court however refused to uphold the claim, because in making the payments for her maintenance the relatives of the lunatic did not intend to constitute themselves creditors against her estate. There needed to be some intention to be

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[8] Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, New York, 2011) at 476 describes *Re Rhodes* as the "leading case" for recovery of necessaries supplied to an *incapax*.

repaid. In *The Law of Restitution*,[9] the learned author notes that if a necessitous intervener must establish an intention to be repaid – as is required by *Re Rhodes* – then "that restriction, if strictly adhered to, means that the scope of recovery at common law in this sphere is very narrow".[10]

[27] The concept of a 'supply of necessaries' is also discussed in *The Law of Quasi-Contract*,[11] in a chapter dealing with recompense for unsolicited services. The learned author refers to the "very old law" whereby a person could provide direct support to infants or lunatics and later seek to recover the cost of that support from that person's estate.[12] After discussing whether a defendant in such circumstances could indeed be considered "unjustly enriched" at all, the author goes on to say that:[13]

> Unless, in other words, what is supplied is truly a necessary, as well as supplied with obvious intention to charge for it, what P beneficially does for D does not entitle him to a recompensatory claim.

[28] From a conceptual perspective, the learned authors of *Goff & Jones: The Law of Unjust Enrichment* argue that "it is illogical to conclude that […] the burden of proving an intention to charge should be imposed on the intervener; the burden should rather lie on the assisted person to prove that the intervener intended to act gratuitously".[14] This is seemingly premised on the view that the law should encourage people to intervene to preserve life and property in an emergency. Such altruism formed the basis of the Roman law doctrine of *negotiorum gestio.* The English common law has historically been loath to adopt such a position. As was noted by Goff and Jones:[15]

> In contrast, many common law jurisdictions, including England, have tended to reject any doctrine of *negotiorum gestio*, seemingly fearful that this would "breed overnight a nation of busy-bodies anxious to perform useless and meddlesome services for others

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[9] Burrows, above n 8.
[10] At 476.
[11] S.J. Stolar *The Law of Quasi-Contract* (2nd ed, The Law Book Company Limited, 1989).
[12] At 197.
[13] At 198.
[14] Charles Mitchell, Paul Mitchell, Steven Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet and Maxwell, London 2011) at 494.
[15] Goff and Jones, above n 14, ay [18-02].

> and to try their luck with the court", and contending that virtue should be its own reward.

[29] In the United Kingdom, the cause of action identified in *Re Rhodes* has been superseded (at least in part) by the Mental Capacity Act 2005.[16] There is no equivalent statutory provision in New Zealand. However, the common law line of authority regarding this type of necessitous intervener was acknowledged by the New Zealand High Court in *Mollgaard v Accident Rehabilitation and Compensation Insurance Corporation* [1999] 3 NZLR 735. This appears to be the only time the doctrine has been expressly considered in New Zealand.[17]

[30] In *Mollgaard,* David Mollgaard had been sexually abused and had suffered severe brain damage after an attempt to take his own life. This had rendered him a quadriplegic. He required intensive 24-hour care. After a period of hospitalisation, he was taken home and cared for by his mother. Mrs Mollgaard lodged a claim with the Accident Rehabilitation and Compensation Insurance Corporation (ACC) on David's behalf for financial assistance. ACC refused to provide cover to David in respect of the care his mother was providing, on the basis that this was not an "expense actually incurred" by him.

[31] Intrinsically linked to this question was whether David had a legal liability to pay Mrs Mollgaard for the services that she provided to him. The High Court held that Mrs Mollgaard could recover by virtue of her position as a welfare guardian under the Protection of Personal and Property Rights Act 1988, but also – and more importantly for present purposes – under the doctrine of necessitous intervention. Hammond J noted at [43] that:

> It is sometimes said that the common law does not recognise a general principal of reimbursement or legal protection akin to the Roman law doctrine of negotiorum gestio (see Buckland, *A Text-book of Roman Law from Augustus to Justinian* (3rd ed), 1963) ch XII, section CLXXXV). But, it is plain that our law does recognise something like that doctrine. There is authority for the proposition that someone can be bound by acts done for his benefit although that person has not specifically authorised another to act for him.

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[16] Sections 5, 7 & 8 in particular.

[17] But for a fleeting obiter reference in *Monk v New Zealand Nurserymens Association Incorporated* HC Wellington CP 166/91, 14 May 1991 at 8.

[32] Hammond J recognised that the disparate patchwork of legal actions that fall within the ambit of necessitous intervention have not been developed into a single, coherent doctrine. Despite that recognition, he then sets out at [44] the "historically accepted elements for recovery for necessitous intervention", (albeit somewhat begging the question as to what *type* of necessitous intervention is being referred to):

a. An impossibility of adequate communication between the parties;

b. Circumstances of necessity, defined as "something which is reasonably necessary, in all the existing circumstances";

c. The agent must act in the interests of the principal;

d. The overall action by the agent must be reasonable and prudent; and

e. The burden must not have been undertaken gratuitously.

[33] His Honour explicitly noted that he was not intending to undertake "the breadth of [the] burden" of unifying the disparate causes of action in the area of necessitous intervention, but nor does he indicate from where these "historically accepted" elements derive, and to which cause of action they relate. *Hastings v Semans Village* [1946] 4 DLR 695, cited by Hammond J, seems to be the source of the first three of the five elements. However, *Hastings* deals with a slightly different issue around whether an *agent* can exceed the scope of their authority under the doctrine of necessity.

[34] The reference to "impossibility of adequate communication between the parties" seemingly refers to communication between the agent and the principal, not the intervener and the person receiving support.[18] As Steven Courteney was not acting as an agent for any principal, the application of this element as strictly stated by Hammond J is difficult. Steven could possibly be characterised as the agent of Ron Courteney, so that he would be "entitled to recover his costs pursuant to the

[18] See also *The Law of Restitution*, above n 8, at 472.

general rule of agency law that every agent is entitled to be reimbursed expenses incurred in the execution of his authority,"[19] but as was noted by Goff and Jones:[20]

> This is an unnecessarily complex and roundabout way of explaining why a necessitous intervener should be entitled to recover his expenditure. The same result could be reached more simply, without interposing a deemed agency relationship of doubtful authenticity, by holding that necessitous interveners have a general right of recovery under English law.

[35] The test laid down by Hammond J appears broader in scope than what was applied in *Re Rhodes*. But it is an affirmation from the High Court that a necessitous intervener can in principle recover under New Zealand law, and as such is binding on this Court.

[36] Approaching this case in that way (but with some reformulation), Steven Courteney can succeed in his claim under this head if he can show that:

a. Steven Courteney supplied reasonable and prudent necessaries of life to Ron Courteney that were in Ron Courteney's interests; and

b. Ron Courteney lacked the capacity to contract for the supply of those services himself; and

c. Steven Courteney did not act gratuitously, in that there was an intention that he be repaid by Ron Courteney (or, in this case, his estate).

Did Steven Courteney supply his father with reasonable and prudent necessaries of life?

[37] The Court in *Re Rhodes* does not discuss in any depth what constitutes the necessaries of life, although Lopes LJ does say that "the question what are necessaries must always be considered with reference to the reasonable requirements of the person under disability, having regards to his means and station in life". On its facts *Re Rhodes* establishes directly only the proposition that asylum costs can be considered necessary.

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[19] *Goff and Jones,* above n 14, at [18-53].
[20] Above n 14, at [18-53].

[38] Goff and Jones say that:[21]

> A defendant will also be held to have been enriched by the receipt of market value when he is relieved from the burden of paying for goods and services which it was factually necessary for him to acquire. When deciding whether an expense was factually necessary, the courts take a broad and commonsensical view, and do not insist, for example, that the expense must have related to the bare essentials of life. It is enough that it is an expense that the defendant would have borne if the claimant had not relieved him of the need to do so.

[39] When discussing whether a minor is under any duty to pay for necessaries, Goff and Jones note that:[22]

> A minor is under some liability to pay for necessaries. These are goods and services that are "fit to maintain the [minor] in the state, station and degree in life" in which he moves. According to circumstances they can include food and clothing, shelter, medical services and the provision of education.

[40] The Supreme Court of British Columbia in *Skibinski v Community Living British Columbia*[23], when discussing the doctrine of necessitous intervention, held at [290]:

> The term 'necessaries,' as used in the cases, suggests necessaries of life and health, such as medical care, food, water and other necessary human sustenance – which in contemporary mores could encompass psychological and other forms of care deemed necessary to preserve mental health. Many cases will involve emergencies. But deciding whether the plaintiff's intervention was necessitous requires a broader view of saving life and limb than just urgent life-saving action. A needy person can die no less certainly for a month's lack of necessary care than from want of an hour's. The court's deciding whether a plaintiff's (non-meddlesome) intervention was necessary to preserve or (maintain) the life and health of an individual facing emergent or existing threats turns on the axis of the nature of the intervention and the medical and other evidence before it.

[41] An analogy could also be drawn with "necessaries" as appearing in s 151 of the Crimes Act 1961:

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[21] Goff and Jones, above n 14, at [4-19].
[22] Goff and Jones, above n 14, at [24-15].
[23] [2010] B.C.J. No. 2076, BSC 1500.

> **151 Duty to provide necessaries and protect from injury**
> Every one who has actual care or charge of a person who is a vulnerable adult and who is unable to provide himself or herself with necessaries is under a legal duty—
>
> (a) to provide that person with necessaries; and
>
> (b) to take reasonable steps to protect that person from injury

[42] Before amendment in 2012 the section referred to "necessaries of life". It was amended after the Law Commission felt that a broader duty should be imposed on people who have charge of such persons. In *R v Lunt* (2003) 20 CRNZ 681, the Court of Appeal held at [23]:

> The expression "necessaries of life" (or "necessaries" in s 152, which in context bears the same meaning) has long been well understood as encompassing goods and services (food, clothing, housing, medical care) necessary to sustain life. Apart from the dictum in *R v Popem* (1981) 60 CCC (2nd) 232 to which the Judge referred, it has never, so far as the diligence of counsel and our own researches have discovered, been understood to include the taking of an action other than providing goods and services for the purposes of sustenance, albeit in relation to goods and services it is a flexible expression capable of adjusting to changing times and circumstances.

[43] At [24] the Court went on to say:

> In other contexts, such as bankruptcy and infants' contracts, necessaries may include anything suitable or appropriate for the person in the particular circumstances or social situation, not merely those things which the person must absolutely have to sustain life […].

[44] "Necessaries of life" should in this present context be interpreted with a significant degree of both flexibility and compassion. It is abundantly clear on the clinical evidence that Ron Courteney's overall condition and quality of life improved markedly and immediately upon his arrival at Kandahar Rest Home and the commencement of care by EFM. There is really no other way to read the relevant clinical notes. His day to day life substantially and demonstrably improved, and was lifted far above the distressing and sometimes near-vegetative or non-responsive state he had previously been subsisting in.

[45] In those circumstances I conclude that the "necessaries of life" were in fact provided by Steven paying for the services of EFM, as the evidence establishes

that without those services being externally provided, Kandahar Rest Home would otherwise have been unable to take Ron Courteney, and his quality of life would have remained at a much reduced and distressing level.

Did Ron Courteney lack the capacity to contract for those services?

[46] Cotton LJ, in *Re Rhodes*, said that "whenever necessaries are supplied to a person **who by reason of disability cannot himself contract**, the law implies an obligation on the part of that person to pay for such necessaries out of his own property".[24] The requirement has been legislatively adopted by the Mental Capacity Act 2005 (UK) (see above at [29]), which requires that the receiving party "lacks capacity" in relation to the matter. It also reflects the historic English common law position as encapsulated by Bowen LJ in *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 CH D 234 at 282: "liabilities are not to be forced on people behind their backs".[25]

[47] If Ron Courteney was in a position to contract for the services of EFM himself, then he should have been left to make that decision without interference. Here I am quite satisfied that Ron was not, at the time of the transfer to Kandahar Rest Home, properly able to make that or indeed any decision. The clinical notes eloquently express his very poor or at times absent ability to make any rational and informed decisions relating to his own care. Indeed the evidence shows that his much reduced mental and physical functioning rendered him unable to make even the smallest decision, as well as presenting very significant daily challenges both to staff and to his wife.

Did Steven Courteney act gratuitously when providing the services, or was it clear that he had an intention to be repaid?

[48] The cause of action, as set out in *Re Rhodes*, requires that the plaintiff intends to constitute themselves as a creditor against (here) the estate. Indeed, it is on this issue that the plaintiff in *Rhodes* failed.

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[24] At 870, emphasis added.

[25] Cited with approval by the New Zealand High Court in *Villages of New Zealand (Pakuranga) Limited v Ministry of Health* HC Auckland CIV-2003-404-5143, 6 April 2005 at [87].

[49] In evidence Steven Courteney referred to a number of conversations in which the cost of EFM services was discussed. It appears to have become apparent at a meeting with Dr Duncan on 23 April 2010 (prior to the move to the rest home) that Ron Courteney required a degree of peace and quiet to assist in his recovery, away from the commotion and confusion experienced in the hospital ward. However, a single ward was unavailable, and due to staffing levels, Ron Courteney needed to be next to a nursing station so that he could be monitored, which was impractical and, in any event, undesirable.

[50] This prompted the family to get in contact with EFM. Steven Courteney describes a lengthy phone conversation he had with his brother Stuart on the evening of 26 April 2010:

> We discussed the status of Dad's health and the likelihood that extra funding (e.g. for 24 hour care, if Dad left the Wairarapa Hospital) would be required to help Mum and Dad over the next few months until Dad's situation stabilised. We both knew that Mum and Dad had significant amounts of money on bank accounts in Jersey, but recognised that Mum might have difficulty in getting access to this money at short notice and also, at that stage, the full cost and indeed the implication of Dad's illness and future were not known. Stuart agreed that we should help Mum by paying for anything that was not either free, or covered by insurance. We settled on splitting these undefined costs 50:50.

[51] Steven Courteney goes on to say:

> If we could get Dad out of Wairarapa Hospital, into a quiet and safe environment, with good care, then there seemed to be a good chance that he could recover. This would come at an extra cost, as there would be a need for supplementary carers. This was manageable, however. Mum and Dad had good savings. And I understood that my brother and I would pay half of the cost each, which would mean they did not have to worry about using their own money.

[52] On or about 4 May 2010, Steven Courteney said that Stuart Courteney indicated that he (Stuart) was no longer prepared to pay anything towards his father's care. Steven Courteney commented on this apparent change in his evidence:

a. "I was worried about my employment contract being up for renewal on 30 November 2010 combined with the fact that I was paying for Klaudia's [his daughter] education and also trying to put money away

for retirement. Mum said that I need not worry about Klaudia, since she could always get a student loan and she would inherit everything from the whole family one day and could then easily pay off the student loan".

b. "I told Mum not to worry, that Karen and I would find a way to cover the costs".

c. "Karen 'Skyped' me just after I got home […]. I told her briefly what had happened and Karen agreed that we would find a way of funding Dad's needs".

d. "The following morning (Wednesday, 5 May 2010) my mother phoned me early in the morning and said that she was not prepared to go into the hospital. I passed on to Mum the fact that Karen had confirmed that we would find a way of funding Dad's needs."

[53] In a note written by Steven Courteney on 7 May 2010 to his mother and brother outlining the situation, the following directly relevant point is explicitly made:[26]

> Karen and I will extend as an interest free loan up to NZ$35,000 to Mum and Dad to cover the enhanced carer costs (i.e. Elder Family Matters – details attached). This is just over five weeks of high-level care. Towards the end of the period, when Stuart is in New Zealand, we all need to review what, if any, progress is being made. **If Mum and Dad end up being dragged into some form of means testing, then Karen's and my loan needs to be protected.**

[54] An invoice from EFM, totalling $2653.20, for transitional care for the period 15 to 25 June was received and paid for by Steven Courteney. On 23 July 2010, a letter from WCM Legal was sent to Mrs Courteney on Steven's behalf, including the following:

> Our client wishes to record that to date he has incurred costs in addition to the invoice above of $34,216.19 for Mr Courteney's care. Although we understand on 7 June 2010 Ms Watson of Elder Family Matters conveyed to Karen Courteney that the payments made were not considered by you to be a loan to the family, it is our client's view that

[26] Emphasis in the original.

> the money paid are in fact a loan as was pointed out in his note of 7 May 2010, a copy of which was received by you and your younger son.

[55] It is clear, then, that a matter of days after the services of EFM were initially enlisted, Steven unequivocally expressed in writing an intention that he be repaid for the costs incurred. I do not overlook the fact that the Client Agreement form was signed on 3 May 2010, between Steven Courteney and EFM. This happened the day before Stuart told Steven that he, Stuart, would not share the costs incurred. The oral undertakings thereafter given by Steven to his mother do not necessarily exclude an intention that the costs Steven and Karen agreed to meet would result in the creation of a loan. And indeed that intention was made explicit in the note dated 7 May 2010.

[56] Whatever might have been the contractual arrangements as between Steven Courteney and EFM, as between Steven Courteney and (notionally) his father, and as were extant at the time the payments to EFM were variously made, I conclude that there was clearly an intention that Steven Courteney be, at some stage, repaid.

Result

[57] In light of the above, and given that the requirements of the second basis of claim are all established, Steven Courteney is entitled to recover from the estate the money he paid to EFM.

[58] There will be judgment for the plaintiff. No claim for interest is made. As successful plaintiff however, Steven is entitled to costs. If the parties cannot agree, memoranda can be filed in the usual way. I did not hear from counsel as to costs, but in all the circumstances I consider that the estate should not be niggardly or parsimonious, but rather it should be generous, with respect to costs.

AIM Tompkins
District Court Judge