IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HPP 72/2017

BETWEEN : **SANGEETA SHALINI LATA** of Navakai, Nadi, Waitress

Plaintiff

AND : **VINAL VILASH DEO** of Waqadra, Nadi, Self-employed

Defendant

APPEARANCES:

Mr A Chand for the Plaintiff
Mr DS Naidu for the Defendant

DATE OF HEARING: 10 February 2020

DATE OF JUDGMENT: 1 May 2020

DECISION

1. In this claim filed in September 2017 the plaintiff seeks to challenge the validity of her father's last will, made in 2003, some 14 years before his death in January 2017.

2. But while I have a great deal of sympathy for the plaintiff's situation, I am satisfied – for the reasons that I will set out in this judgment – that this proceeding is misconceived and should never have been brought. Instead, while it is not the function of the court to give legal advice, it seems obvious that there were and still may be other options available to the plaintiff which she should have been advised to pursue instead, very probably with a much greater chance of success.

3. Unfortunately the defendant appears also to have been poorly advised, and as a result the parties now, as a result of this decision, face a situation where after three years of no doubt expensive court proceedings neither is further advanced in resolving issues arising from the estate, and both face the prospect of having to take steps through the Court to obtain clarity about their entitlements.

Background

4. The subject of these proceedings is the will of the late Vidya Sagar, who apparently (although there is only passing reference to it in the evidence, no death certificate has been produced, and there is no evidence as to the circumstances or cause of

death) died on the 3rd January 2017. No information has been provided to the court about the extent of Mr Sagar's estate, except that he appears to have owned a house in Waqadra, Nadi, and possibly other assets including bank accounts. No evidence of the ownership, details or value of this property has been produced (or was discovered in the course of the proceedings), and there is no evidence of any other assets that Mr Sagar owned when he died. I have assumed that there is something worth fighting over; these proceedings would be completely pointless if there is not.

5. It seems that Mr Sagar was an educated man (it is suggested that he went to Oxford University in the United Kingdom), who worked throughout his life as a Senior Co-operatives Officer for the Colonial Sugar Refining Company and later the Fiji Sugar Corporation.

6. Mr Sagar left a last will dated 12 September 2003. A copy of the will was produced by the plaintiff in evidence. In it Mr Sagar appointed the defendant (who he refers to in the will as his grandson) Vinal Vilesh Deo as the sole executor, and he leaves all his estate to him. The will appears to have been signed in Nadi, and witnessed by a solicitor and his/her solicitor's clerk.

7. The defendant is not in fact related to Mr Sagar. He is the grandson of Mr Sagar's de facto wife, and it seems accepted by all parties, was brought up from a very early age (the defendant says when he was seven months old) as the child of his grandmother and Mr Sagar.

Plaintiff's claim and evidence

8. The plaintiff claims to be the daughter of Mr Sagar. She says she was born on the 21st February 1976 as a result of a relationship between Mr Sagar and her mother, Shiv Devi, who died in 2000. The plaintiff did not produce a copy of her birth certificate, which she says did not have her father's name on it, but which would at least have confirmed that she was the daughter of Shiv Devi as she claims. However she did produce (in cross-examination!) a copy of a document issued by the Magistrates Court at Nadi in August 1980, which relates to enforcement of a maintenance order apparently made in favour of Shiv Devi against Mr Sagar on the 4th August 1978 in respect of an un-named child. Although the defendant denied in his statement of defence that the plaintiff was the daughter of the deceased, there seemed to be no serious suggestion at trial that the plaintiff is not who she claims to be. The plaintiff said in evidence that Mr Sagar always called her 'daughter' at their meetings.

9. In her statement of claim the plaintiff alleges that:

i. The deceased, Mr Sagar, was forced and threatened to prepare the will in favour of the defendant.

ii. The defendant was threatening Mr Sagar that he (the defendant) would not look after Mr Sagar if he did not make his will in the defendant's favour.

iii. The deceased was warned by the defendant to act in such a manner before the solicitor who witnessed the will that the solicitor did not realise that Mr Sagar had been coerced into making the will in that form.

iv. She believes that the deceased was frightened and had been pressured into signing the will as he did.

v. The defendant threatened and warned Mr Sagar not to change his will.

vi. The deceased was not of sound mind, or was incapable, because of stress caused by the defendant, of making up his own mind about his will.

vii. The defendant acted fraudulently by manipulating the deceased's mind with the intention of obtaining the deceased's property.

viii. The defendant acted untrustworthily which made the deceased unable to understand the nature of his own acts and efforts as to what the deceased's decision towards his estate shall be.

ix. The defendant took advantage of the deceased's old age and health conditions and made use of his complete dependence upon the defendant for the everyday necessities of life to force the deceased to make his will contrary to his own wishes and intention.

x. As a result of these matters, Mr Sagar 'could not have been in a position to understand and execute his will'.

10. The plaintiff accordingly seeks in her claim:

i. A declaration that the will purportedly executed on 12 September 2003 is null and void.

ii. An order restraining the defendant from applying for a grant of probate.

iii. An order that the plaintiff may apply for the grant and administer the estate of Mr Sagar

iv. An order that the defendant provide estate accounts of monies collected as rent for the deceased's property, and to reimburse that money to the plaintiff.

v. An order that the defendant deposit the original lease of the deceased's property and all other property to the Registry of the High Court at Suva for safe keeping.

vi. An order that the defendant vacates the property formerly owned by the deceased.

vii. Such other relief as the Court consider's just.

viii. Costs on an indemnity basis.

11. The plaintiff gave evidence about the relationship she had with her father. Although she said that her parents had lived together for 5 years after she was born, that seems unlikely given the evidence of a maintenance order being sought and made in 1978, within a couple of years of her birth, and the plaintiff herself gave no evidence of having lived with the deceased. She said her mother told her about her father, including where he was living and working, and she remembers her mother taking her to see her father when she was a child, particularly on one occasion when he had had an accident and wanted to see her (she doesn't remember how old she was at that time, except that it was before she had started school).

12. Once she grew up she started meeting her father secretly. This was when she was a teenager, before her mother died, and while she was working (i.e. before she got married in 1997 at aged 21years). The first meeting happened by chance, but after that they met by arrangement. She says that up to around three years before he died (after which he was unable to drive, and so they could no longer meet) she and Mr Sagar used to meet from time to time outside MH's store at Namaka, and sometimes at a vegetable shop on the Nadi back road. It is unclear exactly how often they met, and how meeting arrangements were made, although Ms Lata says that after she married in 1997 Mr Sagar used to phone her - on her husband's mobile phone - from a public telephone box. She did not have a phone, and did not have a phone number for Mr Sagar. The plaintiff said that these meetings took place approximately every 3 months. She says that when they met outside MH's they did not sit down to talk, merely talked for a while and then went their separate ways.

13. It is not clear what the plaintiff and Mr Sagar talked about when they met, but the plaintiff says that her father told – she does not say when this happened - her that he had not made a will, and that if he did so he would leave her a share of his estate. He once told her, she said, that he had signed something, but he did not know what it was, and she did not question him further about it. Apart from this (which I have the impression was something that was discussed only once, or if not, certainly no more than occasionally) there was no discussion about Mr Sagar's will, or what would happen with his estate. The plaintiff believes that her father would have told her if he had made a will. She says that she remembers meeting her father in 2003, which was the year in which he made his last will, but she does not say when in that year, or how often. Mr Sagar did not tell her that he had made a will, but nor did she say that she had asked him. She says that when they met in 2003 her father complained about feeling sick, and told her that he had gastric problems, although these were apparently not serious enough for him to see a doctor, or go to hospital. He used to say, she says, that he was not as fit as he had been previously, he was getting on in age, and he was forgetting things. However, she says that this occasion (in 2003) was the only time when they discussed the issue of his forgetfulness.

14. Ms Lata also says that she believes that Mr Sagar was afraid of the defendant. She says that he told her that the defendant got 'angry with him and starts fighting'. She was not asked to, and did not elaborate on this evidence, but acknowledged that the conversation about his fear did not occur in the context of discussions about his will. It seemed, rather, that this was the reason/excuse given by Mr Sagar for keeping his meetings with the plaintiff secret.

15. Ms Lata also confirmed that knew of but had never met the defendant; she does not know her father's birthday, and would not recognise his signature. She knew where he lived, but otherwise had no means of contacting him. He occasionally called her, on her husband's cellphone, but she doesn't know if he had a telephone – he used to call her from a public phone. Whenever they met they would make arrangements for the next meeting. She had not seen or spoken to him for around three years before he died. She found out about his death only through the daughter of Mr Sagar's brother. There was no evidence of how she knew Mr Sagar's niece. The plaintiff did not attend Mr Sagar's funeral because, she said, she didn't want to cause any 'problems'. She couldn't say what problems she thought might have occurred, but she didn't want to take the risk .

16. In cross examination Ms Lata was asked about the allegations she made in her statement of claim. She disclaimed any knowledge of the allegations, and said that she had not told her solicitor those things. In re-examination she resiled from this

position somewhat, but not in the sense that she provided any evidence for the assertions that are contained in the statement of claim. Instead it seems that Ms Lata believes that what she has alleged must be so, because otherwise her father would have made some provision for her in his will. This may be what she believes, but it is not evidence for the correctness of those beliefs.

17. After learning of her father's death Ms Lata made enquiries about a will, and discovered that Mr Sagar had made a will in 2003. The plaintiff then lodged a caveat against the grant of probate pursuant to the Succession Probate and Administration Act 1970.

Defendant's response and evidence

18. In his statement of defence the defendant denies the plaintiff's allegations and says:

    i. He was aged only 19years when Mr Sagar made his will in 2003.

    ii. He was not present either at the time the instructions for the will were given, or when the will was signed.

    iii. He was not aware of the making of the will or its contents until some years after it was executed.

    iv. He was given into the care of his grandmother (the de facto wife of the deceased) in 1984 when he was 7 months old, and thereafter was raised as the son of his grandmother and the deceased.

19. In his counterclaim the defendant seeks a declaration that the court 'pronounce that the will dated 12th September 2003 is the true will of the deceased'. What the counterclaim does not do is seek probate of the will, and given that there is neither evidence of the death of Mr Sagar, nor the original of the will, the court cannot grant probate as matters stand in these proceedings.

20. Nor has the defendant applied for removal of the plaintiff's caveat under section 47 Succession Probate & Administration Act 1970.

21. The only evidence for the defence was given by Mr Deo. His evidence was that he had been brought up for as long as he remembered by his grandmother, and her partner Mr Sagar. He has never, to his recollection, lived with or been brought up by his natural parents, who live partly in Fiji, and partly with his brother in New Zealand. He did not say when or in what circumstances he came to know who his natural parents were, and of the relationship between his grandmother and Mr Sagar. Mr

Deo says that Mr Sagar had never told him he had a daughter, and that he did not know anything about the plaintiff, or her relationship with Mr Sagar until, after Mr Sagar's death, she registered a caveat against the grant of probate.

22. Mr Deo's grandmother died in 2002. At the time she died she, Mr Sagar and Mr Deo were living at Mr Sagar's property in Waqadra, the same property where Mr Deo is now living with his wife and family. Mr Deo continued to live with Mr Sagar. He married in 2010, and Mr Sagar paid for the wedding.

23. Mr Sagar was generally fit up to the time he died. He was unwell and taken into hospital only the day before he died on 3 January 2017. He was 84 years old when he died.

24. It was put to Mr Deo in cross-examination that he had 'pushed and threatened' Mr Sagar to make a will in his favour, and thereafter to make sure that Mr Sagar did not change his will. It was also suggested that the only reason Mr Deo continued living at the Waqadra property with Mr Sagar after his grandmother's death was to make sure that Mr Sagar made a will leaving the property to him. Mr Deo denied this, and I believe his evidence, just as I believe the plaintiff's evidence about the relationship she and her father had. He continued to live with Mr Sagar after his grandmother died because that was his home. There is simply no evidence to support the plaintiff's case that Mr Sagar was coerced into signing the will.

The law

25. It is clear that although those propounding a will must satisfy the court that the testator was of sound disposing mind, and that the will was properly signed in compliance with the requirements for a will (see section 6 Wills Act 1972). In the absence of evidence pointing to the contrary the court will be guided by the evidence that is in front of it when a copy of the will is produced, i.e. that it is rational on its face, and appears to be properly executed and witnessed. It is also clear however that once evidence of incapacity is provided, the decision must be against the validity of the will unless it is affirmatively established that the deceased was of sound mind when he executed it.

26. The principles applicable to the assessment of testamentary capacity are well settled. The most commonly cited authority is the decision of Cockburn CJ in **Banks v Goodfellow** (1870) LR 5 QB 549. These principles were recently restated and affirmed in the New Zealand Court of Appeal in **Loosely v Farn** [2018] NZCA 3 as follows:

1. *Because it involves moral responsibility, the possession of the intellectual and moral faculties common to our nature is essential to the validity of a will.*
2. *It is essential to the exercise of such a power that a testator:*
   (i) understands the nature of the act and its effects; and also the extent of the property of which he is disposing;
   (ii) is able to comprehend and appreciate the claims to which he ought to give effect;
   (iii) be free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
3. *In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.*
4. *A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business.*
5. *Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all.*
6. *Nor must the testator possess such capacity to the same extent as previously. His mind may have been in some degree weakened, his memory may have become in some degree enfeebled; and yet there may be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament.*
7. *But if that standard is not met, he will lack capacity.*

27. The New Zealand Court of Appeal has also reiterated the onus and standard of proof of testamentary capacity in **Bishop v O'Dea** (1999) 18 FRNZ 492 as follows:

1. *In probate proceedings those propounding the will do not have to establish that the maker of the will had testamentary capacity, unless there is some evidence raising lack of capacity as a tenable issue. In the absence of such evidence, the maker of a will apparently rational on its face, will be presumed to have testamentary capacity.*

2. *If there is evidence which raises lack of capacity as a tenable issue, the onus of satisfying the Court that the maker of the will did have testamentary capacity rests on those who seek probate of the will.*
3. *That onus must be discharged on the balance of probabilities. Whether the onus has been discharged will depend, amongst other things, upon the strength of the evidence suggesting lack of capacity*

These principles have been well recognised for a long time, and are essentially the same as those set out by the authors of Williams, Mortimer & Sunnucks **Executors, Administrators and Probate** 21st Ed (2018) Sweet & Maxwell at paragraph 10-26.

Analysis

28. As I have said, I have some sympathy for the plaintiff's situation. Although her father appears to have recognised her as his daughter (even if only privately between them) he has not done so in his will, and he has not left her any share of his estate.

29. However, there is simply no evidence here of a tenable issue that when he made his last will in 2003 Mr Sagar was lacking in capacity, or was subject to undue influence or oppression. Put at its best for the plaintiff, her evidence (there was no other evidence than that provided by the plaintiff and the defendant) is that Mr Sagar complained to her about feeling unwell, and said, in the context of meeting with her, that he was concerned about getting into arguments with the defendant if it was known that he was seeing her. However none of this evidence was credibly connected to the time when Mr Sagar is now known to have made his will in 2003. Although the plaintiff says that she met him in 2003 and he claimed to be feeling unwell, she did not explain how she remembers this from 2003, as opposed to any other time that she met with her father. I think it is much more likely, based on the way she gave her evidence, and the lack of specific information that it contained, that she has identified 2003 because she knows that that is when the will was made, rather than because she remembers anything specifically from that period that was different from any of the other meetings she had with her father. I can well imagine that her father, when meeting his daughter, might well want to offer some excuse for his failure to support her, or his failure to meet her more often, and acknowledge her existence to others. Saying that there would be trouble at home if it was known that he was seeing her is exactly the sort of excuse Mr Sagar may have felt compelled to offer.

30. I am satisfied that the plaintiff gave her evidence honestly, and did not seek to mislead the court. But at best her evidence amounts to wishful thinking on her part, perhaps seeking to rationalise why her father left her nothing. This evidence does not raise a tenable issue that Mr Sagar lacked capacity or was subject to threats, or intimidation by the defendant or anyone else, and there is nothing in the will itself

that would put the court on alert for undue influence or a lack of capacity. It is entirely understandable that shortly after the death of his de facto wife in 2002 Mr Sagar's mind turned to his increasing age (he was then aged 72 years), and the need to provide for his loved ones on his death. It is obvious that the defendant – who he had brought up as his son - would be the first person he would consider as a beneficiary. It may be that a reasonable and just testator would have thought also of the plaintiff, and made some provision for her, but the plaintiff's present claim is not one under the Inheritance (Family Provision) Act 2004[1] where such considerations might be relevant. A testator's capacity to make a will does not depend on his reasonableness, or sense of justice. As the England & Wales Court of Appeal said in **Sharp v Adam** [2006] EWCA Civ 449:

> *An irrational, unjust and unfair will must be upheld if the testator had the capacity to make a rational just and fair one ...*

31. Nor is this a case where the irrationality or eccentricity of the will is itself evidence of incapacity on the part of the testator when he made it. As to the suggestions of undue influence and/or intimidation of Mr Sagar by the defendant, there is simply no evidence of such conduct. The complaints that Mr Sagar made to the plaintiff about feeling unwell, or about wanting to avoid arguments at home about the plaintiff, come nowhere near being sufficient evidence of incapacity, intimidation or influence to raise these as tenable issues.

32. While the law provides that:

    i. when a will apparently rational, and appearing on its face to be properly signed, is produced to the Court, the assumption is that it is validly made and executed, and it will be admitted to probate on the basis of those assumptions.

    ii. However, when there is credible evidence challenging the capacity of a will-maker, or that he/she made the will voluntarily, the onus then switches to the person propounding the will to prove capacity, or voluntariness.

    But in this case the plaintiff's evidence never reached the point where the initial assumptions of validity should be set to one side, and the defendants should be required to prove capacity and that the will was made voluntarily and validly. What Mr Sagar is said to have told the plaintiff is:

    - that he had not made a will,

[1] See also the New Zealand Family Protection Act 1955 on which the wording of this Act is based.

- that if he did so he would leave something to her,
- that he felt unwell, and
- that he was afraid to tell the defendant about his meetings with the plaintiff.

33. But in the extremely vague evidence of the plaintiff, none of these assertions by him are connected to one another in either their timing (i.e. they were not all said at the same time) or subject matter (i.e. they were not made in the context of a complaint by her father of his treatment by the defendant in the context of making a will). There is simply no evidence (credible or otherwise), that raises a question as to validity such that the defendant should be required to prove capacity and voluntariness. On this issue it is particularly significant that when asked in examination in chief"

Q: *Witness, can you tell the court what actually came out from your mind to think or to say that the Will that your father has signed or has made is not his right will?*

A: *Your Worship, he informed me that if I make a Will, I will give your share and if he had done that, he would have informed me*

In other words, it was nothing to do with his health (relevant to capacity) or his fear of the defendant (voluntariness) that came to the plaintiff's mind when asked why she believed her father's will was invalid, but the fact that he had not told her that he had made a will. This falls a long way short of contradicting the evidence that is contained in the will itself that it is properly signed and witnessed.

Conclusion

34. Accordingly the plaintiff's claim for a declaration as to the invalidity of the will (and consequential orders) fails, and is dismissed. Although the defendant has not applied for it, I make an order for removal of the caveat against the grant of probate filed by the plaintiff on 10 February 2017 in the High Court at Suva under HPC 04/2017. Mr Deo will need to apply for probate in the normal way, so that he can administer the estate.

35. In all the circumstances I make no order as to costs. I hope that, with advice, the parties will be able to find a solution to this unfortunate – but very human - situation.

HIGH COURT OF FIJI LAUTOKA

A.G. Stuart
Judge

At Lautoka this 1st day of May 2020

SOLICITORS:

Amrit Chand Lawyers for Plaintiff
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