IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 08 of 2024

BETWEEN: **PAT ERIC GARNETT** of 61 Maryhill Terrace, Mornington, Dunedin, New Zealand, Chef.

PLAINTIFF

AND: **THE ESTATE OF LOLOMA LEVY GARNETT** late of Yanuyanu Settlement in Vatuwaqa.

1st DEFENDANT

AND: **ROBERT GARNETT** of Block 7, Flat 44 Ryland Place, Vatuwaqa, Cultivator

2nd DEFENDANT

AND: **THE CHIEF REGISTRAR** of the High Court of Fiji.

3rd DEFENDANT

AND: **THE ATTORNEY-GENERAL OF FIJI**

4th DEFENDANT

AND: **THE PUBLIC TRUSTEE OF FIJI** of Suva

5th DEFENDANT

Before: Hon. Mr. Justice Deepthi Amaratunga

Counsel: Mr. S. R. Valenitabua for the Plaintiff

Mr. I. Matanitobua for first and second Defendants

Ms S. Kapoor for third fourth Defendants

Ms. Lasike T for fifth Defendant

Dates of Hearing: 29th ,30th and 31st July, 2024

Date of Judgment: 19.9.2024

Catch words

Wills Act 1972 Sections 2, 4,5,6,6A, 26 -Testamentary Capacity- Mental – Instructions given to beneficiary- construction-l meaning- reasonable person-what meant by testator – not the same as dictionary and grammar meaning- instructions given to legatee- execution of last will

Cases Referred

Banks v Goodfellow [1861-73] All ER Rep 47

Perrins v Holland and others [2011] 2 All ER 174

JUDGMENT

INTRODUCTION

[1] Plaintiff is challenging the validity of last will of late Loloma Levu (Loloma) dated 16.11.2009(the Will) and seeking revocation of the Probate No 50073 issued on. The validity is challenged on the basis of lack of testamentary capacity due to sickness and old age, lack of sound mind, and also undue influenza of second Defendant who is the sole beneficiary in terms of the Will. Plaintiff also state that the Will bequeathed a larger share than he was entitled hence the Will was invalid. Second Defendant gave evidence and he also called one of the attesting witnesses to the Will. A close relative of the deceased, Babra Garnett Salele, who lived with late Loloma when he was living in Tai Turaga Island (TTI) till she left for employment, and also continued to visit him in Suva even after the Will was made, confirmed testamentary capacity of Loloma. Another disinterested witness Vaselieli Ratulevu, who lived with late Loloma in Suva from 1985 to 2006 also gave evidence and dismissed the contention of Plaintiff as to the mental status of late Loloma. They both confirmed that late Loloma could understand and converse with them and proved that he had testamentary capacity. Both witnesses explain in detail about late Loloma's knowledge on fishing and his skills. Late Loloma had gone fishing alone and also with others and was able to catch large haul of fish. One of the witnesses to the Will also confirmed that late Loloma's mental capacity to make the Will.

[2] Plaintiff had instituted this action in 2017 admittedly after his efforts to create a trust regarding the land of TTI had failed. Second Defendant is the registered owner of one undivided half share in the certificate of title of TTI. Plaintiff has requested second Defendant to transfer his undivided share inherited from the WII, for the creation of trust in order to manage and administer TTI, and also investment in TTI for preservation of land belonging to TTI from sea erosion and other natural effects.

[3] It is proved on balance of probability late Loloma was a person of sound mind to understand the contents of his last will and was able to foresee that some of the relatives would dispute if his share of TTI given to second Defendant. So, late Loloma had asked second Defendant to build a house in TTI while he was alive .He had expressed his desire to bequeath his share to second Defendant several instances to relatives individually as well as in a family meeting convened by them for discussion of TTI. This was expressed in a family meeting when he was asked to prepare a last will, and had created a rift between Loloma and some relatives.

[4] Late Loloma held his ground in the family meeting and told that he would only give his interest in TTI to second Defendant. This was due to his unwavering affection to second Defendant which he had openly expressed and this had created some friction among some relatives.

[5] Apart from this family meeting few relatives had visited late Loloma's place to ask for his share, without avail. These actions of the relatives show that late Loloma had testamentary capacity.

[6] Family members knew that late Loloma had bequeathed his share to second Defendant. After Loloma's death second Defendant obtained probate in 2010. There were meetings held to discuss about TTI and creation of a trust. Second Defendant had not agreed to transfer undivided half share of TTI to such a trust and this action is instituted in 2017 to dispute late Loloma's mental status after seven years from death of Loloma.

Validity of the Will

[7] In *Banks v Goodfellow* [1861-73] All ER Rep 47 at pp54, 55 held,

‘The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposition of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind in the vast majority of instances will lead men to make provision for those who are the nearest to them in kindred, and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed…….

Further,

‘There are other considerations which turn the scale in favour of the testamentary power. Among those who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind, some may be better provided for than others; some may be more deserving than others; some from age, sex, or physical infirmity may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attention which are one of its chief consolations. As was truly said by KENT, C, in *Van Alst v Hunter* (9)

"It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which be has in protracted life to command the attention due to his infirmities."

[8] Validity of the Will is contested on two grounds;

1. Late Loloma lacked testamentary capacity, when last will was made.
2. Late Loloma had no property to dispose at the time of disposition.

[9] Ground 2 above is discussed first considering its importance to the judgment. In the pleadings this was pleaded following manner

a. At al material times, the testator, Loloma gave devised and bequeathed the whole of Tai Turaga Island, which did not and does not belong to him wholly. He cannot give devise and bequeath properties that does not belong to him.'(see paragraph 25(g) of statement of claim.

[10] In the written submission Ground 2 is stated 'whether Loloma had no property to dispose by Will No 2[1] on the date he attested Will No 2?'[2]

[11] Plaintiff in the written submission had admitted that the fact that title of TTI did not register late Loloma's ownership in terms of the last will of his father, was not a bar to dispose the equitable interest he had on TTI at the time of execution of the Will in 2009.

[12] Section 2 of Wills Act 1972, interprets 'property' as,

> ""Property" includes real and personal property or **any interest therein** and anything or chose in action".(emphasis added)

[13] As the title of TTI is freehold, late Wolesly Garnett's last will created equitable interest for undivided half share to late Loloma and his brother. An equitable interest can be disposed by the Will.[3] It is admitted in the written submission that Loloma could bequeath his interest of undivided half share of TTI by the Will.

[14] Plaintiff contend that Loloma had bequeathed whole TTI by the Will and on that basis it is invalid. In my mind there was no intention on the part of testator to bequeath entire TTI to second Defendant, he knew he had only an undivided half share interest, and he had bequeathed it to second Defendant through the Will.

[1] The last will of Loloma
[2] 1.9(2) of Plaintiff's Written Submission
[3] Paragraph 3.2 of submissions of Plaintiff

[15] Wills Act 1972, Section 26 deals with the 'general rules of construction' of a last will. In terms of general principles stated in construction of last will in Halsbury's Laws of England[4] 'Basic principles of construction' states;

> '(4) the meaning which a will would convey to a reasonable man **is not the same thing as the meaning of its words: the meaning of words is a matter of dictionaries and grammars; the meaning of the will is what having regard to the relevant background the testator would reasonably have been understood to mean;** the background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even to conclude that the testator must, for whatever reason, have used the wrong words or syntax;
>
> (5) the 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents; on the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require **judges to attribute to the testator an intention which he plainly could not have had**.'(Footnotes deleted)(emphasis added)

[16] At no point of time Loloma had claimed entire TTI and he had allowed others to live in TTI. He had asked second Defendant to build a house in TTI while he was alive, indicating firstly he was intelligent to understand what was the intension of beneficiaries of undivided half share of his sibling late Gerrad Bola Garnett and the likelihood of them disputing disposition of his interest to second Defendant when he is dead. So he wanted to cement his undivided half share interest through a permanent construction of second Defendant. Secondly, late Loloma never thought that he was sole beneficiary to his father's estate and had never acted in that manner till he died he was only worried that his undivided share will be disputed by others. Second Defendant as executor of the Will had never claimed more than undivided half share. This is an issue which Plaintiff raised for his benefit to invalidate the Will.

[17] A strained meaning cannot be given on the disposition in the Will in order to invalidate it. Section 26(d) of Wills Act 1972 as well Common Law on

[4]Halsbury's Laws of England Wills and Intestacy (Volume 102 (2021), paras 1–566; Volume 103 (2021), paras 567–1304)4. Construction of Wills(3) Principles of Construction of Wills(i) Application of Principles of Constructional. Ascertainment of Intention

interpretation of last will supports the meaning of the Will to '*the meaning of the will is what having regard to the relevant background the testator would reasonably have been understood to mean'*. So the contention that the Will bequeathed a share larger than late Loloma had cannot be accepted considering the actions of testator as well as executor. The Will was prepared by a priest and it cannot be interpreted to what Plaintiff contend. So the said ground for invalidate the Will is overruled.

[18] At paragraph 3.3 of the submissions of Plaintiff, contends the absence of express appointment of trustee to the estate makes it Express Trust. According to Plaintiff the Will 'appears to be a Will and Express Trust, but with two of the three certainties lacking, the Will as an express Trust is therefore invalid'

Appointment of Second Defendant as Executor of the Will

[19] Plaintiff contend that late Loloma did not appoint second Defendant as trustee of the estate hence the Will is not valid. Late Loloma was not transferred undivided half share of land of TTI in terms of last will of Wolsley Garnett who died on 23.5.1950. According to Wolsely Garnett's last will all his **daughters became life interest holders of TTI and it could not be sold while they were alive.** The trustees and executors of the said last will were late Gerrad Bola Garnett and late Loloma who were the only sons of Wolsley Garnett.

[20] Only Gerrad Bola Garnett was registered on the title of TTI as Executor and Trustee on 3.1.1951. So it is presumed that late Loloma, who was appointed as executor and trustee by his father, did not assume the duties as executor and trustee of the estate of late Wolsely Garnett. When his father died late Loloma was a minor.

[21] Late Loloma preferred his brother Gerrad Bola Garnett to be sole executor and trustee of the estate of late Wolsely Garnett after attaining age of majority and or even after death of said executor. After death of Gerrard Bola fifth Defendant registered Transmission by Death on the title of TTI in 1964.

[22] Last will of late Wolely Garnett stated;

> 'I give devise and **bequeath the whole of my property** both real and personal of whatsoever nature and kin and whosesoever situate unto my Trustees UPON TRUST to pay all my just debt funeral and testamentary

expenses and all duties payable in respect of my estate and to hold the net residue thereof upon the following trusts namely

(a) TO PERMIT each of my daughters during her life at any time or times and from time to time as she may choose and with her husband and children (if any to live and dwell upon the Island of Tai Turaga aforesaid comprised in Certificate of Title Volume 14 Folio 1303 at such place thereon as my Trustees shall direct without payment of rent AND I DIRECT that the said **Island shall not be sold while any daughter of mine is living.**

(b) **In Trust subject as aforesaid for my said two sons Gerard Bola Garnett and Loloma Levu Grarnett** or the survivor of sons shall die before me or having survived me shall die before me or having survived me shall die before attaining the age of twenty one year's leaving male issue who survive me and attain the age of twenty one year's then such male issue shall take and if more than one equally between them the shares which his or their father would have taken had he survived me and attained a vested interest under this my will.'

[23] It is admitted fact that in terms of late Wolsely Garnett's last will, the executor and trustee did not transfer the shares to ultimate beneficiaries, being himself and late Loloma.

[24] There is no evidence of any of the daughters of late Wolsely Garnett alive when the Will was made.So the trusteeship of the Estate not to sell TTI is no longer applicable to fifth Defendant which had transferred undivided half share of TTI to estate of Loloma to second Defendant as executor and remaining undivided half share to estate of Gerrard Bola Garnett's estate. Then second Defendant had obtained the property for undivided half share of freehold title of TTI.

[25] Loloma had equitable interest for undivided half share of the title of TTI. The remaining half share belongs to the estate of late Gerad Bola Garnett. They are undivided half share of TTI free from being held in trust for the daughters of late Wolsely Garnett, till they are alive.

[26] Halsbury's Laws of England Wills and Intestacy (Volume 102 (2021)[5] defines meaning of executor of a last will in following manner.

> '608. Meaning of 'executor'.
>
> An executor[6] is the person appointed, ordinarily by the testator by his will or codicil[7], to administer the testator's property and to carry into effect the provisions of the will[8]. A special executor may be appointed or is deemed to be appointed ……'

[27] The Will in paragraph 2 states;

> 'I hereby appoint my grandnephew Robert Garnett s/o Thomas Garnett born on the 3rd of November 1955, of Yanuyanu Settlement in Vatuwaqa, as Executor of my last Will and Testament.
>
> Robert Grarnett s/o Thomas Garnett shall be authorized to carry out all provisions of this Will and pay my just debts, obligations and funeral expenses.'
>
> So the appointment of second Defendant as 'Executor of ' the Will is in effect same as appointment of executor and trustee of the estate of late Loloma as the intention of the testator was clear and unambiguous. Second Defendant is the executor and trustee of the estate of late Loloma.'

[28] Section 6A of Wills Act 1972 states,

> "Court may declare a document to be a will
>
> 6A.- (1) A document purporting to **embody the testamentary intentions** of a deceased person, even though it **has not been** executed in accordance with the **formal requirements under section 6**, constitutes a will of the deceased person if the Court is satisfied that the deceased person intended the document to constitute his or her will.

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[5]Halsbury's Laws of England Wills and Intestacy (Volume 102 (2021) paras 1–566; Volume 103 (2021), paras 567–1304)8. The Office of Representative(1) Representatives Generally

[6] An executor is properly described as **'executor of AB' or 'executor of the will of AB' or 'executor of the will and trustee of the estate of AB'.**

[7] As to the express appointment of an executor by will see paras 612–613. As to the appointment of an executor other than by express appointment by the testator see paras 612, 614–616.

[8] See Shep Touch (7th Edn) p 400; 2 Bl Com 503. See also *Farrington v Knightly* (1719) 1 P Wms 544.

(2) The Court may, in forming its view, have regard, **in addition to the document, to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence, whether admissible before or after the commencement of this section, of statements made by the deceased person."**

(3) A party that seeks a declaration under this section has the onus of proof."(emphasis added)

[29] There is no merit in the contention that second Defendant was not appointed as trustee of the estate of late Loloma. He was appointed as executor and trustee considering the content of the last will and construction of words in it which stated

"Robert Garnett s/o Thomas Garnett shall be authorized to carry out all provisions of this will and pay my just debts, obligations and funeral expenses."

[30] So the Will had appointed second Defendant to exercise duties of an executor and trustee.

[31] So the grounds for invalidation of the Will cannot be accepted in terms of Section 6A of Wills Act 1972, which allows court to accept a the Will considering the surrounding circumstances as well as statements made by testator where he had only shown his desire to leave his interest on TTI to second Defendant.

Testamentary Capacity

[32] Plaintiff's evidence and witnesses who gave evidence for Plaintiff mainly dispute testamentary capacity of late Loloma to make the Will. Sections 4 and 5 of Wills Act 1972 applies to the Will.

"PART II-CAPACITY TO MAKE A WILL

Capacity generally

4. Subject to the provisions of Part V, every person not less than eighteen years of age has capacity to make a will.

Property may be disposed of by will

5. Every person having by this Act capacity to make a will may by a will executed or made in manner required by this Act dispose of all his property and of all property which in exercise of a power of appointment he is entitled or able to dispose of by his will and may also by his will appoint a guardian of his infant children."

[33] Accordingly, any adult person has general capacity to make a last will and may dispose property by such and instrument.

[34] *Perrins v Holland and others* [2011] 2 All ER 174 at 181 held,

"[15] In *Moore v Hackett* (1755) 2 Lee 147, 161 ER 294 the court pronounced for the will, there being no opposition, on the basis of evidence proving the testator had full testamentary capacity at the time he gave instructions for his will and that the will propounded conformed to those instructions even though the will was not read over to the testator and he had lost full testamentary capacity before he executed it."

[35] Plaintiff allege that testator lacked general testamentary capacity.

Mental Capacity

[36] Plaintiff's evidence and the three other witnesses who gave evidence for Plaintiff tried to paint a picture of late Loloma as a person who lacked mental capacity to make a last will.

[37] Late Loloma was the youngest and the only child from second wife of late Wolesely. Late Loloma was not married and had moved to Suva from TTI

though he visited TTI in some occasions there is no evidence any person accompanying him or taking care of him during such visits. Evidence was that late Loloma lived with his late brother Gerrard Bola's child late Thomas Garnett and his family at their residence and he had visited some relatives who live in Suva and suburbs. When late Loloma died he was seventy five years old and he was looked after by second Defendant though he received Social Welfare Allowance and able to manage his allowance without assistance of others.

[38] Late Loloma in his last will had left his interest in TTI to second Defendant who had taken care of him and lived with him in his old age. Late Loloma was not married and had no children his only brother died and he lived with said brother's child late Thomas Garnett in Suva after he left TTI. Second Defendant is son of said late Thomas Garnett, who took care of late Loloma after his parents died. So it is natural for late Loloma to leave his interest in TTI to second Defendant.

[39] Plaintiff and the witness called by Plaintiff stated that late Loloma had a 'history of mental incapacity or of unsoundness of mind '[9]. This is not a fact that is proved on the analysis of evidence. It is an allegation by Plaintiff and witnesses who called by him who were interested parties and who will benefit from invalidation of the Will.

[40] Late Wolesley Garanett in his last will appointed 'Gerrard Bola Garnett and Loloma Levu Garnett' as 'Executors and Trustees' of his estate. This last will was made three years prior to his demise. So late Wolesley Garnett had ample opportunity to name a person other than late Loloma who was a minor at that time. When he died in 1950, Loloma was fifteen years old and if he was of abnormal mental status no reasonable person would have appointed such a person as joint executor and or trustee of the estate. As father of eight children who had engaged a solicitor to make his last will in early as 1947 cannot expect to act irrationally or illogically in appointing a person who was suffering unsound mind or having sign of mental issues. As father he should have known children better than any of the witnesses who gave evidence and he had considered late Loloma not only to inherit undivided half share of TTI but also to become executor and trustee of the estate. This is a clear indication that late Loloma was not a mentally unsuited person to execute the Will.

[9] Seeparagraph 3(a) of written submission of Plaintiff

[41] Late Loloma was a minor when his father died and in 1951 he was sixteen years old. Joint executor and trustee and step brother of late Loloma Gerrald Bola Garnnett had obtained transfer of the title of TTI to him as executor and trustee, but he had failed to transfer undivided half share to him and late Loloma. After Gerrard Bola Garnett's death fifth Defendant became the trustee and administrator and this was registered on title of TTI in 1964.

[42] The contention of Plaintiff that late Loloma was suffering from mental disorder cannot be accepted. Late Loloma had lived with second Defendant and his family after he moved to Suva. Second Defendant in his evidence stated that late Loloma on several instances asked him to build a house in TTI while he was alive, indicating his level of intelligence and foresight. He expected the relatives to dispute his share left to second Defendant after his death. This had become a reality, by this action instituted seven years after obtaining Probate by second Defendant in terms of the Will.

[43] Late Loloma's father thought him equally fit to be executor and trustee of his estate. Late Wolesly Garnett had engaged a solicitor to make his last will and he had granted life interest to his daughters and two sons were bequeathed equal shares and they were considered equally by making them executors and trustees. He had the option of appointing **only** Gerrard Bola Garnett as executor and trustee or any other child or his second wife instead of late Loloma who was only a minor at that time.

[44] Both Ranadi Babra Garnett Salele (Babra) and Vesalieli Ratulevu (Ratulevu) were disinterested parties and would not directly benefit in upholding the validity of the Will. They confirmed that late Loloma had mental capacity to make a testamentary disposition. Late Loloma had told to both of them that his interest in TTI will be bequeathed to second Defendant. There is evidence that late Loloma asked second Defendant to build a house on TTI based on this future inheritance from him.

[45] From them, Ratulevu had lived with late Loloma for more than 21 years and he told the fishing skills of late Loloma and how he taught it to him the fishing skills and he still uses this traditional fishing knowledge passed on to him verbally by late Loloma,when he goes fishing . He is not a beneficiary or

relative of the parties and disinterested independent witness hence high credibility to his evidence.

[46] Analysis of his evidence shows that he had lived with late Loloma till 2006, just three years before death, and late Loloma could go fishing alone and was skillful in mending the fishing nets and identifying areas where there were fish and he was able to teach these skills to him. This indicate a high intellect on the part of late Loloma. He was also physically active person and had also worked removing weeds on farm where Casava planted.

[47] During fishing expeditions with late Loloma, he had talked about who would inherit his share of TTI with Ratulevu. This was prior to making of last will in 2009. He had heard about the said wish of late Loloma several occasions. This evidence is corroborated by late Loloma's expression of same sentiments in family meeting where Barbra attended.

[48] Barbra is a child of late Gerrad Bola Garnett, who was sole executor of the estate of Wolesley. She had lived with late Loloma in same house TTI and also had visited frequently late Loloma even as late as November, 2009. She was a teacher and had observed late Loloma for more than sixty years and she refuted that late Loloma lacked testamentary disposition. She told in her evidence 'It saddened me "when she was cross examined on the premise that late Loloma was mentally unsound person for a long period which is false. A person who had some affection towards a relative such as late Loloma, would feel sad and this was shown by Barbra in her cross examination.This shows the genuineness in her evidence and she was truthful about her evidence. From her evidence proved that she was affectionate to late Loloma but did not expect anything in return for her affection. Her evidence has withstood the test of cross-examination and unshaken.

[49] She also confirmed that late Loloma had testamentary capacity even last time she met him in 2009 before she went to New Zealand. She was told by her brother in law that late Loloma had 'given his share' to second Defendant and she did not ask how it was 'given'. She said that before this family members were aware that late Loloma was going to leave his share of TTI to second Defendant. She had thought about this for a while and had realized that the reason for leaving late Loloma's interest in TTI to second Defendatn. She said that late Loloma had spoken a lot about second Defendant and his affection to him. So in her mind, leaving late Loloma's share to second Defendant is

not a strange or suspicious thing. If Loloma was suffering from mental disability at that time this should be the issue as how a mentally unfit person disposed his interest in TTI prior to his death and there should be immediate dispute regarding Probate to the estate of late Loloma. This was not what happened and second Defendant obtained the Probate in 2010 without any opposition.

[50] If late Loloma lacked testamentary disposition for a long period of time as contended by Plaintiff and witnesses called by him, why did not any person make an application for the court to make a management order appointing a person to manage his estate? Barbra in her evidence stated she talked with late Loloma even last time she met him in 2009.

[51] She also said there was a family meeting at the residence of second Defendant and late Loloma around 2006, where late Loloma attended and it was held in the residence of second Defendant. Barbra and her brothers and other relatives were present except second Defendant who had excused himself from the meeting and Plaintiff who was living abroad had invited her to the meeting but he was not present. It is safe to assume that Plaintiff was aware of the outcome of the meeting especially regarding late Loloma's share.

[52] In this meeting Barbra's brogher demanded late Loloma to make a last will more than once. Said command was not to obtain his half share for extended family rather than to second Defendant. By this time it is known that late Loloma will leave his share only to second Defendant, and may be the reason for second Defendant to excuse himself. After several requests to make a last will, late Loloma was quiet for some time and seemed helpless but he had a strong mind not to give in to the request and had dealt with the situation diplomatically but stated his intention clearly. This shows that late Loloma had testamentary capacity and other family members knew about his testamentary capacity. If not why should they have a meeting with late Loloma and also insisted that late Loloma to make a last will? Having failed to obtain late Loloma's share, the Will is challenged by this action seven years after Probate was obtained by second Defendant.

[53] Late Loloma had not replied to said demand at said meeting held and kept silent, but when insisted he had stated "Only Boby" indicating he will only bequeath his share to second Defendant who was called as 'Boby' by him.

This had angered some family members who were present including Barbra's brother Bola Garnett.

[54] She also stated in her evidence her brother who attended said meeting is hot tempered and called for a fight with late Loloma. This shows that in such a formidable and hostile environment an elderly person such as late Loloma had acted wisely and kept cool while not giving in to the request of other relatives.

[55] The request for a last will to late Loloma was in fact a tactic used by them to verbally agree to dispose late Loloma's interest in TTI to them but late Loloma was intelligently dealt with the situation and also expressed his wishes to other family members. This shows he had a strong and unwavering mind as to what he was going to do with his interest in TTI and that was to bequeath it to second Defendant through a last will, which he had done.

[56] It is illogical and unthinkable to request a mentally unfit person to make a last will at family meeting by the family members. This shows that allegation of lack of testamentary capacity is an afterthought having failed all other avenues to obtain late Loloma's share from him while he was alive and after death from second Defendant.

[57] Plaintiff in his evidence stated the issues TTI is facing some challenges ,due to sea erosion and climate change issues and it is in need of investment for preventive measures such as construction of protective wall. He said he had invested some money for that and wants to create a trust for TTI.He also admitted that not all the beneficiaries of undivided half share belonging to the estate of late Gerrad Bola Garnett, are of the same mind about the said idea to create family trust for entire TTI. He had spoken with second Defendant about this and he was not agreeable to part with his undivided half share to create a trust without a consideration. This had resulted this litigation after seven years from second Defendant obtaining Probate for the estate of late Loloma.

[58] From the analysis of evidence for Plaintiff and Defendants it is proved that late Loloma was not a mentally unsound person from the time he spend in TTI and also till his death in 2010, that was the reason that witness Barbara said that she was saddened to hear such allegations to a dead relative who

cannot speak or defend such allegation. This is an allegation that is not proved in orders to invalidate last wishes of late Loloma

[59] On balance of probability it is proved late Loloma had testamentary disposition and or person who had testamentary capacity. He had openly expressed who will be the beneficiary to his estate or interest in TTI upon his death and even other family members were fully informed about this fact while he was living as well as after his death in 2010. Late Loloma had a strong affection for second Defendant and he had expressed that he would be the sole beneficiary of his share in TTI. This had angered other members of extended family of late Loloma. First they had come to meet him to ask about his share and late Loloma had not met them and told second Defendant that his displeasure when they had not looked in to his needs and requirements but only wanted his share of land. This shows that the relatives who sought his share never supported him financially or otherwise to his satisfaction. In such a situation late Loloma will not allow his share to be bequeathed to such relatives, and there is no suspicious circumstances in his testamentary disposition.

[60] Late Loloma attended a family meeting at his residence around 2006 where Barbra also participated on the request of Plaintiff. In that meeting second Defendant had not participated and this may be to allow late Loloma to take his own decision at the said meeting independently. Late Loloma had shown great strength and character as he was adamant that sole beneficiary for his share would be second Defendant, despite being physically challenged by a person of younger generation. Late Loloma had no person to support him or defend his position in this meeting but he was not intimidated. This is not the character of a person who lacked testamentary disposition, though he was more than seventy years old in 2006. Later some surgical procedure administered on urinary tract but testator's mental capacity was not impaired.

[61] Late Loloma had died shortly after his seventy fifth birthday on 15.4.2010. He had executed his last will on 16.11.2009. There is no evidence that Late Loloma, was treated for such a mental condition. If he developed such condition there was no reason not to seek medical treatment.

[62] Late Loloma was also a recipient of Social Welfare Allowance given monthly. A mentally unfit person cannot manage funds. He was poor and he visited family members and sometimes asked for money and this was mostly on foot

again may be due to lack of funds to travel by taxi or through other means or his desire to enjoy walking. This shows he was physically fit person to walk considerable distance and was able to remember such places. Plaintiff admitted that he gave some small amount of money when he visited late Loloma, if so why should he give money to a person who cannot manage money? Why did Plaintiff waited seven years to dispute late the Will? All these actions of Plaintiff shows that allegation of mental incapacity is without merit.

[63] Late Loloma had visited his relatives, and this is not an unusual behavior of elderly person who lived on Social Welfare Allowance. Plaintiff is using such visits, to show that he was aimlessly walking but this again is not proved on analysis. Late Loloma visited his relatives for a purpose and he knew where they were. There is no evidence that all of them welcomed late Loloma or to see him at their place of work or residence but this is not a reason to state that he was of unsound mind or walked aimlessly.

[64] Next issue is whether Loloma had testamentary capacity when he provided instructions to second Defendant to prepare a last will and or executed last will.

[65] Plaintiff in the submission contend that since there are evidence that late Loloma lacked testamentary capacity medical evidence needed to prove testamentary capacity. This is wrong proposition. There will always be evidence to prove or disprove a fact in issue. Court must analyze the facts and come to a finding of existence of the fact in issue. Medical evidence or expert's evidence is not always necessary though if such evidence would help the court, and again not conclusive.

[66] Lack of medical evidence as to mental status at the time of execution of last will is not a reason to refuse the testamentary capacity. Even allegation of 'delusions' were not a reason to reject mental capacity of Late Loloma. These 'delusions' were not proved, but even proved cannot invalidate the Will.

[67] *Banks v Goodfellow* [1861-73] All ER Rep 47 at pp56

> "But we have here the measure of the degree of mental power which should be insisted on. If the human instincts and affections or the moral sense be perverted by mental disease, if insane suspicion or aversion

take the place of natural affection, if reason and judgment are lost and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition due only to its baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power undisturbed by frenzy or delusion to take into account all the considerations necessary to the proper making of a will and producing a rational and proper will, should be subject to some delusions, but a delusion which neither exercises nor is calculated to exercise any influence on the particular disposition? Ought we in such case to deny to the testator the capacity to dispose of his property by will? It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If, therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposition of property, why, it may well be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affection in itself so great by the deprivation of a right, the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind, is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will and influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to his rights".

[68] *Banks v Goodfellow* [1861-73] All ER Rep 47 at pp56,57 held,

'It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause, namely, from want of intelligence arising from defective organization, or from supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defeat of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that, though the mental power may be reduced below the ordinary standard, yet, if there be sufficient intelligence to understand and appreciate the testamentary

act in its different bearings, the power to make a will remains. It is enough if, to use the words of SIR EDWARD WILLIAMS in his work on EXECUTORS, if "the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done." In his COMMENTARY OF THE PANDECTS, lib 28, tit 1, s 36, founding himself on CODE, book 6, tit 23, 1 15, VOET says:

> "Non sani tantum, sed et in agone mortis positi, seminece so balbutiente lingua voluntatem promentes, recto testaments condant si mode mente adhuc valeant." “

This part of the law has been extremely well treated in more than one case in the American courts. In *Harrison v Rowan* (10) referred to in *Sloan v Maxwell* (11) the law was thus laid down by the presiding judge:

> "As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. 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 imbecility, and yet he may possess sufficient 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. For most men at different periods of their lives have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new."

In a subsequent case of ***Den v Vancleve*** (12) the law was thus stated:

> "By the terms 'a sound and disposing mind and memory,' it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things, and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

In the same case it is said:

> "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect: it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the faculties of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength".

[69] Second Defendant stated that late Loloma requested him to make arrangement for last will and his intention was for him to inherit his share of TTI. He had spoken this to a priest and he and his wife had given relevant information to preparation of the Will according to wishes of late Loloma. This is a not a complex last will where there were many properties. A person such as late Loloma could easily give verbal instructions to second Defendant to prepare a last will considering there was only one property and one beneficiary and executor. So the fact that late Loloma did not instruct directly to prepare the Will does not invalidate last Will as he had openly expressed

his wishes to others and they also knew it. There is no suspicion about the disposition considering long standing affection to second Defendant and his caring to testator for a long period of time. If second Defendant desired he could have arranged the last will much earlier than 16.11. 2009.

[70] Evidence of Plaintiff and two witness called for Plaintiff namely Oliver Garnett and Nimara Lasewai regarding mental capacity of testator cannot be accepted on analysis.

[71] Second Defendant had not expected late Loloma to leave his share to him,or influenced the mind of late Loloma and he had on his own decided to part his interest in TTI to second Defendant. Even without any undue pressure he could have requested late Loloma to write a last will long before 2009 and he would have done so. It was clear from evidence that even prior to 2006 late Loloma had made his mind to leave his interest in TTI to second Defendant and he had asked second Defendant to arrange it. It was delayed by second Defendant as he was not keen on the prepare it earlier.

[72] *Perrins v Holland and others* [2011] 2 All ER 174 at pp 182,183. UK Court of Appeal, applied Banks (supra) regarding testamentary capacity and held,

> "[20] Given this historical background, I am unable to accept the submission of counsel for David that the judgment of Sir James Hannen in *Parker v Felgate* came 'out of the blue' and without prior support in the decided cases. As he was trying the case with a jury, citation of authority would not have been appropriate. His directions to the jury are supported by the cases I have referred to in paras [14] to [17], above. Further his directions were cited without comment in Theobald on Wills (3rd edn, 1885). In ch IV entitled 'Requisites for a valid will' it is stated:
>
> > 'But a will prepared in accordance with the testator's instructions is valid, though at the time of execution the testator remembers only that he has given instructions and believes the will to be in accordance with them. *Parker v Felgate*, 8 P.D. 171.'
>
> [21] Further the decision in *Parker v Felgate* was stated to be good law, as one of two grounds for the decision, by the Privy Council in *Perera v Perera* [1901] AC 354. Similarly in Mortimer on Probate Law and

Practice p 70 ***Harwood v Baker*** is cited as authority for the proposition that:

> 'If a testator, while in a state of health, has given instructions for a will, and it is prepared in accordance with those instructions, a very slight degree of mental capacity at the time of execution will, it would seem, suffice.'

The author then refers to ***Parker v Felgate*** as authority for the proposition that it is sufficient that the testator when executing the will is capable of understanding and does understand that he is executing the will for which he had previously given instructions."

[73] From the above decision it is safe to come to conclusion that though late Loloma had not directly instructed the person who drafted the Will that was not a reason to invalidate it as he had uttered his intention to leave his interest in TTI only to second Defendant prior to execution of the will and even after that there was no evidence that it had changed and second Defendant had taken care of the testator until he died. There was no suspicious circumstances to doubt validity of the Will.

[74] Testator had more than one instance stated who would be legatee to his estate and he had requested second Defendant to prepare a last will in accordance with his wishes. Late Loloma had not given direct instructions to the person who prepared the Will and brought it to his residence. The Will was explained by the person who made it and witnessed it. It is not unusual to seek assistance from a religious person such as pastor to prepare a last will. Second Defendant is also an associate pastor is not a reason to be suspicious considering circumstances of the case. Section 6A of Wills Act 1972 allows court to consider all the circumstances including utterances or '*statements made by deceased person'*. So the formalities contained in Section 6 of Wills Act 1972 are not the paramount consideration for invalidation of a last will. In this case there is evidence that late Loloma desired to leave his interest in TTI to second Defendant had when he executed the Will he fulfilled it and had knowledge about the said testamentary disposition.

CONCLUSION

[75] Plaintiff in the statement of claim sought a declaration relating to validity of the Will. The validity is challenged on the grounds contained in statement of claim in paragraph 26. Main contention is that late Loloma lacked testamentary capacity. This is rejected in the analysis of evidence. There was no need to attest late Loloma's thumb print placed on the last will, as the witness to the Will gave evidence and there was evidence that the contents were explained to late Loloma and he had consented to it and placed his thumb print. Late Loloma had testamentary disposition and he had asked several times to prepare a last will and bequeath his estate to second Defendant. Late Loloma had given instructions to second Defendant and he had given instructions for preparation of last will and this was read and explained to late Loloma before he placed his thumb print and by this not only approved the content but also fulfilled his long standing desire to leave his interest in TTI to second Defendant. Three was no evidence of any pressure being exerted by second Defendant. Late Loloma had given verbal instructions to second Defendant to prepare the Will and it was prepared on such instructions. The presences of second Defendant away from testator, in such a situation cannot be considered as undue influence. So Plaintiff was unable to prove the Will as invalid on any of the grounds pleaded in the statement of claim. Legal contention that late Loloma disposed an interest larger than him is rejected on the construction of the Will.

FINAL ORDERS;

a. Request for revocation of Probate No 50073 is refused.

b. Last will of Loloma Leveu Garnett dated 16.11.2009 is valid in law and testator had testamentary capacity when it was made.

c. Plaintiff's action is dismissed.

d. Cost of this action summarily assessed at $2,000

.....
Deepthi Amaratunga
Judge

At Suva this 19th day of September, 2024.

Solicitors
Ratumaiyale Esquires
AG's Chambers
Fiji Public Trustee Corporation
Ravono & Raikaci Lawyers