

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 43 of 2014

BETWEEN : NAOMI BALE

Plaintiff

AND : SIMON COLE as the Sole Executor of the Estate of ALAN
THOMAS FLETCHER

Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr P. Knight for the Defendant

Dates of Hearing : 28 and 29 November 2017

Date of Judgment : 8 May 2018

JUDGMENT

1. The Plaintiff in her Statement of Claim says as follows:
 - (1) At all material times she was lawfully married to Alan Thomas Fletcher, having married him on 8 August 2005. (the deceased).

- (2) The Defendant is executor and trustee of the estate of the deceased by virtue of the grant of Probate No 51712.
- (3) After their marriage the Plaintiff and the deceased were residing at a property held under certificate of title No.28792, Lot 19 on DP 6884 (the property), which was registered in the deceased's name.
- (4) Circa June or July 2011, the deceased became sick and was admitted first to Sigatoka Hospital and then to Lautoka Hospital.
- (5) The deceased passed away on 28 July 2011.
- (6) The Defendant obtained the execution of the will by exercising undue influence and coercing the deceased into executing it, in the absence of the Plaintiff.
- (7) The Defendant was a friend of the deceased who trusted him.
- (8) At the time of signing the will, the deceased did not understand its nature and contents, and lacked the understanding and testamentary capacity due to his deteriorating health condition.
- (9) Through her then solicitors, the Plaintiff discovered she was not a beneficiary under the deceased's last will and testament.
- (10) The Defendant has no other place of residence than the property.
- (11) The Defendant has entered into a Sale and Purchase agreement (SPA) for the said property and she has been required to vacate it.
- (12) Wherefore the Plaintiff prays:
 - (a) The Defendant be restrained from executing any transfer documents for the sale, transfer or assigning of the property.
 - (b) That the Court order that the Probate granted be revoked and the Rules of Intestacy be applied and Letters of Administrator be granted to her.

2. The Defendant in his Statement of Defence says as follows:
- (1) The deceased executed his last Will and Testament in the absence of the Plaintiff. She is not a beneficiary of the estate of the deceased.
 - (2) The Defendant as executor and trustee of the estate of the deceased and as directed by him in his will had entered into a SPA on 15 July 2011 for the sale of the piggery and livestock belonging to the estate for the price of \$140,000.
 - (3) The Plaintiff has been given notice to quit and deliver vacant possession of the property.
 - (4) The Plaintiff has earlier by her solicitors filed a writ of summons and statement of claim on 11 December 2012 vide HPP No 44 of 2012 that contained the exact same claims and sought the same relief as contained in the Claim herein. That action was discontinued circa 9 October 2013.
 - (5) The Defendant prays that the Plaintiff's claim be dismissed with costs.
3. The Plaintiff in her Reply prays for the Statement of Defence to be struck out with costs.
4. The Minutes of the Pre Trial Conference minutes dated 14 March 2016 record, inter-alia, the following:

A. Agreed Facts

- (1) The deceased became sick circa June or July 2011, was hospitalized in Lautoka and died in an United Kingdom hospital, on 28 July 2011.

- (2) The Defendant and the deceased were friends and the deceased trusted the Defendant.
- (3) The deceased made a will dated 15 July 2011, which was executed in the Plaintiff's absence and under which she was not a beneficiary.
- (4) The Defendant entered into a sale and purchase agreement for the sale of the property for \$140,000.

B. Issues.

1. Whether the deceased gave instructions for a will to be made.
2. Whether the deceased lacked understanding and testamentary capacity at the time of signing the will.
3. Whether the deceased executed the will under undue pressure and coercion and did not understand its contents due to his health condition.
5. The hearing commenced with the Plaintiff (PW1) testifying the contents of her statement of claim are true.
6. Under cross-examination PW1 said she was married to the deceased on 8 August 2005 when he was 52 years old and she was 26. Before this marriage they were living together for 6 years. She did not know he had written a will. She denied she had affairs with other men. She saw how the deceased was in the hospital and that is the basis for saying he did not understand the contents of the will.
7. In re-examination she said she was not there when the will was signed and has therefore no witness. With that the Plaintiff closed her case and the Defendant opened his.

8. The first witness was Ms Jasweeni Jotika Devi (DW1). She said she was employed by M/S S.B.Patel & Co in 2011 and was instructed by Mr Patel to go to Lautoka hospital to take instruction for a will. She and Patel witnessed the signature of the testator who spoke to her clearly and she understood what he said and he understood what they asked.
9. Under cross-examination, DW1 said when they went back with the will the deceased was walking slowly.
10. The next witness was Simon John Cole, the Defendant (DW2). He said he knew the deceased for 6-7 years. The deceased told DW2 of the affairs of the Plaintiff. He contacted Patel to prepare the will. He was not there when the deceased gave instructions and he was not there when the will was executed. He is not a beneficiary except for the deceased's books. The deceased understood what he said. He was in England when the deceased died. He obtained the probate.
11. Under cross-examination DW2 said the deceased gave him the names of those involved in the extra-marital affairs. With that the Defendant closed his case.
12. The Plaintiff submitted a 2 page handwritten note which she said was her submission and that she would rely on it.
13. The Counsel for the Defendant said the only issue is whether the will is valid or not and whether the deceased understood the contents of the will and signed it of his own free will. No medical evidence was called by either party. The Plaintiff saying the deceased was not speaking clearly and was physically ill does not mean he did not understand what he was doing. DW1 said he understood what he was doing on the date of signing the will. The beneficiaries are the

deceased's children by his previous marriage. There was no evidence that the Defendant influenced the deceased on the contents of the will.

14. The Plaintiff replied she depended on her written submission.
15. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my decision.
16. At the outset I shall state I have perused the 2 pages paper that the Plaintiff provided the Court. If I may say so with respect it does not advance the Plaintiff's cause as it was more of a jeremiad than a submission.
17. The nub of the claim is the will. I have perused it very carefully and I note the following pertinent facts:
 - (1) The Defendant is the sole executor and trustee.
 - (2) He is only given the books of the deceased.
 - (3) All the real and personal property of the deceased are given to the trustee upon trust for the 3 children of the deceased.
 - (4) The deceased made no provision for the Plaintiff for reasons stated in his instructions for the preparation of the will.
18. Probate of this will was granted by the High Court, Suva to the Defendant.
19. In the above circumstances I do not see how the Plaintiff can consider she is entitled to any of the relief she is claiming. She has not provided a modicum of evidence to establish her husband was not compos mentis. No medical man was called to give evidence. The Plaintiff is seeking to prevent the Defendant from doing what the deceased has required him to do viz selling the property for the benefit of the deceased's children. No evidence has been provided why this Court should revoke probate that appears to have been properly granted by the

Court.

20. If the Plaintiff is seriously challenging the will then the 3 children/beneficiaries should have been made co-defendants but even this her original solicitors have not done.
21. I rely on the decision of Amaratunga J. in Sukhma Wati Samujh and 2 Ors AND Ram Shankar : High Court Suva Probate Action No. 32 of 1992: Judgment on 30 September 2016. He said in para 27 that "There was evidence that the Defendant and his behavior were not helpful for an aging mother, and she did not bequeath estate to him. Though he used to engage in a garage on the ground floor of the premises where deceased lived the late mother did not trust him, and his (sic) dissatisfaction is mainly due to his behavior. So, the Defendant being left out from the Last Will cannot be considered as an unusual thing, or irrational thing". This appears to be the position of the Plaintiff vis a vis the deceased which he makes clear in his written Instructions to Will in the presence of the solicitor who witnessed his will and a solicitor's clerk.
22. At the end of the day the ends of justice will be met if I were to dismiss the action, which I hereby do.
23. However, in the circumstances of this case I shall order each party to bear her/his own costs.

Delivered at Suva this 9th day of May 2018.



David Alfred
Judge of the
High Court of Fiji