CIVIL CASE NO 10/97

BETWEEN

Juanita Dick - PLAINTIFF

AND

Curator of Interstate Estates- FIRST DEFENDANTS

AND

Beneficiaries of the Estate of Roy Degoregore deceased - SECOND DEFENDANTS

HELD

1. Errors, if in fact they are errors do not of themselves provide evidence that someone is not of sound mind. They may indicate a mistake which may or may not be capable of clarification.

2. Whether a testator at the time of making his Will is of sound mind and has the mental capacity to express his testamentary intentions, must of necessity rely upon the testimony of witnesses who were present when the will was made and signed.

3. The court has no doubt that the medical and professional evidence clearly established that the deceased was of sound mind and had complete mental capacity to make and execute his will.

For Plaintiff - Anthony D. Audoa
For First Defendant - Mr. B. Connell
For Second Defendants- Mr. D. Aingimea

Before - Dillon. J.

2. That "Emoniba" is referred to twice in the Will, once for a benefit of $500,000 and again for a benefit of $150,000;

3. That there is no such person as "Nelinda Dedaning" referred to in the Will;

4. That "S.M.H." does not exist in Nauru and this shows "... the unsoundmindness of the deceased ...";

5. That the Will has no "residue provisions" and is therefore "a bad Will at *ab initio*".

As an alternative plea, the Plaintiff seeks the following Orders :

1. That the Will dated 20 August 1996 be disallowed and the former Will dated 12 August 1996 be accepted;

or in the alternative

2. That the three mistakes in the Will already referred to above be deleted from the Will;

or in the alternative

3. That the Will dated 20 August 1996 be accepted but the three questioned legacies referred to above be deleted.

It is relevant to point out that the Will dated 12 August 1996 referred to by the Plaintiff was never produced to the Court and so forms no part of the present proceedings. The Court cannot make assumptions as to what the deceased may have stated in that Will.

Because the Plaintiff alleged the deceased "was not of sound mind" when he signed his Will on 20 August 1996, it is that serious allegation this Court must now consider. The deceased died in Melbourne; his Will was witnessed by a Solicitor Mr P.M. Earle; and by an Accountant Mr

N.J. Robieson who both practised their professions in Melbourne. Doctor M.D. Green, an oncologist attached to the Freemasons Hospital in Melbourne, was the treating doctor to the deceased. The Chief Justice, with the consent of all Counsel, authorised the hearing of the evidence and the cross examination of those three witnesses in Melbourne. This was arranged on 5 December 1997.

COURT PROCEEDINGS IN MELBOURNE

Dr Green in evidence confirmed his earlier statutory declaration when he had declared that :

> "(4) at the time of signing of his will on 20 August 1996 Mr Degoregore was not taking any form of medication or other drugs which would have affected his mental state or his mental capacity;
>
> (5) I believe that on 20 August 1996 Mr Degoregore was of sound mind and, while seriously ill, was still in a fit mental state, in particular I would have no doubt about the late Mr Degoregore's capacity to give instructions for the preparation of, to read and understand and to execute a will."

In answer to extensive cross examination by Mr Audoa, Dr Green concluded his evidence as follows :

> "MR AUDOA: So apart from your physical and exterior assessment of Roy Degoregore, you do not really know what is going on in his mind, the pressure he was experiencing?
>
> THE WITNESS: I agree.
>
> MR AUDOA: So you just saw him as a person under such given circumstances, he was acting normally?
>
> THE WITNESS: He was acting in a capacity which I believed was appropriate for his illness. He was clear, he was lucid, he was making rational decisions, but he was very sick, as you indicated, yes.
>
> MR AUDOA: And would you say that the knowledge that Mr Roy Degoregore had at that time that he was dying - he knew he was dying?
>
> THE WITNESS: He knew he was dying.
>
> MR AUDOA: Would that not affect his rationalisation?

THE WITNESS: In general, that does not usually affect people's ability to think clearly unless, as you say earlier, they are under drugs which might influence them to do that. But generally speaking, just because a person is dying doesn't mean they can't think clearly and make rational judgments.

MR AUDOA: No more questions, your Honour. Thank you."

Upon cross examination by Mr Connell, Dr Green concluded his evidence as follows :

"MR CONNELL: But you are sure that on 20 August he was in the position where he could give proper instructions for a Will?

THE WITNESS: Yes. Certainly in the week leading up to his death, I'm pretty sure of that because we had a number of conversations about whether we should continue therapy or not, and he made very explicit decisions about stopping all therapy, and in that situation I was fairly clear that he was making rational decisions because I agreed with those decisions.

MR CONNELL: And you have in your statutory declaration in which you have said :

He was not taking any form of medication or other drugs which would have affected his mental state or his mental capacity -

it was clear that he was not taking any drugs of any description which would have in any way mitigated his mental state at that time?

THE WITNESS: Yes, the particular drugs I would have been concerned about were the opiates such as morphine, and he was not taking those.

MR CONNELL: No more questions, your Honour."

Mr Robieson, one of the Accountants at the Freemasons Hospital, also gave evidence and confirmed his signature as being one of the attesting witnesses to the Will of the deceased. He explained that nursing staff were not normally permitted to witness documents and that he or two other senior personnel attended to those requirements. He explained the hospital procedure that he had adopted this way :

"MR AINGIMEA: Mr Robieson, I understand that part of Australian law is that you have to be as a witness - to be a witness in a Will you - the witness in the Will has to have an idea of the capability of the person that is taking the - capability of the person making the will as to his - well, as to his capabilities to make the Will.

THE WITNESS: Yes, I believe that is the case. Usually when we are called as witnesses before we actually attend the room my colleagues and I speak to nursing

staff who are responsible for the patient to ascertain their feelings as to the person's capacity and their current condition. We then - if we are happy to proceed we then go to the room. Usually we ask, I suppose small talk questions would be the best way of putting it. We usually ask the person if they are indeed the person in the document, their address, do they understand what is in the document? May be ask a few other questions just to ascertain that the person is aware and has a knowledge of their situation at the time and if we are happy we then proceed to witness the document.

MR AINGIMEA: And in this case?

THE WITNESS: I would not have signed if I was not happy as to Mr Degoregore's capacity."

The third witness was Mr Earle, a Solicitor practising his profession in Melbourne. The circumstances leading up to the deceased executing his Will and Mr Earle and Mr Robieson witnessing his signature are described as follows :

"I then took some of his instructions and - with a view that I would then prepare a Will in an appropriate form, but he at that - on that second occasion then produced a Will that he had had prepared - he actually produced that from underneath his sheet - and said that this was the Will that he had had prepared and he was wanting me to follow the same specific format in terms of the specific bequests that he had identified. I decided that it was probably preferable to have that Will signed there and then even though I recognised it wasn't in an appropriate form; for example, there were no executors and there were no specific powers that I would have expected to see. But I took the view that if this was his wishes, and he was rather keen to sign it, that we should sign it in the proper way in any event and that I would then go back to the office, I needed to check with Barry Connell and with Malcolm Reid to see whether they were prepared to act as executors, and re-do that Will, if you like, in what I would consider to be more appropriate form.

So I then proceeded to talk to Mr Degoregore about the Will. He, to my mind, was very clear about what he was doing and the content of his Will. I then arranged for another witness to be present for the purposes of signing of that Will and that was Mr Norm Robieson who was an Accountant at the hospital. Mr Robieson came up and I formally stated to Mr Degoregore that he understood he was signing his last Will and Testament to which he - he acknowledged, and we signed the Will then in the appropriate. So that was the circumstances leading to the signing of what is now his Will."

In cross examination by Mr Connell, Mr Earle provided the following assessment of the deceased's capacity to make a Will.

MR CONNELL: Perhaps I should ask you, too, just to take it one step further. What was - you having a long experience of drafting Wills for people and particularly people in hospital at different times, what was your view of his capacity at the time?

THE WITNESS: My view was that he had complete capacity, complete mental capacity, that he had a very clear understanding of what he was signing, what he was doing, and I had no doubt about that otherwise I would have been wanting to seek some assistance from the medical staff there and then as to their assessment of him, but as a non-medical professional, I had no concerns at all."

COURT PROCEEDINGS IN NAURU

At the resumed hearing in Nauru on 19 December 1997 the Plaintiff herself and Mr Joseph Hubert gave evidence. The Plaintiff described the deceased as her uncle, although she later referred to the deceased as being either a first or second cousin of her mother. In evidence this witness stated as follows :

"I saw that Will made by my uncle I think not of sound mind because a lot of things there that are not correct. I have seen Will. S.M.H. is a mistake. Should be S.H.M., that's a mistake. Nelinda is another mistake, also Elinda No. 12. It's not a mistake but there is something wrong with the spelling. Surname is wrong. Therefore this person who made this was not of sound mind."

Those errors, if in fact they are errors, do not of themselves provide evidence that someone is not of sound mind. They may indicate a mistake which may or may not be capable of clarification. As such that mistake may or may not affect a specific bequest. But it cannot be stated as a conclusion that because there is a typing mistake, e.g. S.M.H. instead of S.H.M., that therefore a testator is not of sound mind.

However the real significance of the Plaintiff's evidence was her admission that whileshe was the only beneficiary who was objecting to the Will of the deceased, she was taking this action on behalf of her brother Alfred Dick and her half brother Mr Audoa, her Counsel in these proceedings and who had not been included as benefactors under the Will. That admission immediately questions the motives of the Plaintiff and her brothers in making this present challenge to the deceased's ability to make a Will. If, as the Plaintiff now concedes, the whole purpose of her challenge to the validity of the deceased's Will, is to secure a share of this estate for her two brothers, then the procedure alleging that the deceased is of unsound mind

is misconceived - especially when the Plaintiff has produced no evidence to support or substantiate such a serious allegation. But when the Court read over to the Plaintiff the evidence of Dr Green she agreed and accepted it. She did not challenge the Doctor's belief "that on 20 August 1996 Mr Degoregore was of sound mind and while seriously ill, was still in a fit mental state". In fact while she did not challenge the medical opinion expressed above, she went even further and "agreed" with it.

The only other witness called by the Plaintiff was Mr Joseph Hubert who was visiting the deceased when Mr Earle, the Solicitor, called on 20 August 1996. He was not present however when the Will was signed.

Mr Aingimea then called three witnesses to explain the alleged misdescriptions upon which the Plaintiff relied as the basis for her allegation that the deceased was of unsound mind. There was no serious challenge to the evidence of those witnesses.

At the conclusion of the witnesses evidence both Counsel made brief but helpful submissions. Mr Audoa conceded that "If the Court takes the three double up names and S.M.H. out of the Will the Plaintiff would accept as a valid Will". That concession in effect abandons the Plaintiff's claim of "unsound mind" suffered by the deceased.

CONCLUSION

Whether a testator at the time of making his Will is of sound mind and has the mental capacity to express his testamentary intentions, must of necessity rely upon the testimony of witnesses who were present when the Will was made and signed. There are three witnesses who have sworn evidence to the deceased's condition at that time, viz :

1. Dr Green who said the deceased "... was of sound mind and while serious ill, was still in a fit mental state ... to give instructions for the preparation of, to read and understand and to execute a Will".

2. Mr Robieson, a witness to the Will, who stated that "I would not have signed if I was not happy as to Mr Degoregore's capacity".

3. Mr Earle, the Solicitor, and the other witness to the Will who gave as his experienced opinion "my view was that he had complete capacity, complete mental capacity, that he had a very clear understanding of what he was signing, what he was doing, and I had no doubt about that ... I had no concerns at all".

There has been ~~on~~ no challenge to that evidence from the Doctor who treated the deceased; and from the experienced professionals who witnessed his Will. The only challenge relates to three alleged mistakes and typographical errors in the Will which in my opinion do not support such a serious allegation of mental incapacity. It is patently obvious to the Court that the Plaintiff now accepts the futility of such a baseless proposition when it is submitted by her Counsel that she would be satisfied with the Will if "the three double up names and S.M.H." were deleted from the Will. Such an issue is not for this Court to decide on the present pleadings.

The Plaintiff claims "that at the time of the drafting of the said Will the deceased was not of sound mind". This Court has no doubt that the medical and professional evidence clearly establishes that the deceased was of sound mind and had complete mental capacity to make and execute his Will.

The Plaintiff's claim fails and is dismissed. The Plaintiff is ordered to pay the costs and disbursements of the First and Second Defendants both in Melbourne and Nauru and the expenses associated with the Melbourne hearing to be fixed by the Registrar, and in the event of any disagreement to be referred to the Court for determination.

Dillon J.