In the Supreme Court of Nauru Civil Action No. 5/2002

Mop Gairoe	Plaintiff
and	
Eideraidid Dowedia	First Defendant
Nauru Lands Committee	Second Defendant

Reuben Kun for Plaintiff

P. Aingimea for First Defendant

L. Adam, Chairman, Nauru Lands Committee in person

Interim Decision on Will validity delivered Monday 17 February 2003

DECISION - CONNELL C.J.

The question has arisen at the threshold of this action whether there was a valid will or not under which Deirok Gairoe determined the distribution upon her death of her properties.

It is accepted that the only written document which may have disclosed the testamentary intentions of Deirok Gairoe deceased was contained as a Minute in the Minute Book of the Nauru Lands Committee ('NLC') for Friday 12/12/97.

The Minute read as follows (as translated)

"Friday 12/12/97 Members Caleb, Mizpah and Anton

10 a.m. Eideraidit and Deirok Gairoe came regarding, as Deirok said, her properties. She wants to give everything to her daughter, Eideraidit, to look after (personalty and realty) and to do with them as she pleases, for she has been looking after me."

M/Book 4058, p28.

Deirok Gairoe died on 12 September 2001, nearly four years later.

It is also accepted that there was no will made in compliance with section 3(2) of the Succession, Probate and Administration Act 1976.

If there was a will it could only be so under the prevailing customary rules applying to a Nauruan will. What are the requirements for such a will? Chief Justice Thompson faced with various claims challenging the validity of wills has developed some jurisprudence on the question over a number of cases.

Whilst it is apparent that verbal wills were once recognized under Nauruan customary law probably until the second world war, though

see the direction in 1923 that written wills should be made in future in Dogirouwa cited below, a Court would now require that a will be reduced to writing. In Dogirouwa (Land Appeal No. 14 of 1969), a will dictated to a Nauruan Chief as the testator was dying in Truk during the Second World War was held valid though it had not been signed by the deceased. The circumstances of the moment no doubt assisted the Chief Justice to the conclusion of validity together with the prominence given then to chiefly duty and obligation. A further example of dying wishes is given in John Aremwa and Others v The Lands Committee (Land Appeal No. 4 of 1970) where the Chief Justice said 'I have no doubt that the Nauru Lands Committee is normally bound to distribute a deceased person's estate in accordance with his dying wishes, certainly, if the details of those wishes are agreed to by the members of his family'. The latter part of the sentence is the part that is important. I do not believe that this is a recent example of giving credence to a verbal will, but simply for the family under an intestacy to take account of the dying wishes of the deceased in reaching an agreement.

Indeed, my remarks on Aremwa's case are born out by the remarks of Chief Justice Thompson in the unreported decision Samuel B. Halstead v. Willie Halstead (Land Appeal No. 3 of 1981) on page 2 where he says -

'The requirement that a meeting of the family be held to see whether agreement can be reached reflects the Nauruan customs that, even when a person has died without leaving a valid will, the members of the family are bound by their conscience to give effect to any wishes of the deceased which they know of for certain. So, in the present case, the respondent, knowing of Anna's wishes was bound by his conscience to agree to effect being given to them. In some cases the conscience of some members of the family of a deceased person may be weaker than their instinct of greed.

Both the above relates to what happens upon an intestacy with regards to the family meeting and what should be the guiding spirit of that meeting. I hasten to add that to overcome capriciousness in testators, the twentieth century saw common law countries adopt Family Provision or Testators Family Maintenance statutes that allowed Courts to consider applications by family members who may have been disinherited either by mistake or, more likely, the capriciousness of the testator. Nauru, however, has not followed this statutory course. A valid Nauruan will may be set aside where there is agreement not only by the family but also by all the beneficiaries as well (D. Duburiya v B. Agoko) Land Appeal No. 6 of 1973.

It was, in fact, in Gloria Harris and anor. v Lucas M.D. Hedmon (Land Appeal No. 6 of 1981) that Chief Justice Thompson imposed an equitable ruling where a will whilst entitling illegitimate children had excluded the legitimate children. He then felt it unsafe to give effect to the will without express words of disinheritance or there was some evidence that the testator had had proper advice on the effect of the will. By so ruling, he had ameliorated the effect to the family, in relation to a Nauruan Will, of an absence in Nauru of a Testators Family Maintenance statute.

But with most Nauruans dying intestate, it is left largely to the conscience of the family meeting to reach agreement.

By the time of Land Appeals 3, 4 and 5 of 1980, Chief Justice Thompson had reached the conclusion that for a Nauruan will to be valid the following criteria are necessary:

1. It must be written
2. It must be signed by the testator
3. It must be witnessed at the time of signature by a Nauruan of standing, formerly a Chief, but now a Councillor or Member of Parliament, as he stated.

4. It also is to be signed by a further witness at the time of signature of both the testator and person of standing.

I would vary these criteria but only to a small extent. The witnesses must have reached adulthood, and, whilst it may be useful if a will is to be tested later that a person of standing has signed, it is not so important, provided there are two adult witnesses who are not beneficiaries and the will is dated.

Furthermore, formal words need not be used but the document must be clear that it is a will and represents the testamentary intent of the signatory. It is then to those criteria as outlined that the Court will look in the future. There may be circumstances where there is a case for further consideration of the circumstances but the above criteria represent the norm.

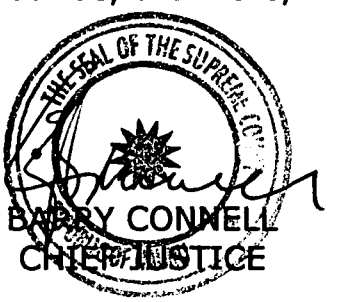
In relation to the document in this case, it does not fulfil the above criteria. Whilst the document is signed by the deceased and there is a date, it is not clear to the Court that it was the occasion where a testamentary disposition was made. Indeed with the presence of the daughter, and the circumstances of the occasion as related to the Court by the Pleader of the Defendant, it is far more likely that the mother was content there and then merely to indicate to the Nauru Lands Committee that her then present property was being

cared for and being looked after by her daughter. If the document was to be a Nauruan will, and that had been explained to the members of the NLC then I am sure it would have been made expressing more clearly such intent and duly signed and witnessed as one. The terminology of the Minute was, if anything, an indication that the daughter was to act as a bare trustee of the mother's property.

The Court was pressed for the Defendant to note and apply the decision of Chief Justice Thompson in the Halstead case (Land Appeal No. 3 of 1981). However, I would distinguish that case for there was a will tendered in evidence which was not held by the Court to be valid as not being witnessed by a person of standing but it may have been validated, in the view of the Chief Justice, by later actions of the testator going to the NLC and stating her testamentary intentions to the Committee. The Chief Justice further said that if then this was recorded and signed by her in the presence of one or more members of the NLC, it was a valid will. Unfortunately, the NLC was not able to trace such a recording at the time of the appeal with the result that neither this Court nor the Court of Thompson C.J. was able to determine that there was a proved will.

I would think it somewhat dangerous to accept as a valid will something merely in the form of a note before the NLC and I am not prepared to do so. In the Halstead case if there was a clear intention

expressed in a will deficient for lack of witnessing but that was supplemented by the same testamentary intentions revealed later to the NLC then there is a case for validating the original as a customary will. However, on the facts before me, I hold that there is not a valid will as it has not satisfied the criteria necessary for a valid Nauruan will. The deceased Dairok Gairoe, therefore, died intestate.



BARRY CONNELL
CHIEF JUSTICE

In the Supreme Court of Nauru

Civil action No. 5/2002

Mop Gairoe	Plaintiff
and	
Eidiraidid Dowedia	First Defendant
Nauru Land Committee	Second Defendant

The parties consented to the following order of the Court.

ORDER

I order as follows –

1. That the Nauru Lands Committee, following a decision of the Supreme Court dated 17 February 2003, set aside its decisions published in G.N. No. 3/2002 relating to the estate of Deirok Gairoe.

2. That the Nauru Lands Committee is to convene a family meeting within 21 days to consider the estate of Deirok Gairoe deceased under the laws of intestacy.

3. That the moneys presently held by the Curator of Intestate Estates, or coming into the hands of the said Curator under the

estate of Deirok Gairoe, be held in trust and not distributed until further order of the Court.

4. That the interim injunction dated 21 May 2002 issued in Civil Action No. 16/2002 be discharged on the understanding given by the Plaintiffs in this action No. 5/2002 that the present status quo will not be disturbed prior to any family agreement following the family meeting called by the Nauru Lands Committee.

5. That the costs are awarded to the Plaintiff against the First Defendant with respect to the issue of the will validity, and for one day in court, and for normal disbursements. Such costs to be taxed by the Registrar in event of dispute.

THE SEAL OF THE SUPREME COURT

BARRY CONNELL
CHIEF JUSTICE

DATED 17 February 2003