IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

Probate No.:	**6/08**
IN THE MATTER	of **RANGIPARI MAURANGI** of Rangiura, Nikao, Rarotonga **Testator**
AND	
IN THE MATTER	of an application by **RANGI TAIA** of Parekura, Avarua, Rarotonga **Applicant**
AND	**EILEEN & SAM PERA** of Nikao, Rarotonga **Objectors**

Hearing:	3 May 2010
Post Hearing Submissions for Objectors:	31 May 2010
Post Hearing Submissions for Applicant:	4 June 2010
Counsel:	Ms L Rokoika for Applicant Mr T Arnold for Objectors
Judgment:	18 June 2010

RESERVED JUDGMENT OF WILLIAMS CJ ON APPLICATION FOR GRANT OF PROBATE

I. Introduction – Nature of the Case

1. The Testator died on 30 March 2008 aged 82 years. She was a pensioner who had lived in Rarotonga all her life. She was once married to Mr Sadaraka Samuel but she had long since been separated from him. His whereabouts were unknown.

2. She had no natural children and was survived only by a son, Zerubabela Teokati Maurangi ("**Zelu**"), she adopted in 1998 when she was around 70 years of age. He is now about 12 years old.

3. The Testator's geneology is set out I Appendix 1. The main beneficiaries under the Will were the Testator's grandnephew Mr Rangi Taia ("the Applicant"), and her nieces Raita Taia Snr. and Tokura Mani. Mr Taia was also appointed the trustee and executor of the Will, and is the Applicant for probate.

4. The Objectors are Eileen and Sam Pera on behalf of their natural son, Zelu. They contend that the testator was without testamentary capacity and/or was under influence from the Applicant.

5. In her affidavit, Mrs Pera confirmed that Zelu was currently in their care and said:

> "4. As far as we know, she [the testator] was always talking about Zelu as her child and had asked us to let her adopt him. She never in any way denied the fact that she had adopted a son, and would talk about him freely as being her adopted son.
>
> 5. Zelu, kept coming back to stay with us, but that did not stop Rangi from referring to Zelu as her son.
>
> 6. We were surprised when our lawyer informed us that Mr Vakalalabure commented to her that Rangi did not mention she had any children at all.
>
> 8. It was the understanding among our extended family that when Rangi adopted Zelu, he would inherit anything that Rangi has – that she adopted him for exactly that reason. It was our understanding that she still wanted Zelu to have whatever she had, up to the date she died."

The Objectors also complain that the Will failed to make provision for "the primary caregiver of the deceased, namely Ngapoko Tutai Adamson and her family and, without explanation or reason of any sort disposes of all assets exclusively to persons having only limited contact with the said

deceased". That latter statement was a reference to the Applicant and his relatives.

6. This is the kind of case which in New Zealand would be brought as a routine Family Protection Act claim. In the absence of such a statute it is framed as a testamentary capacity/undue influence case.

7. The sequence of events leading up to the demise of the Testator is as follows:

- February 2008 – lumps appeared and were seen on Testator's back;
- March 4, 2008 – admitted to surgical ward at Rarotonga under Dr Aung;
- March 5, 2008 – taken to hospital for check and then admitted for observation at the surgery;
- March 7, 2008 – Testator discharges herself from hospital;
- March 10, 2008 – check up with Dr Uka. Family meeting when testator gives Will instructions;
- March 12, 2008 – execution of Will at Te Vaka Law P.C. offices, the witnesses being Ms Regina Mustonen, a Legal Executive employed by Te Vaka Law P.C. and Mr Tevita T. Vakalalabure, the principal of Te Vaka Law P.C.;
- March 19, 2008 – admitted to medical ward at Rarotonga hospital for palliative care under Dr Aung;
- March 28, 2008 – confused and disorientated as to time and place;
- March 30, 2008 – date of death – entry in the Register Book of Death.

II. The Main Elements of the Medical Evidence

8. Dr Uka saw the Testator on 10th March 2008 at his surgery. The Testator was complaining of pain in the lower limbs, chest and abdomen. He said that:

> *"... On examination she was oriented in time and place and person. Also, lethargic looking, she was alert and responding appropriately.*
>
> *There were obvious tumour lesions on the back of the chest and abdomen which appears to be malignant in origin. As she was*

explained about her medical conditions and the medication she was prescribed for pain, she responded cooperatively.

In conclusion, her mental faculties were within normal limits."

9. Dr Uka gave this advice on May 1st 2008, less than two (2) months after seeing the Testator. It is important evidence because the opinion of Dr Uka was formed on the same day as the Testator gave her instructions to some members of her family concerning her Will and just two days before the Will was witnessed by Mr Vakalalabure on 12th March 2008.

10. Dr Aung also made findings on the mental capability of the Testator in the medical report dated 29th June 2008, supplied in response the written questions form Mr Vakalalabure as follows:

"1. What was the medical condition Mrs Maurangi complained about?

Mrs Maurangi was known to have congestive cardiac failure, chronic obstructive airway disease, and had multiple musculoskeletal lumps which were thought to be Sarcomas. A psychosocial assessment on 15th February 2008 showed that her cognitive executive functions were intact (High metal state examination score) and she was able to do most of her Activities of Daily Living (ADL) on her own. She was admitted to the surgical ward on 4th March 2008 and transferred to Medical ward under my care on 19th March 2008 for palliative care.

Problem list:

Congestive cardiac failure

Chronic obstructive airway disease

Multiple musculoskeletal lumps (abdominal wall, back and chest wall)? Sarcoma

2. Were you able to communicate with her while she was there?

I was able to communicate with Mrs Maurangi for the duration of her admission until the final two (2) days before her demise on 30th March 2008.

3. Was she able to understand you?

She was able to understand and responded appropriately to my questions as well as to carry out simple instructions.

4. Was she able to respond to you?

Mrs Maurangi responded appropriately to me for the duration of her admission until two (2) days before her demise when she became confused and disorientated to time, place and person.

5. Did you prescribe any mediation and if so what was if for?

Cefotaxime 1 gram 12 hourly intravenously – Antibiotic to treat infection

Frusemide 20 mg in the morning – Diuretic for Heart Failure

Digoxin 0.25 mg daily – Assist heart function

6. In your view, was she in control of her mental faculties at the time she was in hospital?

On admission, Mrs Maurangi was in control of her mental faculties, however, this deteriorated over the week preceding her demise as she became more unwell with associated confusion two (2) days prior to her death."

(Underlining added)

11. Dr Aung admitted the Testator into hospital for most of the month of March after admission on 4th March and was therefore well positioned to make the observations in the report concerning the whole of the material time involved in this case. The underlined passages in his report are significant.

III. The preparation and execution of the Will

12. The undisputed evidence was that the Will was signed with the thumbprint of the Testator in the offices of Te Vaka Law P.C, with Mr Vakalalabure on the left hand side of the Testator and the Applicant propping the Testator upright for her comfort on the right hand side of the Testator. As to the general sequence of events which preceded the execution of the Will I accept the evidence of Mr Vakalalabure, which I find truthful and accurate, notwithstanding some conflicting accounts from other witnesses. It was as follows.

13. On or about the 10th March 2008, the Applicant came to his office enquiring about the making of a will for his grand-aunt, the Testator. He said she was over 80 years old and was bed ridden. Mr Vakalalabure advised him that he would need to speak to her before the Will was prepared but "that because of her advanced age,

he can bring the details of the Will to the office before she came I so that she need not come more than is essential." The following day the details were brought to the office and given to Mr Vakalalabure and the Will was prepared on the basis of those details. (The fact that Mr Vakalalabure did not take instructions directly from the Testator is one of the many complaints of the Objectors.)

14. On the 12th of March Mr Vakalalabure asked that the Testator be brought to his office. The Testator could not walk without aid so initially he spoke to her in the car outside his office. She confirmed that she wanted the Will done and said she had already provided the details to her family to bring to the office. She was then carried into his office by the applicant and the Will was interpreted and explained to her in Cook Islands Maori by his secretary/legal executive, Ms Mustonen.

15. In explaining the Will to her clause by clause Mr Vakalalabure said he was sure that she understood that the Will was to carry out her wishes when she passed away and that she was also aware and confirmed that all the properties identified in the Will belonged to her and she confirmed who the beneficiaries were, as named in the Will. He said he made her understand that family lands would remain with the family when she passed away and that any lease will revert to the family when it expires.

16. Mr Vakalalabure deposed that the Testator understood the content of the Will and signed by her thumbprint in the presence of Ms Mustonen. He let her attest to her Will by thumbprint because although she was not blind she could not properly see the space where she was to sign.

17. Mr Vakalalabure asserted that the Testator was in full control of her mind and was not under duress or pressure. She could have raised any objections with him as she was alone with them the office when the Will was explained. In his view the Will was properly executed and she understood its content before she signed it.

IV. The Contents of the Will

18. The precise testamentary dispositions were set out in paragraphs 3 and 4 of the Testator's Will dated March 2008, as follows:

"3. I GIVE DEVISE AND BEQUEATH the following of my possessions as follows;

1. Rangiatua Section S103C2 Kaikaveka (3,726m²) including the three (3) houses on the piece of land to my nieces RAITA TAIA SNR of Rangiura, Avarua, Rarotonga; and TEKURA MANI of Kavera, Arorangi, Rarotonga.

2. Puoromea Section 49B1 to my grand-nephew RANGI TAIA of Parekura, Avarua, Rarotonga.

3. My Daylem 110CC motorbike to ARIKI TAIA ("husband of my niece Raita Taia Snr"), of Rangiura, Avarua, Rarotonga.

4. My animals to ARIKI TAIA ("husband of my niece Raita Taia Snr"), of Rangiura, Avarua, Rarotonga.

4. I GIVE DEVISE AND BEQUEATH the rest, residue and remainder of my estate both real land personal or whatsoever nature and kind and wheresoever the same may be situate of which I shall be possessed or to which I shall be entitled or over which I shall have any disposing power at my death unto my nieces RAITA TAIA Snr of Rangiura Avarua, Rarotonga, solely.

19. The Will records that it was *"SIGNED by the abovenamed RANGIPARI MAURANGI of Avarua, Rarotonga by impression of her left thumb-print for her last will and testament in the sight and presence of us together present at the same time who in her presence at her request and in the sight and presence of each other have hereunto subscribed our names as attesting witnesses"*. The thumbprint appears opposite this jurat.

20. The Will did not contain the certificate required by section 445 of The Cook Islands Act 1915. Section 445(3) provides as follows:

> "(3) Every [person referred to in subsection (2) of this section] so attesting the will of a Native shall, before attesting the same, satisfy himself that the testator understand the effect thereof, and shall certify on the will that he believes the testator to understand the effect thereof; but no will shall be invalidated or be deemed to be informally attested by reason of any breach of the provisions of this subsection."

This matter is discussed below.

21. It will be noted that clauses 3(1) and 3(2) purported to dispose of two sections of land the first of which had three houses upon it.

22. Section 446 of the Cook Islands Act provides as follows:

> "The persons entitled on the death of a Native to succeed his real estate, and to his personal estate so far as not disposed of by his Will, and the persons entitled on the death of a descendent of a Native to succeed his interest in Native freehold land, and the shares to which they are so entitled, shall be determined in accordance with Native custom so far as such custom extends: and shall be determined, so far as there is no Native custom applicable to the case, in the same manner as if the deceased was a European."

Section 447 goes on to provide that native land is not to invest in administrators but that under Section 448 the Land Court shall have exclusive jurisdiction to determine the right of any person to succeed to native freehold land. The Court may make succession orders accordingly. Such succession orders are, by virtue of Section 449, conclusive proof of the title to the successor.

23. Counsel were agreed that the provisions of the Cook Islands Act had a different application to these two devises. It was their view, as confirmed in their joint memorandum to the Court of 16 June 2008 ("the June Memorandum") that the devise of the Puoromea land in Clause 3(2) was void as in breach of Section 446. They further advised in a telephone conference on 17 June that in consequence Zelu has inherited that land as the testator's only successor. (Counsel for the applicant acknowledged that the void attempt to deal with the Puoromea section by Will was not itself fatal to the Will.)

24. As to the Rangiatua land which was land leased by all landowners to the testator this was not affected by Section 446 and was capable of being willed. It was subject to a lease dated 9 January 1990 from the landowners to the deceased. There was no legal requirement that the lease be registered in order to take effect. It had been executed by the Registrar of the High Court pursuant to High Court confirmation of land owner resolutions on 8 December 1989. Accordingly, this lease therefore comprised the principal asset of the deceased estate and would pass to the two nieces if the Will was upheld.

25. Counsel advised in the June Memorandum that for the purposes of assessing the "ball park value" of the Rangiatua lease, it had an area of almost an acre and three houses in various states of repair. Counsel were agreed that an appropriate market figure for that lease (i.e. land and buildings) which had forty years to run would be $250,000.

26. Two of the houses were rented out for a time at $100 per week each by the deceased; they are not currently rented. The Applicant's parents currently live in the Deceased's home as they are maintaining the land.

27. All monies collected from the rent has been deposited into the Deceased's bank account. Approximately $11,000 was collected from rent when the deceased passed away and the last rent paid into the account was on 2 October 2009.

28. The current balance in the account is $10,256.94 as the difference was used for funeral expenses including the payments for the Deceased's grave.

V. The Adoption of Zelu and the Effect of the Will

29. That adoption is a matter of court record; High Court (Land Division) application no. 296/97 record book number 12/68; order made by Mr Justice McHugh 13 January 1998.

30. At the time of the adoption, the Testator was clearly of advanced years. It was disclosed to the Court that "*we have agreed that I will look after the child but most of the time he goes back to the parents but I wish to adopt the child.*" As the evidence in this case disclosed that is, in fact, what happened. Zelu did not live on a permanent basis with the Testator.

31. Had the Testator died intestate, then under Section 77(b) of the Administration Act 1969 of the New Zealand as applied in the Cook Islands, the Testator's estate would be held "*on the statutory trusts for the issue of the intestate*" i.e. Zelu.

32. The Court finds on the evidence before it that the purpose of the adoption was not to have the Testator bring up their child, but rather to fulfill her wish (being childless herself) to have an heir to whom her estate might pass in the ordinary course. The Court accepts the submission of counsel that adoptions in the Land Division of the

High Court are made in open court in view of their having consequences in terms of succession to native lands.

33. The adoption was in the mind of the Testator as she addressed estate issues in the weeks prior to her death. She communicated this both to her niece, Ms Adamson and to Ms Adamson's daughter, Doreen Boggs.

34. The apparent effect of the Will is to exclude Zelu from all real property and personal property of the Testator that was capable of gift or devise by will.

35. However, as noted above, since the attempted devise of the Puoromea section was void that Zelu was entitled to the Puoromea section as the sole surviving successor of the testator. Counsel indeed confirmed that the Puoromea section had now passed to Zelu. Thus while it is true that on its face the Will excluded Zelu the ultimate consequence was different since Zelu has inherited the Puoromea land.

36. As for the Puoromea land; it is an occupation right of 753m2 located not far from Telecom's Parekura premises. It is currently vacant and yields no rent or other income. As an occupation right it has no value. However, it is capable of being converted to a 60 year lease and counsel agreed in the June Memorandum that were this done, it would have an approximate market value of $50,000.

VI. The Legal Framework and the Grounds of Objection

37. As noted in the submissions of the Objectors, in the Cook Islands, unlike New Zealand, there is not in force any form of Family Protection or Testamentary Promises legislation. Thus, this Will will stand, or fall, having regard to the provisions of the Wills Act 1837, the Cook Islands Act 1915, and the English common law as applied in the Cook Islands pursuant to Section 615 of the Cook Islands Act 1915.

38. A notice of objection was filed on 13 May 2008. At the conclusion of this hearing the Court sought clarification as to the status of the grounds set out in that notice. In the Objectors post-hearing submissions the precise objections where set out and argued as follows.

Ground 1: Lack of testamentary capacity

39. The prime objection was that the Testator was without testamentary capacity at the time of making the will. The bulk of the objections lengthy and detailed submissions considered the state of the evidence, and applicable law, with regard to that ground of objection.

Ground 2: Undue influence

40. It was also asserted that the Testator was under "undue influence" from the Applicant and other beneficiaries named in the Will at the time of making the Will. This ground was asserted in the technical legal, sense of "undue influence" in the particular circumstances of the mental and physical state of the Testator both at the time of the meeting to discuss the making of a will and at the time of her visit to law offices in order to sign that will. The Objectors acknowledged that in respect of undue influence, the Court must be satisfied there was coercion, pressure of whatever character, whether acting on the fears or the hopes of the Testator at the time of the making of the will.

41. In the peculiar circumstances of the Testators behaviour at the time of visiting the law offices on the day of execution, it was submitted that her behaviour could be typified in only one of two ways - either she *could not* walk/talk/read/write on that occasion or she *would not*. If the latter, then there arises the question of whether influence was exerted "*as to overpower the volition without convincing the judgment: Halsbury 4th Ed Vol 17 para 911*".

Ground 3: Will not reflective of Testator's wishes

42. As a third ground it was alleged the terms of the Will reflected the wishes and instructions of the Applicant rather than those of the Testator. It was acknowledged, however, that this ground was more happily expressed as a want of knowledge and approval and is to some extent subsumed in terms of its being a consequence of the alleged absence of testamentary capacity and/or the alleged undue influence. This ground was phrased in this way since paragraph 4 of the Applicant's first affidavit (dated 1 May 2008) stated that "the Testator had instructed her lawyers to prepare a will to make provision for those that cared for

her in her old age." By the conclusion of the case however, the main point of the Objectors' case in this area was the fact, which the Court finds established on the evidence, that Mr Vakalalabure was not instructed directly by the Testator at any stage. This matter was said to retain significance primarily in terms of the Court considering whether and to what extent the Will could be considered an "inofficious testament" - a circumstance which the Objectors said had important consequences in terms of the burden and standard of proof.

43. The Objectors contended that the nature and extent of the financial and other assistance given by Mr and Ms Adamson and the Adamson/Boggs family over the years was amply set out in the relevant affidavits. That they should be totally excluded from the Will with neither acknowledgment nor explanation, suggested that the Testator failed to recognize the moral claims resting upon her, not only in respect of Zelu, but also in respect of Ms Adamson and her family. It was submitted that the existence of those moral claims raised in an acute form the issue as to why, at no stage, did they surface in the mind of the attesting solicitor.

44. The Will was also objected to in that clause 3(2) purported to devise an occupation right, contrary to the terms of the Cook Islands Act 1915. It was acknowledged, however, this did not invalidate the Will (and indeed, as noted earlier, Zelu, by virtue of his adoption, had now succeeded to that occupation right). This issue was said to remain of relevance as an evidential matter touching on the degree of the Testator's knowledge and understanding and testamentary capacity at the time of making the Will.

45. While there had been objection taken to the circumstance that the executor was also a beneficiary of the Will, it was acknowledged by the Objectors this was not a matter that, of itself, could invalidate the Will. However, where, as in this case, the individual who actually instructed the lawyer as to the terms of the Will was also constituted its executor and one of its prime beneficiaries, certain evidential consequences were said to follow.

Other matters raised by Objector

46. The notice of objection referred to other matters which would be raised at hearing. It was submitted that while other issues had indeed arisen but was acknowledged

that they were not relied upon as separate grounds. Rather, primarily they raised evidential and burden of proof issues that the Court should bear in mind when addressing the prime objections as to lack of testamentary capacity and undue influence. Briefly stated those other matters were:

- The Will signed by means of a thumbprint rather than a written signature.
- One of the two witnesses, Ms Mustonen, being aged only 15 years at the time the Will was executed;
- The lack of knowledge on the part of the attesting solicitor as to the Testator having a legally adopted son.
- Consequential failure of the attesting solicitor to explain the effect of the Will (as opposed to its contents) as required by Section 445(3) and a further failure to certify the Will as required by the same subsection.

VII. Submissions of the Objector

Burden of Proof – Standard of Proof

47. The submissions of the Objectors first addressed the applicable principles of law which touched on the burden of proof and standard of proof in cases of this sort. This was a lengthy analysis and the Court confines itself to noting the key propositions.

48. It was said that a useful summary of the position was found in the case of *Hartley v Fuld* [1965] 3 All ER 776. As to testamentary capacity it was axiomatic that a will must express the will of a free and capable testator: "*English law relies on a presumption of sanity unless there be circumstances which reasonably give rise to doubt, when the burden of calling affirmative evidence falls on him who propounds the will*": *Hartley v Fuld* at page 780. It was submitted that the issue of whether the Will is inofficious came into play as a circumstance that reasonably gives rise to such doubt.

49. In the face of the adoption and the expressed wishes of the Testator to third parties not interested in the Will that the testator wished her adopted son to inherit land,

the Objectors contended the Will was an inofficious testament, that is to say, a will which wholly passed over, without assigning sufficient reason, those having strong natural claims on the Testator: *Banks v Goodfellow* (1870) LR 5 QB549 at 570.

50. The general rule was that an inofficious will should be regarded with great distrust and every presumption should in the first instance be made against it: *Barry v Butlin* (1838) 12 ER 1089.

51. Where there was dispute or doubt as to the capacity of the Testator, her testamentary capacity must be established and provided affirmatively: *Sutton v Sadler* (1857) 5 WR 880.

52. Furthermore, the requirement of a sound disposing mind went well beyond basic comprehension. The degree of mental disability has long been held to extend to the issue of moral claims:

> *"In order to be of a sound disposing mind a testator must not only be able to understand that he is by his will giving his property to one or more object of his regard but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property: (Halsbury 4th Ed vol 17 at para 898)."*

53. The time the sound disposing, or competency or incapacity exist must be the actual moment of execution of the Will: *Eady v Waring* [1974] 2 OR (2d) 627, *Brouncker v Brouncker* (1812) 2 Phillim 57.

54. It was accepted that some cases suggested the measure of testamentary capacity need not be as complete at the time of execution as it was at the time of giving instructions for the Will: *Parker v Feldgate* (1883) 8 P.D. 171. It was submitted however, that this general proposition had limited application in cases such as the present. In *Battan Singh v Amirchand* [1948] 1 All ER 152 at 155 PC, it had been said that the principle that the key point in time was when the instructions were given should be applied in the greatest caution, where, as here, the Testator did not himself give instructions to the solicitor but gives them to a lay intermediary who reports them to the solicitor. In such a case, before presuming validity, the court must be strictly satisfied that there is no grounds for suspicion, and that the instructions given to the intermediary were clearly

understood and faithfully reported by him and rightly apprehended by the solicitor.

Knowledge and approval

55. It was submitted for the Objectors that, as axiomatic as the issue of testamentary capacity, was that of knowledge and approval:

> *"In my opinion the whole point of the rule is evidential; it is concerned with the approach required of the court to the evidence submitted for its consideration. In the ordinary case proof of testamentary capacity and due execution suffice to establish knowledge and approval, but in certain circumstances the court is to require further affirmative evidence..... It is sufficient now to indicate that it is a rule which in certain cases requires of the court vigilant care and circumspection in investigating the facts of a case. It is a rule which calls on the court not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the Testator: Hartley v Fuld* at page 781.

56. Given the facts of the present case, the law regarding those "*certain circumstances*" was relevant. Halsbury 4th Ed vol 17 para 907 was relied upon:

> *"Thus where a person propounds a will prepared by himself or on his instructions under which he benefits, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it. A similar onus is raised where there is some weakness in the testator which although it does not amount to incapacity, renders [her] liable to be made the instrument of those around [her]; or where the testator is of extreme age; or where knowledge of the contents of the will is not brought home to[her]; or where the will was prepared on verbal instructions only"...- or where the will is at variance with the testator's known affections, or previous declarations...or a general sense of propriety"*

57. It was submitted by the Objectors that the present case clearly fell within a number of those circumstances:

(a) The Applicant, not the Testator gave the instructions to Mr Vakalalabure;

(b) The Testator was clearly, on the day of signing, in a state to be considered "liable to be made the instrument of those around her";

(c) The combination of her age and medical condition obviously produced behaviour out of character with her behaviour both before and after the day of execution;

(d) While the contents of the Will might have been explained, it is clear that the effect of the Will never was;

(e) On the evidence of Ms Mani and Mr Taia, the Will appears to have been prepared on the verbal instructions only of the Testator;

(f) The Will was at variance with the known affections and previous declarations of the Testator; and

(g) In terms of being inofficious for the reasons set out above, was equally at variance with a general sense of propriety.

58. This being so, it was contended that the onus rested firmly upon the Applicant *"to prove the righteousness of the transaction and that the testator knew and approved of it".*

59. In particular, it was asserted that the present case was clearly one in which a person has prepared a will in his own favour; that is to say, the Applicant, both the executor and a prime beneficiary of this Will, took the initiative in identifying a lawyer, relaying instructions, and then taking the Testator to that lawyer in order to have the Will executed. Although at some pains in his evidence to put himself at a distance from the Testator both at the time the Will was explained by Ms Mustonen and at the time of execution, his evidence was contradicted in certain respects both by Ms Mustonen and Mr Vakalalabure.

60. The Objectors acknowledged that *"The mere circumstance that the person who prepared a will takes an interest under it does not vitiate the will, and the [relevant principles of law] must not be used to raise a cloud of unjustifiable suspicion.*": Halsbury 4th Ed vol 17 para 915.

61. That said, it was said to be clear that: *"Where a person has prepared a will in his own favour it is his duty to bring to the testator's mind the effect of his testamentary act, and failure to do so may amount to fraud. Those who take for*

their own benefit after having been instrumental in preparing or obtaining a will have thrown upon them the onus of showing the righteousness of the transaction..... It is a circumstance that ought generally to excite suspicion and for vigilant and jealous examination of the evidence in support of the instrument. It rests upon the person who has procured a will under which he takes a large benefit to show that the will does really express the testator's mind and intention." (ibid)

62. It is in this context, the Objectors submitted, the failure of the Applicant to advise the attesting solicitor of there being an adopted son, and, for that matter, of others who might have some form of moral claim upon here - and consequent failures to comply with the provisions of section 445(3) of the Cook Islands Act 1915 - were of real relevance.

63. Non-compliance with section 445(3) was not, of itself, a circumstance that could invalidate the Will - the section itself made that clear. However, the Act will operate to invalidate a will made in the Cook Islands by a Cook Islander unless one of its witnesses is a suitably qualified person (see section 445(2). This was the clearest indication the legislature intended that person to address - and bring to the attention of a testator - the full implications of the transaction. In the context of the present transaction that must extend to his giving a full and proper explanation as to the dis-inheriting effect of the Will on the Testator's adopted son.

64. Thus the Objectors submitted that in addition to the circumstances outlined in Halsbury, there was, in the Cook Islands, an evidential burden upon the Applicant to show due and proper performance, by the qualified attesting witness, of the statutory duties.

65. If the Court should find that evidential burden was not discharged, then that was a matter material to the Court's consideration of whether the Applicant had discharged the evidential burden arising under the English common law generally, of satisfying the court on issues of knowledge and approval.

Objectors' Submissions as to the Evidence

66. The Objectors' submissions then passed to a detailed review of the evidence.

Background material - relevance

67. By way of introduction the Objectors noted that a number of affidavits dealt with matters of general background. The Court had pointed out that in the absence of testamentary promises or family protection legislation, the role of the Court in the present application was simply to consider whether the Will should be admitted to probate and that issues which the Court might properly take into account were therefore relatively narrow. The Objectors acknowledged that such was the case. They relied on the background material, as adduced for the Objectors, primarily as demonstrating the nature of the family relationships, and the inofficious nature of the Will.

68. On the all important question of testamentary capacity, it was submitted that those affidavits painted useful background. The picture painted by all was that the Testator was a woman of character, strong minded, stubborn, "a hard case".

The adoption

69. It was said to be clear that the Testator married late in life and that the marriage was unsuccessful. The impetus to adopt Zelu was that of the Testator. In terms of the status of that adoption, the Court was invited to draw the inference, the adoption of Zelu was something she wanted to do, and that in the ten years that followed she maintained he was her adopted son.

70. Both Tekura Mani in her affidavit and Rangi Taia in his supplementary affidavit acknowledged that the Testator's adopted son was discussed in the context of the family meeting held in Arorangi when the Will was discussed. Their evidence gave no hint of any repudiation by the Testator of that adoption or of her relationship with Zelu. This corroborated the evidence of Ms Adamson and Ms Boggs on this issue; their evidence suggested that just weeks before her death, the Testator was talking in terms of not needing to make a will at all, as she had an adopted son.

Declining Health

71. The affidavits were said to be useful, also, in establishing a pattern of declining health. The affidavits of Mr and Mrs Adamson both suggested some measure of forgetfulness and senile decay. In terms of the issue of hypoxia which was now before the Court, it was to be noted that in the Applicant's supplementary affidavit that "*in late February 2008 Aunty complained having shortness of breath.*"

72. The Objectors acknowledged there was little in the evidence (either their own or the Objectors) that would suggest any ongoing lack of testamentary capacity prior to the Testator's admission to hospital in early March 2008. Ms Adamson's affidavit set out details of the Testator's failing health and, but it was acknowledged the primary medical conditions were those of congestive cardiac failure and chronic obstructive airway disease; in terms of mental capabilities the issues seemed to those of confusion and/or forgetfulness..

The independent medical evidence

73. It was submitted that the Court would be greatly assisted by the evidence of two independent medical witnesses who were both able to give clear, unequivocal, evidence as to the condition both before and after the day of signing the Will. Although those witnesses were brought by the Applicant, the Objectors placed great weight on the contrast between their accounts and those of the four witnesses present on the day the Will was executed. Before considering the events of 11 and 12 March which gave rise to the making of the Will, it was said to be instructive to compare the evidence of Dr Uka with that of Dr Aung.

The evidence of Dr Uka at to the March 10 visit

74. The evidence was that although carried up the stairs at Ingram House the Testator walked from the top of the stairs to Dr Uka's surgery. Dr Uka's evidence was that when the Testator entered his office she was walking by herself:

> "*When she entered my office, she was walking by herself but at the time she was with probably her nephew or grandnephew and niece or - I think the two of them with her but she was by herself unaided and she walked to the chair and she sat on the chair without any assistance.*"

75. The Testator was in the doctor's surgery for approximately half an hour. There is no evidence that she was unable to support herself in the chair over that time. Although Dr Uka recalled her being assisted out of his office by someone, he recalls that at the end of her time with him "*she stood up by herself*" (at page 64).

76. Clearly, on that occasion, the Testator was capable of talking:

> "*When I was talking to her she was aware where she was and she knows who I was and when I spoke to her about asking what was the problem with her and she was responding to my questions. She said that she has been eating well but mainly the complaints of pain and weaknesses of the legs. So I take it that as she is aware of what is going, what is happening.*"

and again:

> "*I would say that she was not hesitant to answer my questions....when I spoke to her I spoke to her in the language where she can easily understand what I am saying but she answered appropriately. You know, she answered the questions.*"

77. In cross examination it was put to Dr Uka that the Testator was responding with what seemed to him to be a totally normal way - a proposition that was agreed to by him. Dr Uka reported that although it took "*a couple of minutes for her to respond*" at the start of his time with her, thereafter he had no difficulty communicating backwards and forwards with her.

78. It is significant that Dr Uka was able to recall the day he saw the Testator that she did not observe any trembling on her part - "*no tremor at all*".

79. For all this, Dr Uka's opinion at the time was that the Testator should be admitted up to the hospital.

The evidence of Dr Aung

80. The Objectors submitted that Dr Aung's evidence was the key to this case. His evidence was of a history of respiratory symptoms which, by the time of his examining her in March, were accompanied by a developing heart problem and lumps on the wall of the chest, abdomen and back.

81. It was clear Dr Aung had known the Testator and treated her for a period of some years. Dr Aung's relationship with the Testator was obviously one that enabled

him to give clear, confident evidence as to his observations of her. His evidence was that he would see her every morning sit and talk with her. His evidence was that every time when he visited her she would talk to him and then she would answer him, always recognized him, always responded with his name and that she appeared to be "*quite well in terms of her mental capacity*" until the final two days of her life.

82. Although the lumps on the Testator's body were obviously causing pain and discomfort, Dr Aung confirmed that the Testator was effectively killed by heart and lung problems, with her body shutting down to the point where she became progressively unresponsive and died.

83. Dr Aung was asked to share with the Court his experiences of the Testator on her good days and her bad days and he confirmed that whether the Testator was experiencing a good day or a bad day "*she always talked back to me.*"

84. Dr Aung confirmed that she was able to answer appropriately in English to his questions in English.

Hypoxia

85. The Court's attention was drawn in the Objectors' submissions to the exchanges between counsel for the Objectors and Dr Aung. On hearing the circumstances described and asked to consider a medical explanation for the Testator's behaviour at the time of her visit to the law office, Dr Aung had a ready answer. His analysis - and the Objectors contend it as a compelling one - was this;

> "*...when she was in my ward she needs oxygen most of the time and at times she just took off on her own no matter how much we want her to, she said "no, I don't like it."....at times, especially when she is lacking oxygen, she might have some reading difficulty and may be also lacking of oxygen may cause her a little bit more sicker....*"

86. Dr Aung confirmed that she was still walking when transferred to the medical ward under his direct care. When the events of the law office were put to Dr Aung he acknowledged that it was "*very likely*" that they would be consistent with hypoxia.

87. The inability of the Testator, (apparently sitting on a bench without side support) to remain upright without support was put to Dr Aung and Dr Aung's answer again suggested the Testator had become weaker in the absence of oxygen.

88. On the question of whether hypoxia might effect mental capacity, Dr Aung indicated that it would do so "*if the hypoxia is too serious*". He acknowledged that the verbal unresponsiveness of the Testator might possibly indicate a corresponding slowing of the Testator's cognitive function at that time.

89. The evidence of Dr Uka as to the absence of a tremor was put to Dr Aung. His evidence was that when he checked her pulse and blood pressure he did not notice any tremor. When the difficulties experienced with the pen and the thumbprint were put to Dr Aung he indicated "*it could be partly hypoxia and it could be partly to her general well being because she was a very, very sick patient.*"

90. On the apparent inability of the Testator to read on the occasion of her visit to the law offices, Dr Aung was able to explain this symptom in a manner that directly related to brain function;

> *"[Counsel] So again my question to you and it comes back to this hypoxia, would hypoxia affect this woman's vision in terms of making it harder for her to see? Dr Aung; Yes if you had asked me for that particular hypoxia. Hypoxia can affect the brain. The brain controls all our vital functions starting from respiration, heart, circulatory and also all the other cranial - because vision is controlled by the brain as well...from the optic nerves, so once you have the general hypoxia and all the brain cells are lacking the oxygen then all the functions of the nerves become suppressed ...[Counsel] and in terms of vision would that result in blurred vision or ...[Aung] blurred vision, that is correct"*

91. In answer to a final question from the Court Dr Aung gave the following answer;

> *"Court: And what is your comment, if any, on the simple proposition that once she had left the hospital she did not have access to oxygen? Is that of significance or not?"*
>
> *Dr Aung; yes, it is quite significant. When she is lacking oxygen and then her breathing will become more laboured and then when she is lacking oxygen her mental function or the brain function will become more suppressed or depressed."*

92. In summary, it was submitted by the Objectors that it was apparent that by the time Ms Adamson and Ms Boggs took the initiative to have the Testator admitted to the hospital, she was no longer unable to take care of herself around the house and was suffering from a lung condition (causing a heart condition) that would kill her within a matter of weeks.

93. The Testator's lung condition was such she required oxygen when at the hospital. It appeared to be common ground between the parties that once she had discharged herself from the hospital, the Testator no longer had access to oxygen.

The making of the will - the Arorangi meeting

94. It was against the foregoing background that the Objectors submitted the making of the Will should be considered. The evidence relating to the meeting on March 10, 2008 at which Tekura Mani, Teariki Taia, Papa Tere and the Applicant, along with the Testator, were present was said to be instructive in a number of respects. The Court was asked to note the following matters.

- "*Rangi then asked what will happen with the piece of land across from him in town and she said she had already given it to Rangi.*" It is common ground as between the Applicant and the Respondent that the Testator had not "already given it to Rangi", a circumstance which throws doubt upon her knowledge and understanding as to the extent of her assets.

- The Court should note, too, that although the Will contained a provision purporting to pass that land interest to Rangi Taia, on the evidence both of Tekura Mani's affidavit and Rangi Taia's, that was not in contemplation by the Testator.

To put that another way; the Testator, at that meeting, neither asked nor expected that to feature in the Will; the Objectors asked then on whose authority, then, was it included? That the devise nevertheless appeared in the Will (and was presumably explained by Ms Mustonen and/or Mr Vakalalabure) and elicited neither query nor comment from her when the Will itself was explained to her -

why would she be unresponsive to an aspect of the Will that was contrary to her understanding of the position?

- "*I asked her if she had an adopted son and Aunty Rangi said she gave her Power of Attorney to me and it was my job to go and get another piece of land for him.*" (Mani)

- "*Aunty Tekura and I then asked her about the boy that we had heard she had adopted. She said "no not over there*". She then told Aunty Tekura to look for another section to give for the boy. She told Aunty Tekura, "*I gave you the Power of Attorney so you can go and sort that out later.*" (Rangi Taia)

95. It was submitted that this evidence was important in a number of respects;

(a) When considered along with the evidence of Tutai Adamson and Doreen Boggs, these reported statements of the Testator obviated any suggestion it was her intention that Zelu was in some way not deserving of recognition and of obtaining benefit from the her as her adopted son;

(b) Clearly, the Applicant knew of and enquired as to the adopted son. He was on express notice of the intention of the Testator that provision be made for her adopted son, through the power of attorney. The evidence of Mr Vakalalabure made it clear that neither these instructions nor, even, the existence of an adopted son were made known to him;

(c) Clearly, from cross examination of Tekura Mani and in her response to questions asked by the Court the Testator knew that she had a fatal condition and would shortly die and knew, also, that the Power of Attorney would not survive her death. This obvious contradiction suggests, strongly, that there must have been some impairment as to the Testator's powers of understanding and reasoning at the time of the meeting;

(d) "*Rangi asked her what will happen to the homestead and she said she wanted to leave it to Teariki.*" It would seem the homestead was an asset of considerable value, comprising a leasehold property on which

improvements of value were erected. Teariki appears to have played some role in upkeep and maintenance of that property, but it was difficult on any analysis of the evidence, to understand why the Testator might want to benefit a person who was not her blood relation, and not an owner of the land, to such a large extent - while at the same time excluding her adopted son from any benefit.

The Objectors submitted that this circumstance should be measured against the Testator's statement to Mrs Adamson and Mrs Boggs; could it be that the Testator was simply intending to pass on property to third parties to take care of, pending her adopted son coming of age?

(e) Last, but by no means least, was the question - unanswered - as to why this meeting was confined to the Applicant's family members, and not to the broader family. It did not appear that the Testator requested the meeting nor did it appear she had any input as to those attending it; why were the Adamson/Boggs/Pera interests not advised of a meeting to discuss succession issues?

96. Before leaving the Arorangi meeting, the Court's attention was drawn to the evidence of Mr Vakalalabure. His evidence was of asking the Testator, in the context of attempting to satisfy himself on issues of undue influence "*Mama, have you had anybody talking to you about your Will*?" She said "*No*". This interchange was said by Objectors to raise a number of obvious questions - as to capacity, and as to undue influence. The Arorangi meeting was obviously a fairly comprehensive discussion of matters; did the Testator simply have no recollection of it, just 24 hours or so later, or did she feel somewhat intimidated in terms of admitting the extent to which Mr Taia and Ms Mani had been involved in the discussions that gave rise to such obvious benefits to the two of them?

97. It was clear that Mr Vakalalabure was not made aware of the Arorangi meeting by anyone else. He said "*I was not aware of this meeting*"; Objectors noted the intimation from Mr Vakalalabure that had he been aware of the meeting "*I wouldn't have got the will executed Mr Arnold because I've gone through the preliminary point of cautioning myself and put it across to her and I was satisfied*

she was under no influence whatsoever and the contents of the Will she approved".

98. As to the making of the Will and the events of 12 March 2008 it was submitted that when contrasted with the evidence of Drs Uka and Aung, serious questions arose as to the physical and mental state of the Testator on the occasion of her visit to the offices of Te Vaka Law P.C. to execute the Will.

99. As to walking, the evidence from the two independent medical practitioners as to the Testator's ability to walk unaided, both before and after execution of the Will, was noted. That evidence was to be contrasted with the evidence of the Applicant, Ms Mustonen, Mr Vakalalabure, and Tekura Mani as to her inability to walk unaided on May 12. Ms Mani attempted to explain this as Mr Taia "spoiling" the Testator, but quite clearly the Testator was unable to hold herself upright on a bench, still less walk, on the day in question.

100. As to talking there was said to be equally compelling evidence that the Testator was a woman quite capable of carrying on a intelligent conversation both in Maori and in English.

101. The evidence of the four witnesses who were present at the office that day was said to be disturbingly contradictory, but, nevertheless none of them suggested that the Testator carried on any sort of sustained conversation with anyone that day apart from the Applicant who claimed the Testator was talking to him and Ms Mani.

102. Tekura Mani herself did not support that but claimed to have heard her utter the word "*yes*" on one occasion and of answering a question on arrival to the effect that she was "*alright*".

103. Ms Mustonen's evidence was of the Testator nodding from time to time; significantly, Ms Mustonen's evidence was that the Testator said nothing when alone in the office with Ms Mustonen and Mr Vakalalabure. Mr Vakalalabure, on the other hand, claimed that "*At times she was mumbling "yes or "no" but she was saying it in the appropriate response to my questions that I put to her and also at this time, she maintained eye contact with me at all times.*"

104. It was contended that, given the obvious inability of the Testator either to see or sit upright, and somewhat contradictory evidence of Ms Mustonen, there must be real doubt as to Mr Vakalalabure's recollection. As to Mr Vakalalabure's evidence that "*She said she wants to go ahead with it. That is why I had to go to the office*", that evidence however was not corroborated in any way by the three others there at the time and is evidence given by Mr Vakalalabure in the context of his assertion that the explanation of the Will was undertaken in the office and not at the car - on which the state of the evidence was unsatisfactory.

105. On the question of the Testator's sight there was a conflict of evidence insofar as Tekura Mani said that "*I know Aunty Rangi could not see the paperwork because she forgot her glasses so they allowed her to use her thumb print*". However, the affidavit evidence of both Ms Adamson and Ms Boggs was said to establish that the Testator did not have or use glasses. A witness, truly independent, who had known and had dealings with the Testator for some years - Dr Aung - gave confident evidence that he had never known the Testator to wear glasses. Perhaps most tellingly, the Applicant gave evidence that he had not seen her wearing glasses when she was alive.

106. Ms Bogg's gave evidence of the ability of the Testator to both read and - apparently - comprehend and speak to an Easter card that was presented to her following her readmission to hospital. Once again, however, the evidence of the four persons present on that occasion was consistent with a woman either unable or unwilling to read the document in front of her. There are a number of references to her having left her glasses at home, but that would seem to be a fiction, either of the Applicants' witnesses or of the Testator herself.

107. On the issues of body tremor and hand/eye coordination, both Dr Uka and Dr Aung gave evidence that would seem to suggest that two days earlier the Testator appeared not to have exhibited any tremor or other hand / eye coordination symptoms and - similarly - that while obviously weak, the Testator was not observed by Dr Aung on the occasions upon which he took her wrist to feel her pulse, to suffer any degree of tremor. However it was submitted that Mr Vakalalabure's evidence and that of Ms Mustonen gave a vivid picture of a

serious degree of tremor, to the extent of the Testator not being able to sign with either a pen or a thumbprint.

108. On the question of the ability of the Testator to sit upright, there was no suggestion of her being unable to do so during her time with Dr Uka - a period of approximately half an hour. The evidence of Ms Mustonen and Mr Vakalalabure, however, was of a woman who was able to sit upright only by virtue of being effectively, supported on one side by Mr Vakalalabure and on the other side (if Mr Vakalalabure's evidence is to be believed over that othe Applicant) by Mr Taia.

109. The matters referred to above were physical symptoms but their presentation, together, to such a marked degree could admit of no doubt the Testator was in some way seriously incapacitated at the time of her visit to the lawyer's office. The questions for the Court were:

- what might have caused this degree of apparent physical incapacity; and

- could that apparent physical incapacity have had a mental cause in terms of incapacity which either affected the testamentary capacity (in the true sense) of the Testator or, if the Court should find that she had capacity in that sense nevertheless operated to result in the want of requisite knowledge or approval.

110. It was submitted that in this context that the issue of "undue influence" was appropriately considered. The following facts seemed reasonably clear;

(a) The Testator was no longer in a fit state to be living by herself;

(b) The Testator, however, did not wish to remain in the hospital and, in fact, "absconded".

(c) Having been taken to the hospital on the initiative of Ms Adamson and Ms Boggs, the Testator apparently turned to the Applicants family who took her in.

(d) The Testator was then taken to Tekura Mani's place.

One inference that may be drawn from that evidence, it was submitted, was that whatever took place at the meeting the day before, by the time of the visit to the law office, the Testator did not wish to execute the Will. That is to say, her apparent inability to walk, talk to any degree, see, sit up straight, or to make any signature or to make a single thumbprint impression (apart from that undertaken by Mr Vakalalabure) was consistent with a woman who did not, in fact, wish to participate in the exercise at all.

111. The submissions then turned to what were said to be serious conflicts of evidence among Applicant's witnesses. In this respect the Court was asked to consider the evidence of the four witnesses who were actually present at the law office that day i.e. the Applicant, Tekura Mani, Regina Mustonen, and Tevita Vakalalabure.

112. The Court had had the opportunity of listening, directly, to three of those four witnesses. The evidence of the fourth, the Applicant, was taken before Weston J just seven months after the execution of the Will.

113. The Court might reasonably expect, having heard from both witnesses to the Will and from two other witnesses present, there would be a reasonable degree of unanimity in the accounts of those persons. The Objectors submit that given the burden of proof lying on the Applicant, the need for this is particularly acute in the present case.

114. In fact, there was an almost incomprehensible divergence in the accounts of these four witnesses.

The Applicant

115. Considering, first, the evidence of Rangi Taia he claimed the Testator was better the day at the lawyer's office than she was at Dr Uka's - "*she was in a lot more calmer thing than before we took her to Uka's because she was in pain.*" Mr Taia was confident that the Testator was not in pain the day she went to the doctor's indicating that she had some painkillers.

116. The Applicant's initial evidence as to what took place that day was contained in his supplementary affidavit. At paragraph 33ff he said:

> *"33 While the lawyer spoke to Aunty Rangi, Aunty Tekura and myself waited outside. The lawyer had a local girl there who was translating what the lawyer was saying into Cook Islands Maori so Aunty Rangi could understand.*
>
> *34 After they talked, I went into the office when Aunty Rangi was asked to sign the will she told me she had not brought her glasses and could not read the will as it was a little blurry. I told the lawyer this and he suggested that he could use her thumbprint to sign off the will and she agreed."*

117. At hearing, the Applicant expanded on that, giving evidence that upon arrival at the lawyer's office he carried the Testator in, then he brought her back out because it was uncomfortable to sit on the seat in the office. He agreed that the first thing that happened was that Mr Vakalalabure spoke to the Testator in the car. His evidence was of Ms Mustonen coming out to the car with Mr Vakalalabure, along with Mr Vakalalabure's brother.

118. Later in his evidence, the Applicant gave affirmative evidence in answer to a question as to whether he recalled talking to the Testator at the time that the explaining of the Will was being done in the car

> *"I actually stepped away. Me and my Aunty here [Tekura Mani] we stepped away when they were trying to explain everything....I am very sure of what we did."*
>
> *"When the will was getting explained I said to my Aunty "I think it is better we step away" so we did we walked away from them."*
>
> *"Both of us stepped away. It was explained by the lawyers and the receptionist I feel that it shouldn't be us trying to you know, to translate or explain. I feel, you know, it is not right. So we stepped away."*

119. The Applicant's evidence was equally adamant that the Will was signed outside:

> *"Mr Rangi Taia: As I can recall it was outside...she was sitting in the car when the will was done.*
>
> *Mr Arnold When the will was done. When you say done, how was it done?*
>
> *Mr Rangi Taia; when he was thumbprinting.*

Mr Arnold; thumbprinting

Mr Rangi Taia; Yes

Mr Arnold; So you say she was sitting in the car, she was sitting in the car when she put the thumbprint on

Mr Rangi Taia; Yes."

120. After giving this evidence the Applicant expressed reservations "*To tell you the truth I can't really remember inside or in the car but I am sure it is in the car.....she was sitting down in the car*".

121. The Applicant's evidence was of seeing the pen go across to the Testator while she was in the car at which point he claimed still to have been standing at a distance.

122. His evidence of that first attempt to sign was of seeing the pen "*-it was totally somewhere else and they were trying to point it should be here. So I realized oh, she probably can't see.*"

123. In terms of the Applicant's distance from the Testator and those clustered around her out by the car, his evidence was that he could not hear what was being said from where he was standing. His evidence, in answer to a question form the Court was that "*I couldn't see properly from where I was standing because they were blocking my view of Aunty*".

124. The Applicant did give some evidence of the Testator nodding her head but in answer to the Court the nodding to which he referred was "*when she was sitting down just me and her*". This, apparently, was where the Applicant first took her in. The Applicant disagreed that after the Testator was unable to sign she was taken into the office].

125. On the issue of where the Will was explained, it was put to the Applicant that most of the explaining of the Will was done in the car, to which proposition Mr Taia agreed and that a little bit of the explaining of the Will was done in the office.

126. To the proposition that he and Tekura Mani were there at the time the Will was explained he enquired as to whether that was a reference to explanation in the

office or outside. His evidence was that he and Tekura Mani were there inside the office at the time of explanation, while continuing to maintain that they were not there for the explanation that was undertaken outside.

127. The Applicant estimated the total time in the office itself as being less than 10 minutes and that he was sitting right next to the Testator; this is the same estimate of time given by Mr Vakalalabure. On reexamination, he confirmed the time frame as being about 10 minutes being spent in the office and something less than half an hour in the car.

128. The Applicant indicated he recalled being present as Ms Mustonen, in the office, was explaining things to the Testator in Cook Islands Maori. On the question execution of the Will, he claimed to have been about 4 to 5 metres away from the Testator when the thumbprint was affixed.

129. The Applicant subsequently claimed to be able to see the Testator's thumbprint, and was adamant he did not have his own hand on her having previously denied that Mr Vakalalabure might have done so.

Ms Mustonen

130. Ms Mustonen's evidence is important as she is one of the two attesting witnesses. She was only 15 years old at the time. The Objectors acknowledged that an underage witness was not a circumstance that of itself could invalidate the Will; it was, however, obviously less than satisfactory in terms of the conflicts of evidence the Court was now called to consider.

131. At that stage Ms Mustonen had worked for Mr Vakalalabure for two months. In light of the fact that there seemed to have been various exchanges in the Maori language, Ms Mustonen's evidence that Mr Vakalalabure was unable to speak Maori is perhaps of significance. In her affidavit, Ms Mustonen gave evidence that the translation itself was satisfied with the help of Tekura Mani who translated some of the terms with which Ms Mustonen was unfamiliar.

132. Ms Mustonen remembered telling Mrs Arnold, one of the counsel for the Objectors, in 2008, that she remembered the Testator and that she was not able to understand, herself, what it was that the Testator was saying. This mumbling

was significant as Mr Vakalalabure claimed to have been able to understand that as being "yes" or "no".

133. However, by the time of hearing Ms Mustonen indicated she could not now remember the mumbling "*All I know is that she showed us, like she was nodding her head. That was the only sign that she showed me.*" Ms Mustonen was clear that the Testator did not ask either her or Mr Vakalalabure any questions.

134. Ms Mustonen gave evidence that she was quite sure the Testator only came out of the car once. Her evidence was that the Applicant came into the office, indicating that the Testator could not walk, and that it was only at the end of the explanation and after an unsuccessful attempt at signing with a pen she was brought in because she could not sign.

135. Ms Mustonen's evidence was that Tekura Mani stayed outside the office once the Testator was relocated there. In terms of the location of Mr Taia at the time the Will was being explained to the Testator (in the passenger seat) she said "*I think he was where the bonnet was on the left side.*" Her evidence contradicts that of the Applicant both as to his location and as to Tekura Mani's location at the time the Will was explained.

136. Ms Mustonen's evidence was of an initial attempt to sign the Will in the jeep and of obvious difficulty "*she just, like - she was unable to sign it. She was shaking and that. She couldn't, like, keep it stable to sign, so after a few turns, that is when we carried her - Rangi carried her to the jeep - into the office, into the office and Rangi stayed outside and -*"

137. Ms Mustonen's evidence that after the unsuccessful attempt at execution, the Testator was carried in by Rangi who sat her on a seat, on the bench there, and that he left, he being told to go outside. Ms Mustonen indicated that the Applicant was mistaken in his recollection of what had taken place.

138. Ms Mustonen's evidence was of the Applicant sitting next to the Testator, holding her up with Mr Vakalalabure and Ms Mustonen next to her and not the 4 to 5 metre distance that the Applicant indicated.

139. Ms Mustonen's account was of some 7 minutes or so being spent in the office on the business of thumbprint execution. Ms Mustonen outlined the difficulty in having the thumb placed on the Will, but confirmed that, in fact, there was a single thumbprint.

Tekura Mani

140. Tekura Mani - like the Applicant is a beneficiary under the Will - had the advantage of hearing the evidence both of the Applicant and Ms Mustonen before giving her own evidence. Her initial affidavit did not shed much light on the events of this day.

141. Ms Mani's initial evidence was of being in the car while Mr Vakalalabure came up to discuss the Will. She indicated that she could not recall Ms Mustonen being there.

142. By the time of reexamination, however, she had resiled from that position, indicating that she was in the car with the Testator, but not when Ms Mustonen was explaining the Will - which contradicts Ms Mustonen's account of getting assistance from Ms Mani with the appropriate Maori translation of the Will at the time of it being explained to the Testator.

143. It appears that - despite Mr Vakalalabure's evidence - Ms Mani was present at the door of the office and watched - she heard the word "yes" and saw the Testator bend down, before she apparently returned to the car.

Tevita Vakalalabure

144. Whether under general principles of the common law, or under the provisions of the Cook Islands Act 1915, Mr Vakalalabure, as the solicitor who prepared the Will and was one of its attesting witnesses, was an important witness. If his account of events was corroborated by that of others, then the conflicts alluded to above might be less important than is otherwise the case. However, his evidence was contradicted in a number of important respects.

145. Although acting as the solicitor for the Testator in this matter, Mr Vakalalabure appears to have made no enquiries, directly of the Testator, as to whether she was married.

146. On the vital question of whether the Testator had any children, biological or otherwise, the implication from Mr Vakalalabure's evidence is that he was misled by the Applicant as to the position; certainly, Mr Vakalalabure's evidence was of being satisfied that there were neither natural nor adopted children to be taken into account; contrast that with the evidence of the family meeting at which the adopted child was specifically discussed - and recalled by the Applicant in his affidavit.

147. There is a serious conflict of evidence between that of Mr Vakalalabure and that of the other witnesses as to where the Will was explained. His evidence is of a brief preliminary encounter in the car, followed by him taking the Testator inside the office and there, by his account, just he and Ms Mustonen explained the Will, clause by clause.

148. Mr Vakalalabure was adamant that the Will was not explained at the car - that "*the content of the will and the will itself was explained to her alone in the confines of the office*" and that it "*was never discussed outside*". and that he was the one closest to the Testator. He did however admit of preliminary explanations and of Ms Mani's involvement in that.

149. In this Mr Vakalalabure was contradicted by Ms Mustonen whose evidence - both her affidavit and in Court - was quite clear; the explanation was carried out in its entirety outside in the car, and indeed following that explanation the preliminary attempts at execution were also outside in the car. Her evidence is of the move to the office being made in the context of the attempts at execution and the retyping of the execution page. There is a direct conflict between her evidence and that of Mr Vakalalabure on this point.

150. Mr Vakalalabure is contradicted also by the Applicant; his evidence is of stepping clear of the car while the explanation was underway and of being at a distance when the initial attempts were made to execute the Will using a pen. Significantly, the Applicant evidence is of most of the explanation taking place at the car and

only a little in the office - and of him being there inside the office when the explaining was done but of stepping away when the explanation was given at the car. His evidence is of the interlude in the office being a short one - of perhaps only ten minutes.

151. Ms Mani's evidence on this issue did not advance the issue of what took place at the car one way or the other as she appeared not to recall the events that took place while she was seated in the car, in a way that would lend credence to one version or the other. She did, however, recall the Applicant going into the office with the Testator and the two lawyers.

Failure to Explain the Effect of the Will

152. Following this evidentiary analysis, the submissions turned to the alleged failure to explain the effect of the Will. Here it was submitted that, putting aside the compelling evidence of the Testator being in an hypoxic state at the time, perhaps the crux of this case lay in the failure of Mr Vakalalabure to take any steps to engage the Testator, constructively, at any stage in a meaningful conversation that might have given on the his explaining the *effect* of the Will as it might affect her adopted son, rather than its *contents*: The following exchanges were relied upon:

> *"Mr Vakalalabure: I was pretty certain, Mr Arnold that you were having a pretty smooth dialogue because at all stages she maintained eye contact with me and she responded nowhere when I asked her whether she wanted changes. She shook her head and when I asked her whether she understood what I was explaining she nodded yes. So to me that was sufficient dialogue that she knew what she was doing and she approved the contents of her Will.*
>
> *Mr Arnold: But surely over the 25 minutes, you must have asked her questions that by their nature required something more than a simple yes or no answer?*
>
> *Mr Vakalalabure: Like in what way? What questions?*
>
> *Mr Arnold: I'm just putting it to you that did you, for instance, take any steps to verify Mr Taia's instructions that there were no children? Did you make any enquiry with regard to that?*

> *Mr Vakalalabure: I had explained to her what are the purposes of the Will and I was going to read her Will to her, whether those were her wishes. I didn't make enquiries but I just confirmed if that was what she wanted and she confirms that's what she wanted."*

153. Counsel for the Objectors accepted that it was obviously difficult to criticize Mr Vakalalabure for his failure to explain the disinheriting effect of the Will; the Testator was obviously in no fit state to engage in any sort of conversation with him; in these circumstances he appeared to have been content to rely on the instructions received from the Applicant; in misleading Mr Vakalalabure on this vital issue (and failing to refer to the rather bizarre power of attorney exchange of the previous day), it was submitted that the Applicant appeared to have led Mr Vakalalabure badly astray.

154. In the concluding submissions of the Objectors it was submitted that this was a case of a will that could only be admitted to probate if the Applicant was able to satisfy the burden of proof that rested on him in the various respects set out in the Objector' submissions. As to that it was noted that the submissions made in support of the Applicant suggested otherwise i.e. that this was a case in which the burden of proof at all times remains with the Respondents. It was submitted that could not be the case, given the accumulation of circumstances that surround the making of this Will.

Objectors' Comments on Submissions for Applicant

155. While the supplementary submissions filed on behalf of the Applicant stressed the need for the Applicant to be aware of the contents of her Will, the Objectors relied on the Applicant's initial submissions - and in particular the Applicant's own reliance on *Banks v Goodfellow*.

156. The Respondent adopted the Applicant's submission that an essential element in this case was that the Testator "must recall those who have claims on her and understand the nature of those claims so that [she] can both include and exclude beneficiaries from the Will".

157. This common law requirement was echoed in Section 445(3) of the Cook Islands Act 1915. That provision did not require that the attesting solicitor satisfy himself

that the Testator agreed with the content of the document drafted. Rather, he must satisfy himself "that the testator understands the effect thereof".

158. It is in this particular area that this Court, the Objectors submitted, should exercise "*vigilant care and circumspection*" in investigating the facts of this case and that the Court could only find for the Applicant if the Court had "*full and entire satisfaction that the instrument that did express the real intentions of the testator*". That these admonishments were central to the issue of validity of a will in modern times could be seen from the House of Lords case of *Wintle v Nye* [1959] 1 All ER 552 - where, in a case of this sort, the Court had urged a trial judge not to turn "*an indulgent eye*" on the matter and held that he was not to accept without "*vigilance or jealousy testimony that demanded the closest scrutiny*".

159. The suspicions arising in this case might have been allayed if prior circumstances had been different - for instance if there had been a family meeting not simply of the Applicant and his family members, but of the broader family including the Adamsons / Boggs and the parents of Zelu. For reasons that had not been explored in this case, the Applicant elected not to do so.

160. Had the Applicant elected to advise Mr Vakalalabure of the meeting - and in particular of the fact that the major beneficiaries named in the Will were present at that meeting, that might have resulted in a meaningful exchange between Mr Vakalalabure and the Testator.

161. Notwithstanding those omissions, had there been clear unequivocal consistent evidence from the four witnesses present at the law office that day, such evidence might have gone a long way to dispel the suspicions that might otherwise attend a case of this sort where two of those persons present regarded themselves as significant beneficiaries of the estate. In fact, those accounts were contradictory in a number of important respects.

162. Compliance with the provisions of the Cook Islands Act 1915 might have been regarded as another important safeguard. However it is clear the Applicant did not give Mr Vakalalabure the information necessary in order to discharge those obligations. Furthermore, Mr Vakalalabure's own account of events appears to

have been contradicted by not one but at least two of the other persons present there that day.

163. In all the circumstances of the case it was submitted by he Objectors that:

(a) The Will was unquestionably an inofficious testament;

(b) Failure of the Applicant to advise the attesting solicitor of the existence of an adopted son materially disadvantaged that solicitor in the discharge of his obligations in those circumstances;

(c) The failure of the Applicant to advise the attesting solicitor of the meeting of beneficiaries with the Testator (two of whom were present at the time of execution) materially disadvantaged that solicitor in the discharge of his obligations;

(d) That circumstance, coupled with the Testator's incorrect answer to an enquiry made of that solicitor as to whether she had talked to any other person about her Will, effectively precluded her solicitor becoming aware of possible undue influence - in circumstances where that solicitor indicated that he would not have had the Will signed if he had concerns as to undue influence;

(e) The failure of the Applicant to advise the attesting solicitor of the power of attorney and the Testator's understanding of its effect materially disadvantaged that solicitor in the discharge of his obligations;

(f) That, even assuming the Testator had the mental capacity on 12 March 2008 necessary to apprehend the fact that she was signing a will, these failures were such that the disinheriting effect of the Will on her adopted son was never made apparent to her.

(g) The evidence was consistent with the Testator being in a severe hypoxic state at the time of execution; her obvious and ongoing inability to see properly being direct evidence, not simply of physical weakness but of hypoxia affecting nervous function.

(h) That the Testator had to be physically propped up, her hand taken, and the Will executed in the manner it was, all suggested that at the time in question she was, in fact, simply the instrument of others.

(i) That even if the Testator had it explained to her that the Will was disinheriting, her hypoxic state at the time of explanation and execution suggests that she was incapable of framing even simple questions to her legal adviser and thus not of the requisite testamentary capacity.

164. Thus in all the circumstances it is submitted the Court should find the burden of proof had not been discharged by the Applicant on the vital issues of testamentary capacity, knowledge and approval and undue influence and that, in simple terms, he had not discharged the burden of establishing that the Will represented the wishes of a Testator who fully understood the disinheriting effect of the Will on her adopted son. The Will should therefore be held invalid and the application for probate dismissed.

VIII. SUBMISSIONS FOR APPLICANT

Pre-hearing Submissions

165. The Applicant filed pre-hearing submissions in 2008 and post-hearing submissions. As to pre-hearing submissions they first referred to section 9 of the Wills Act which is in force in the Cook Islands by virtue of s.615 of the Cook Islands Act 1915. That Act provides:

> *"Signing and attestation of Wills*
>
> *9. No will shall be valid unless –*
>
> *(a) It is I writing, and signed by the Testator, or by some other person in his presences and by his direction;*
>
> *(b) It appears that the Testator intended by his signature to give effect to the Will;*
>
> *(c) The signature is made or acknowledged by the Testator in the presence of two or more witnesses present at the same time; and*
>
> *(d) Each witness either –*

a. Attests and signs the Will; or

b. Acknowledges his signature.

in the presence of the Testator (but not necessarily in the presence of any other witness),but no other form of attestation shall be necessary."

166. The Applicant also referred to Dobbie, "Probate and Administration Practice", Third Edition at paragraph [20], page 9 which stated that:

"[20] Burden of proof – Documents dispositive or equivocal in character –

When you have an instrument in all points of form, and in all point of substance, on the face of it testamentary, nothing more is needed to obtain probate of it than proof of the mere act ...:

167. The Applicant submitted that this application was one in which the Will was on the face of it in compliance with the testamentary intention of the Testator and complied with Section 9 of the Wills Act. Therefore probate should be granted.

168. However, since there were Objectors that required enquiry by the Court. Each of the grounds raised by the Objectors was then addressed.

169. As to the contention that the Testator was without testamentary capacity at the time of making the Will, the test for whether the Testator had testamentary capacity at the time of making the Will was eloquently put by Cockburn CJ in *Banks v Goodfellow* (1870) LR5 QB 549 at 565. Essentially to satisfy the test of capacity the Testator –

(a) Needed to understand that she is making a Will and it will have the effect of carrying out her wishes on death;

(b) She must have known the extent of her property and what it consisted of;

(c) She must have been able to recall those who have claims on her and understand the nature of those claims so that she can both include and exclude beneficiaries from the Will.

170. The applicant submitted that the Testator understood she was making her Will and its effect on her death. First, the medical evidence of Dr Uka and Dr Aung

supported the Applicant's submission. Secondly, Mr Vakalalabure's evidence was to the effect that the Testator was in full control of her mind and was not under duress or pressure. She could have raised any objections with Mr Vakalalabure as she was with him and Ms Mustonen in the office when the Will was explained. There was no doubt from the evidence produced by the Applicant that the Testator had testamentary capacity at the relevant time when the Will was discussed with the family members on 11th March and when she signed on 12th March 2008.

171. In contrast to the evidence in support, the evidence of the Objectors was "*terribly lacking*". None of the affidavits disclosed in what way the testamentary capacity of the Testator was lacking at the material time. Moreover, there was no evidence offered to show that the Testator was too old, therefore infirm or too dosed with medicine or was suffering from any mental illness.

172. Mrs Adamson in her affidavit had said that "*I do not believe that Aunt Rangi had the capacity to make a Will – certainly not a Will of this sort.*" This was the closest she came to providing some evidence on the testamentary capacity of the Testator. In fact, there was no evidence to support that statement.

173. In respect of Mr Adamson, he had asserted that the Testator was heavily medicated:

> *"... At that time she was pretty heavily medicated in terms of pain relief and control (and though I am not a doctor, I cannot help wondering whether either acute pain or the effects of pain relief medication in some way explain the Will and its execution)..."*

174. This evidence was in itself very limited because Mr Adamson acknowledged he is not a doctor and was only speculating that the medication may "*explain the Will and its execution*". He was not providing any evidence at all that there was a lack of testamentary capacity because of medication.

175. Taking all these factors into account, it was submitted that the Testator did not lack testamentary capacity at the time the Will was made.

176. As to the second requirement as to whether the Testator knew the extent of her property and what it consisted of there was evidence that, after the visit from

Dr Uka, the Testator wanted to discuss her property with her family. Ms Mani and the Applicant stated that there was a family meeting where the details of her Will were discussed. Mr Vakalalabure also testified that the Testator knew the properties she owned and who were to receive them. On the other hand, there was no evidence at all by the Objectors that she was confused as to her lands. It was therefore submitted that the Testator was aware of her property and of what it consisted.

177. As to the third factor in respect of the test for testamentary capacity, that the Testator must recall those who have claims and understand the nature of those claims, so that she can both include and exclude beneficiaries form the Will, there was evidence from both the Applicant and Ms Mani describing in detail how the Testator arrived at the instructions of her Will. The Testator specifically gave instruction that Ms Mani use the Power of Attorney given her by the Testator to obtain a piece of land for her adopted son.

178. Ms Mani stated in her affidavit that the Testator wanted to give her family home to Teariki, the father of the Applicant. However, because of the fact that he was not a landowner, the Applicant suggested that the two aunties be named instead of his father. This was why Ms Mani and the other Aunt Raita Taia were named as beneficiaries of the family home at Rangiatua Section S103C2, Kaikavaka.

179. It was submitted that the Testator had clearly made a proper analysis of who she wanted to get which gift on the 10th of March and this was the whole basis on which the instructions for the Will were given.

180. It was noted that the objector, Mrs Adamson stated at paragraph 61 her understanding that the Testator carried out the adoption of her son in 1998 because – "*I had the impression the main reason she adopted him was so that he could inherit her estate*". This might have been correct in 1998 when the adoption was made. However, there is no evidence that the intention remained the same in March 2008.

181. It was submitted that there was indeed no close affiliation or trust between the Testator and the Objectors or Mrs Adamson because the Testator gave her

Power of Attorney to Ms Mani and her bank books to the Applicant and his wife in 2007.

182. It was contended that the exclusion of the adopted son and Mrs Adamson was consistent with the conduct of the Testator in giving the Power of Attorney and the bank account to Ms Mani and the Applicant. Simply put, the Testator acted consistently in giving gifts to people she actually trusted with her property and money when she was alive.

183. In summary, it was submitted that the Applicant had disproved the objection that the Testator lacked testamentary capacity when the Will was made.

184. As to Ground 2 – that the Testator was under undue influence from the Applicant and the beneficiaries of the Will, it was submitted that an allegation of undue influence would only succeed if it could be shown by the Objectors that the mind of the Testator was so dominated that the Will is not her own Will at all but that of the person influencing her: *Hall v Hall* (1868) LR1P and D481. Proof of undue influence was never presumed; it must be proved by those who allege it: *Low v Guthrie* [1909] AC278; *Aimers v Taylor* [1897] 15 NZLR 530.

185. It was noted that there was a high hurdle for the Objectors to surmount to prove undue influence. There was no evidence offered by the Objectors that would show that the Will was not that of the Testator but that of the Applicant and the beneficiaries.

186. There was no evidence offered by the Objectors to show that the facts were inconsistent with any other hypothesis except that the Will was made by undue influence but there were many reasons and hypotheses as to why the Testator favoured only those to whom she gave gifts to and excluded the Objectors. The Objectors had not shown any evidence at all that their hypothesis (i.e. that undue influence was applied on the Testator and she was overborne and no longer had free "will" with respect to her Will) was the only acceptable hypothesis and that the facts were inconsistent with any other hypothesis. In simpler terms, there was no evidence that the Testator's Will made on 12th March was the record of someone else's will and not her own. This ground had not been proven by the

Objectors and there was proof for the Applicant that the Testator was not under any undue influence.

187. As to Ground 3 that the terms of the Will reflected the wishes and instructions of the Applicant rather than the Testator, this ground of appeal was exactly the same ground 2 and the Applicant relied on its earlier submission on undue influence.

188. As to Ground 4, that the Will did not make any provisions whatsoever for the primary caregiver of the Testator, Ngapoko Tutai Adamson and her family and without explanation or reason disposed of all assets exclusively to persons having only limited contact with the Testator, the Applicant first submitted that Mrs Adamson and Ms Mani and other family members provided care to the Testator in the final years of her life. Mrs Adamson herself stated that the extended family were asked in January 2008 to take turns looking after the Testator. The Applicant stated also in paragraph 64 that:

> *"... I know that the only people that she visited were Aunty Tai (Mrs Adamson), Aunty Tekura (ms Mani), my father Teariki, my wife, I and my kids."*

189. It could be deduced from the evidence that the caregivers were not just Mrs Adamson but included Ms Mani, the Applicant and their family members. Therefore, it was quite wrong for the Objectors to claim that Mrs Adamson was the only "primary caregiver" of the Testator as this was not supported by the evidence. It was submitted that Mrs Adamson had already received a property from the Testator by way of the sale of the Ngatangiia property to her and in respect of which nobody knew if it was actually paid for at a fair price or not. Additionally, in the last years of the Testator's life Mrs Adamson was not as trusted as she thought because she was not entrusted with the Power of Attorney or bank accounts of the Testator.

190. As to Ground 5 that Clause 3(2) the Will purported to devise an occupation right contrary to the terms of the Cook Islands Act 1915, the Applicants conceded that the statutory restriction in section 445 of the above Act did not allow the bequeathing of such native land by way of a will. However, this only showed that the neither Applicant nor any beneficiary receiving any such gift under the Will

would get anything in that regard. This was an issue not related at all to issues of whether or not the Will was valid but only showed that wills were subject to statutory restrictions such as that in Section 445.

191. As to Ground 6 that the executor was also a beneficiary of the Will, the common law position was that it was a rule of the Probate Court that the grant of administration followed the interest. This meant that the Court must take into account all the interests of those interested in the estate and it may grant probate to a beneficiary. It is submitted that the executor was not restricted from being a beneficiary of the Will and if there was no executor named, he could apply for probate. He could even apply if the Testator had died intestate.

192. In concluding its pre-hearing submissions the Applicant submitted that the Will made by the Testator on 12th March 2008 complied with the provisions of section 9 of the Wills Act.

Post-hearing Submissions of Applicant

193. In the Applicant's post-hearing submission the legal framework for the case was said to be as follows:

> *"The probate of a will is an adjudication in rem and until it is revoked, the will is conclusive evidence that the testator:-*
>
> *(a) understood that she is making a Will and it will have the effect of carrying out her wishes on death;*
>
> *(b) must know the extent of her property and what it consists of; and*
>
> *(c) know her properties and its distribution to what beneficiaries.*
>
> *Evidential burden*
>
> *The Applicant has the burden of proving that the Will was duly executed and that the testator had the testamentary capacity on the date of its execution and at the material time of execution.*
>
> *The objector has the burden of establishing undue influence through their evidence.*
>
> *Testamentary capacity requires that the testator was capable of knowing what she was doing when the will was executed and in what proportions her Will distributed her property."*

194. It was submitted that the evidence of the Applicants' witnesses had established that at the material time of 12th March 2008, the Testator knew what she was doing, knew the distribution of the property, and duly executed her Will by imprinting her thumbprint.

195. Accordingly, the burden shifted to the Objectors to prove on the balance of probabilities that the Testator was unduly influenced at the material time of execution of the Will. It was submitted that the Objectors evidence has not been able to satisfy on the balance of probability that the Testator was unduly influenced when she was executing the Will on 12th March 2008. The Objectors have not satisfied the burden of proof and that the probate applied and sought for should be accordingly granted to the Applicant.

196. As to the Applicants' evidence, it was submitted that even though there were some inconsistencies with the evidence that adduced by the Applicant's witnesses, a factor that was consistent from all the applicant's witnesses was that at the crucial and material time, i.e. during the imprinting of the thumbprint, this was done in the offices of Te Vaka Law PC with Mr Vakalalabure on the left hand side of the Testator and with the Applicant propping the Testator upright for her comfort on the right hand side of the Testator.

197. Ms Mustonen and Mr Vakalalabure both confirmed that after the explanation of the Will in the office and during the amendment of the execution page of the Will, the Applicant was called in to comfort and assist the Testator.

198. The evidence of Dr Aung regarding hypoxia was a crucial matter that the court needed to consider. Dr Aung gave evidence that the Testator was in a lot of pain because of the tumors that were as big as tennis balls on her body. Accordingly it is submitted that it was because of the pain and discomfort of the Testator, that she had refused to talk and not because of her lack of oxygen.

199. Dr Aung in his evidence indicated that because the Testator was not able to walk there arose the question of whether this inability to walk was due to hypoxia itself or whether it is due to her overall deterioration and condition. Dr Aung was not able to confirm with certainty that the Testator suffered from hypoxia during

walking to Dr Uka's surgery on the 10th March and two days thereafter on the 12th March at the lawyer's office.

200. It was submitted that given the fact that Dr Uka saw the Testator two days prior to execution, his evidence should carry more weight in terms of the mental capacity of the testator in comparison to the evidence of Dr Aung who saw her seven days after execution of the Will.

201. There was nothing that was adduced by Dr Uka to question that the Testator did not have the mental capacity to understand what she was doing

202. Furthermore, Dr Aung was able to categorise the different stages of hypoxia from mild, moderate to severe. He confirmed that if one suffers from mild hypoxia, the person is still able to go about their daily chores and be able to use their motor skills. Dr Aung also indicated in re-examination that he could not really say if the Testator had a mild hypoxia but was able to confirm that it was definitely not a severe hypoxia.

203. In analyzing the evidence and despite this disparity in re-collections of the events of 12th March, 2008, it was vital to note that at the material time (i.e. during the imprinting of the thumbprint) the Testator understood that she was making a Will and that it would have the effect of carrying out her wishes on death; knew the extent of her property and knew her properties and its distribution to what beneficiaries.

204. It was submitted that prior to the Applicant entering the law office, the Testator had the opportunity to advise Mr Vakalalabure of any reluctance to proceed with the Will. However, no evidence was adduced and no inferences could be made that the Testator wanted to withdraw from proceeding with the execution of the Will.

205. As stated by Dr Aung, the pain that was endured by the Testator could have been a factor which made her not talk on 12th March 2008 and accordingly, hypoxia may not have played a role during execution time.

206. It was therefore submitted that during the execution of the Will, the Testator understood what she was doing and the consequences thereof, and that the burden of disproving her Will was therefore with the Objectors.

207. As to the claim that the Testator was under undue influence from the Applicant and other beneficiaries named in the Will it could only succeed if it could be shown by the Objectors that the mind of the Testator was so dominated that the Will was not her own "Will" at all but that of the person influencing her: *Hall v Hall* (1868) LR1P & D 481.

208. Proof of undue influence was never presumed; it must be proved by those who allege it: *Low v Guthrie* [1909] AC278: *Aimers v Taylor* [1897] 15 NZLR 530. None of the Objectors evidence proved anything in relation to the time of execution. Instead the Objectors gave evidence in relation to what they did in the lifetime of the Testator and that they expected something in return for the love and affection they showed the Testator during her lifetime.

209. As to that, it was submitted that the Testator was consistent with regard to her property and those she entrusted with it during the last year of her life. This was shown by the way she gave the Power of Attorney to Ms. Mani and her passbook given to the Applicant and his wife.

210. In simpler terms, there was no evidence from the Objectors that the Testator's Will made on 12th March 2008 was the record of someone else's will and not her own. Furthermore, the only evidence that the Objectors were able to rely upon was the evidence of Dr Aung and Counsel. As noted earlier, this did not assist the Objectors.

211. In conclusion it was submitted that the Objectors through their cross examination and their evidence in chief had not been able to satisfy the burden of proof that during the execution of the Will the Testator was under undue influence from the Applicant.

212. As to section 445 (3) of the Cook Islands Act the ordinary meaning clearly stated that non-compliance did not invalidate a will.

Discussion

213. I have carefully considered the very lengthy and detailed submissions of the Objectors which have been summarised above. It would not be possible without creating a judgment of inordinate length to deal with every single point that has been taken. Therefore the Court will concentrate on what to it appear to be the key issues.

Application of the Inofficious Will Principle

214. It is convenient to first address the Objectors' contention that this was an inofficious Will since the testator did not specifically consider her adopted son in her Will.

215. The affidavit of the Applicant stated at paragraphs 39 and 40 with reference to the instructions of the testator.

> "39. When Rangi came back on Tuesday 11th March we told him Aunty Rangi wanted to go make a Will. Rangi told us he would go to Justice and find out how to do it. The people at Justice told him he had to do it with a lawyer so he went to see a lawyer.
>
> 40. We then went to Rangi's house with Aunty Rangi. Those present were I, Teariki Raia, Papa Tere and Rangi. Rangi noted down all the things Aunty Rangi told us she wanted done. Rangi asked Aunty Rangi what she wanted to note down – she said that she wanted Raita's husband Teariki to look after her animals. She said he could have her bike too. Rangi then asked what will happen with the piece of land across from in town and she said she had already given it to Rangi. I asked her if she had an adopted son and Aunty Rangi said that she gave her Power of Attorney to me and it was my job to go and get another piece of land for him. I then told that my son Stan had asked to buy the left over lease on the homestead but she said no. So Rangi asked her what will happen to the homestead and she said she wanted to leave it to Teariki. Rangi asked her if it was right that she was leaving the whole homestead to Teariki and she said it was her land and she would leave it to who ever she want to leave it to. Rangi said to her no. He did not want the land to go to his dad as he said it would cause a lot of problems with the Tamapua family. This problem happened before so Rangi did not want his dad to go through it again. So Rangi told her how about we put down my name and my sister Raita. Aunty Rangi said all right then. Rangi then asked if there was anything else she wanted to say and she said no; let's go see

> the lawyer now. We waited while Rangi went and took the note to the lawyers. He came back and said the lawyer would ring us so we went back to my house in Arorangi."
>
> (Underlining added)

216. It is worth noting that this evidence was not challenged in any way in the cross-examination of the Applicant before Weston J. Taking it into account along with other evidence dealing with the giving of instructions, I find it to be an accurate account of what occurred. I further find that it shows the testator did squarely confront the question of whether to provide for her adopted son in her Will. She decided not to include him but to leave it to the Applicant to use her power of attorney to get another piece of land for him. Of course she did not understand that her death would terminate the power of attorney. Nor was her understanding in that regard corrected by Mr Vakalalabure in the course of his work on the preparation of her will. That is no criticism of Mr Vakalalabure because it appears that nobody told him of the existence of the adopted son.

217. While it is true that the power of attorney would terminate on her death and that she did not know that, that does not detract from the fact that she considered his interests and decided he was not to be given any interest in her houses or her interests in land which were the subject of clause 3 of the Will. She had no legal obligation under Cook Islands law to leave her adopted son anything. Moreover, it must be noted that her adopted son had only infrequently stayed with her and she had no close relationship with him. His claims on the testator's bounty were not strong as compared with the two competing family groups, the Applicant's family group and the Adamson family group, who cared for her the deceased at various times.

218. The facts of this case present a rather unusual situation. The Will on its face might be described as inofficious but in my view that characterisation cannot be sustained when the testator has otherwise attempted to make provision for the family member concerned. Moreover, though unintended, the fact that the devise under clause 3(2) of the Will is void and with the consequence that the adopted son has inherited the Puoromea land, makes the point about the burden of proof and inofficious wills unsuitable for application in this case.

219. In summary, on the facts of this case and taking into account the Applicant's evidence as to what happened at the meeting on March 10 when the Will instructions were given the Court finds that the Objectors have not established that this was an inofficious Will. The Court finds on the evidence that this was a simple case where, having given instructions to the Applicant to find some land for her adopted son, the testator then had to choose between two branches of her family who had given her care and support at various times in her life. It is clear that the Adamson family had been the primary caregivers in earlier years. However, it equally appears that in the last few years of the testator's life the Applicant's family had had a more prominent role. It is not necessary or desirable for me to decide who gave the most care over the course of the testator's life. I am not in the position of a New Zealand Judge in a Family Protection case. As Mr Arnold rightfully said I must apply the Wills Act and Probate law principles.

220. Since I find this was not an inofficious Will, the burden of proof on the Applicant is not heightened and the presumption of sanity remains.

221. Having decided that this was not an inofficious Will, it is appropriate to restate the governing principles about proof of testamentary capacity. The classic statement of the elements of testamentary capacity is contained in the judgment of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 459, 567, where he said:

> '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.'"

222. In New Zealand the law was stated as follows in *Bishop v O'Dea* (Court of Appeal, CA 120/99, 20 October 1999):

(a) 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.

(b) 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.

(c) 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. In order to establish capacity, when in issue, those seeking probate must demonstrate the maker of the will had sufficient understanding of three things:

(i) that he or she was making a will and the effect of doing so (the nature of the act and its effects);

(ii) the extent of the property being disposed of; and

(iii) the moral claims to which he or she ought to give effect when making the testamentary dispositions.

223. As to when testamentary capacity must be demonstrated, as a general rule the testator must possess testamentary capacity when the order is executed. However, as noted in the Objectors' submissions discussed above, there is an exception known as the rule in *Parker v Felgate* (1883) 8 PD 171. It has been applied in New Zealand in *Tansley v Trustees Executors and Agency Company of New* Zealand (High Court, Wellington, CP 698/92, 17 March 1994, Heron J) and *French v Public Trust* (High Court, Hamilton, CIV-2003-419-000316, M 167/02, 29 October 2003, Venning J). The exception that does not rigorously insist upon the act of execution being accompanied by the requisite mental capacity.

224. Under the rule in *Parker v Felgate*, if a testator, when mentally able, has given instructions to another person, usually to a solicitor, to prepare a will and the will is in fact prepared in accordance with those instructions, then the will be valid even though when it is actually executed the testator is no long mentally capable of making a will. The rule was stated thus in the *Tansley* case supra:

> "Although the Court must find the testator had testamentary capacity at the time the will was signed, consideration also should be given to the state of mind of the testator at the time of giving instruction for the preparation of the will. If the testator's mental state at the time of giving instructions was sufficiently sound to meet the tests for capacity and then subsequently when the will is signed is capable of understanding that he or she is executing a will prepared in accordance with those instructions, then the will will be proved."

Testamentary Capacity

225. Applying these principles the medical evidence of Dr Uka satisfies me completely that the testator was fully competent at the time the instructions were given on March 10, 2008. It is a decisive factor that the family meeting took place on March 10, only hours after the visit to Dr Uka. His evidence, which has been referred to above, was to the effect that the deceased's mental faculties "were within normal limits". The unchallenged evidence of Dr Uka was that the Testator was able to converse normally with him.

226. By March 12, the testator's condition had obviously deteriorated. There was considerable debate about the existence of hypoxia when the testator had the Will explained to her and signed the Will. I find that on the medical evidence that while hypoxia was present it was not at a severe level such as to deprive the testator of the requisite mental competence needed to understand that she was signing her will prepared in accordance with her instructions and that she understood its effects.

227. There is conflicting evidence as to whether the explanation of the Will by Mr Vakalalabure took place in the car outside the office or in his office. I prefer the evidence of Mr Vakalalabure that it took place in his office. I find it hard to accept that a lawyer would be mistaken on a simple issue such as this. In any event, whenever the explanations were given the question is whether they were understood and accepted. I find that affirmative responses were given to Mr Vakalalabure when he explained the Will and asked if it was understood. Mr Vakalalabure was firm in his evidence on this point and I accept it

228. The fact that Mr Vakalalabure was unaware of the existence of the adopted child I find to be of little or no consequence especially in view of the fact that the testator

had considered the adopted son's position at the meeting when her instructions were taken.

229. For all of the foregoing reasons, I find that the testator had the necessary testamentary capacity when she gave instructions for her Will. I also find that when she signed her Will she understood that she was executing her Will and that it had been prepared in accordance with her earlier instructions. Finally I hold that the Will was consistent with her instructions and reflective of her wishes.

230. In short, the case falls within the rule in *Parker v Felgate* and testamentary capacity has been established on the balance of probabilities.

231. As to the mode of signing of the Will the use of a mark was sufficient. In *Wilson v Beddard* (1841) 59 ER 1041, it was held permissible for a testator's hand to be guided toward the page so that the testator can make his mark.

232. As to undue influence, I find that Objectors have failed to establish this ground. I do not consider that the Applicant or his family acted in any way so as to coerce or pressure the testator into making the dispositions in the Will. The fact that the testator initiated the process of giving instructions for her Will is both important and undisputed. So too is the fact, acknowledged on all sides, that the testator was a strong minded person who always made her own mind up. She was a "cranky" individual with a mind of her own. She frequently resisted advice from her family on various topics even when the advice, for example as to her excessive smoking and drinking, was undoubtedly good advice. I find the account of the Applicant as to the giving of the instructions by the testator to be truthful and accurate.

233. To the extent that she did not provide for the Adamson family may be explained by the fact that the period when that family was at the forefront as her caregiver had passed. The evidence shows that in more recent years the testator had more contact with the Applicant's family.

234. I also find that none of the other four matters raised by the Objectors (paragraph 46 above) support their case. First, as I have noted, it is permissible for a Will to be signed by means of a thumb print. Secondly, the youthfulness of one of the

witnesses, Ms Mustone, is immaterial in the present case. Third, for the reasons I have given the fact that Mr Vakalalabure did not know that the Testator had a legally adopted son ultimately has no bearing since the Testator had instructed the Applicant to find land for him and made the deliberate decision not to provide for Zelu in her Will. Additionally, the fact that the purported devise of the Puoromea section was void has happily resulted in the wishes of the Testator being implemented. Thus, in the end, the fact that the Applicant failed to advise Mr Vakalalabure that there was an adopted son is of no consequence. Fourth, as to the alleged failure to adequately explain the effect of the Will and provide a certificate the Court has found that the Will was in accordance with the instructions of the testator and that, before signing, its contents were adequately explained to the testator. The absence of a s.445 certificate is immaterial in the circumstances. In any event it is plain from the language of the section that the non-compliance with the Act in failing to explain and certify the Will cannot invalidate the Will. It seems to the Court that this section is to be read as having hortative effect only.

235. It follows from the foregoing that the various circumstances relied upon by the Objectors as imposing a burden on the Applicant to provide further affirmative evidence has no such effect. For the avoidance of doubt and with reference to those circumstances (listed above in paragraph 57) the Court finds it immaterial, in the circumstances of this case, that the Applicant not the Testator gave the instructions to Mr Vakalalabure. It rejects the suggestion that on the day of signing the Testator was in a state where she was liable to be made "the instrument of those around her". It finds that it has not been established that her conduct in providing the instructions for her Will was out of character with her prior behaviour. The fact that the Will was prepared on the instructions only of the Testator is beside the point because the Applicant faithfully conveyed those instructions to the solicitor. While it might have been preferable for the Applicant to have pointed out to Mr Vakalalabure that there was an adopted son but that he was being looked after outside the Will, his failure to do this was in the end of no consequence.

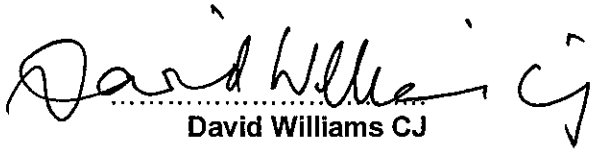
236. The suggestion that the Will was at variance with the known affections and previous declarations of the Testator I find not to be established on the evidence.

237. Finally, I do not find any of the circumstances relied upon by the Objectors (see paragraph 163 above), either alone or in combination, are sufficient to justify the Court in refusing the application for probate. They were either not established on the evidence, for example, the contention that the Testator was in a severe hypoxic state at the time of execution of the Will, or immaterial in the overall setting of the case.

Decision

238. For all of the foregoing reasons and rejecting all submissions to the contrary, the Court finds that the application for probate succeeds and it is therefore granted. The usual undertakings to faithfully administer the estate and to file reports have already been given in paragraph 7 of the Applicant's affidavit in support.

239. As to costs, I have of course heard no submissions as to costs. My provisional view is that costs should lie where they fall and that the Applicant should not have a costs order in his favour even though he was the successful party. The allegation that the deceased lacked testamentary capacity was certainly supported by some evidence and could by no means be regarded as frivolous or obviously untenable. Moreover, it was in the interests of all members of the wider family to have a definitive ruling on these matters. However, I cannot rule without both sides having the opportunity to be heard on costs. Therefore either side may apply to another High Court Justice for costs within 30 days of the date of this judgment.



David Williams CJ

18 June 2010

GENEOLOGY

Appendix 1