IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate Action No. HPP 40 of 2024

IN THE MATTER of the **ESTATE of RAJESH KUMAR a.k.a. RAJESH MAROLIA a.k.a. RAJESH KUMAR MAROLIA** late of 57 Paul Sloan Street, Bayview Heights, Suva, in the Republic of Fiji, Personal Assistant to Chairman, Deceased, Testate.

AND

IN THE MATTER of an Application by **SANJAY PUNJA** of Queen Elizabeth Drive, Suva, in the Republic of Fiji, CEO as the proposed Executor and Trustee of the **RAJESH KUMAR a.k.a. RAJESH MAROLIA a.k.a. RAJESH KUMAR MAROLIA**, Deceased.

Representation:

Mr Shelvin Singh for the Applicant (Shelvin Singh Lawyers).

Date of Hearing: 29th and 30th April 2024.

JUDGMENT

[1] An Ex-Parte Notice of Motion was filed on behalf of the Applicant pursuant to Section 41 of the Succession, Probate and Administration Act 1970, with an affidavit of Nikheel Narren Nambiar seeking the following orders:

> *"1. That the Will No. 25182 dated 11th May, 2023, Will No. 25729 dated 06th July, 2023 and Will No. 26470 dated 06th November, 2023 lodged by the Applicant be revoked.*
>
> *2. That Probate be granted in favour of the Applicant in terms of the last Dying Declaration will and testament of the Deceased dated 09th January 2024;".*

[2] The Application is based on Section 41 (1) of the Succession, Probate and Administration Act 1970 which provides that *"[t]he court may make such order with reference to any question arising in respect of any will or administration, or with reference to the distribution or application of any real or personal estate which an executor or administrator may have in hand, or as to the residue of the estate, as the circumstances of the case may require."* (my underlining).

[3] The Applicant (Sanjay Punja) in this matter is seeking that Probate be granted as per the last instructions by the Rajesh Kumar Marolia to his lawyer, Nikhil Narren Nambiar on 9th January 2024 at around 6pm. Mr Marolia had previously instructed Mr Nambiar and executed three other wills on 11th May 2023, 6th July 2023, and 6th November 2023, respectively. All the 3 wills are registered. The Applicant is seeking that these 3 wills be revoked and probate be granted in terms of the last instructions of Rajesh Kumar Marolia to Mr Nambiar on 9th January 2024.

[4] According to Mr Nambiar, on the evening of 9th January 2024 at around 6pm, he received a call from Mr Rajesh Kumar Marolia for Mr Nambiar to visit him at his home at 57 Paul Sloan Street. Mr Nambiar visited Mr Marolia at his home between 9pm and 9.30pm. Mr Marolia was with his de-facto wife. Mr Marolia asked Mr Nambiar to accompany him to the balcony to talk to him. According to Mr Nambiar, when Mr Marolia instructed him, Mr Nambiar was of the view that Mr Marolia had the capacity to give him directions on his will. The directions Mr Marolia gave Mr Nambiar were to amend his last will of 6th November 2023. Following the instructions of Mr Marolia, Mr Nambiar prepared the will. Later Mr Nambiar was informed by the De-facto of Mr Marolia of his hospitalisation on the morning of 10th January 2024. On 12th January 2024, Mr Marolia passed away.

[5] For a will to be valid, it must comply with certain formality requirements. Formality requirements are found in the Wills Act 1972. The requirements as to the formal validity of a will, the particular form that a will must take to have legal effect are contained in section 6 of the Wills Act 1972. One of the requirements being that the will must be signed by the testator and witnessed by two persons. The will the applicant seeks this court to grant probate upon is not signed by the testator or witnessed by two persons. The formal requirements of a will have not been complied with respect to the will being relied upon by the Applicant in this application.

[6] Section 6A of the Wills Act 1972, which came into effect on 1st September 2004 gives this Court the 'dispensing power' to recognise a will as valid even though formalities have not been complied with. For ease of reference, Section 6A is as follows:

> *"6A.-(1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements under section 6, constitutes a will of the deceased person if the Court is satisfied that the* ***deceased person intended the document to constitute his or her will.***
>
> *(2) The Court may, in forming its view, have regard, in addition to the document, to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence, whether*

admissible before or after the commencement of this section, of statements made by the deceased person.

*(3) A party that seeks a declaration under this section has the onus of proof."(**My highlighting**).*

Under Section 6A of the Wills Act 1972 the High Court may be asked to give dispensation in a number of situations. A situation might arise for instance where (a) the testator might not make or acknowledge his signature in the joint presence of the witnesses or (b) the will is not witnessed or (c) the testator fails to sign the will. The matter before me falls in the third category, (c). Mr Marolia did not sign his will.

[7] Section 6 A of the Wills Act 1972 was added to the Wills Act 1972 in 2004 following a review of the Wills and Succession Laws, A review by the Fiji Law Reform Commission (FLR) commenced in June 1998 with Late Professor Robert Hughes the Commissioner in charge for the reference. Section 6A of the Wills Act 1972 has embodied the Australian approach, more so the South Australian approach. In the Wills and Succession Law Reform Discussion Paper, June 1998, FLR (which can be accessed at https://flrc.gov.fj/wp-content/uploads/2024/04/FLRC.Wills-and-Succession.Discussion-Paper.June-1998.pdf) at page 5, Professor Hughes cites that "*the cases on the South Australian provision suggest that a very liberal approach is appropriate. Of course, there must still be a document but the section allows the admission of probate of a document which might include alterations which would otherwise be ineffective. There is no need to show any attempt by the testator to comply with the formal requirements. The Queensland provision is different in this regard in that it requires substantial compliance. However, under the South Australian and the N.S.W provisions there are no minimum requirements such as signature by the testator on the document. Where there has been a very substantial departure from the formal requirements the courts will be inclined to scrutinise the document more closely in applying the section.*" The reference to the South Australia provision is Section 12 (2) of the Wills Act 1936.

[8] Section 12 (2) of the Wills Act 1936 of South Australia provides the reference point for Section 6A of the Wills Act 1972 as it is similar. Section 12 (2) of the Wills Act 1936 of South Australia states that "*if the Court is satisfied that - (a) a document expresses testamentary intentions of a deceased person; and (b) the deceased person intended the document to constitute his or her will, the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.*"

[9] In South Australian cases have held that section 12 (2) can apply even in cases in which the will was not signed by the testator. In the **Estate of Blakely (1983) 32 SASR 473** the deceased and his wife had instructed a solicitor to prepare mirror wills for both of them. These were drafted, read and approved by the parties but due to a mistake in the solicitor's office the husband signed the wife's will and the wife the husbands. The husband died before the error was discovered and probate was sought for his will notwithstanding that it had been signed by his wife. White J ordered that the will be admitted to probate. He regarded earlier statements on the need for a testator to execute the document for section 12 (2) to operate as obiter and indicated that in an appropriate case no signature was necessary. He said: "*The brake against a*

flood of fraudulent or unmeritorious applications is the very high standard of proof required by s 12 (2)."

[10] In the **Estate of Williams (1984) 36 SASR 423**, the view of the court in Blakely's case that section 12 (2) is capable of applying to cases where the testator's signature was not witnessed was upheld by the Full Court of South Australia. The testatrix and her husband, who were about to depart on a lengthy trip, already had professionally prepared wills but considered them to be out of date. They each wrote out a further will in their own handwriting and invited neighbours in as witnesses. Although the husband signed his will and the witnesses signed both wills, it was only after the death of the wife that it was realised that she had not signed her will. The Full Court held that the testator's signature was merely one of the formalities required by section 8 of the South Australian Wills Act for valid execution and that consequently section 12 (2) of that Act was applicable to cases where this formality was not complied with. Accordingly, since on the proved facts there was no reasonable doubt that the wife had intended the document to be her will, the court ordered that it be admitted to probate.

[11] **In the will of Mark Edwin Trethewey [2002] VSC 83 (14th March 2002)** the Victorian Supreme Court (Australia), Beach J considered the requirements of a valid will in relation to section 9 of the Wills Act 1997 (Victoria). Before an informal document will be admitted to Probate: (a) there must be a document; (b) that document must record intentions which are testamentary intentions; and (c) that document must have been intended by the deceased to operate as his will. In that case, probate of the will comprising a printed copy of the contents of a computer file contained in the hard disk of a computer was admitted to probate. On the issue of the will not being signed Beach J stated *"[t]hat the document is not signed by the deceased does not prevent the document being admitted to probate. In the unreported decision of Cohen, J. of the Supreme Court of New South Wales in Estate of Stewart delivered 12 April 1996, His Honour was required to consider admitting an unsigned altered document to probate. At p.12 he said:*

> "*It is not necessary that the document be signed or otherwise authenticated by the deceased. See Re Application of Brown; Estate of Springfield (1991) 23 NSWLR 535 per Powell, J. at 539. In that case it was pointed out, also at 539, that the ultimate enquiry remains whether the document and the circumstances of its making lead to the conclusion that the deceased intended the document to constitute his will.*"

[12] The case laws show that the justification for empowering the court in effect to waive the formal requirements has been put as giving effect to a genuine intention of the testator to undertake a disposition of his or her property on death. Provided that appropriate safeguards are established which require that the courts satisfy themselves of this element to the appropriate standard, effect should be given to the intention of the testator even though the formalities were not properly complied with or complied with at all.

[13] The evidence before me is that Mr Marolia called Mr Nambiar on 9th January 2024 and Mr Nambiar visited him the same day. Mr Marolia informed Mr Nambiar that he wanted to amend his will. Mr Nambiar prepared the will. Before the will could be executed Mr Marolia passed away. Mr Marolia was hospitalised the next day since

giving instructions to Mr Nambiar. I find that there is a document and the document records the testamentary intentions of Mr Marolia and that the said document was intended by Mr Marolia to operate as his will. I also note that Mr Nambiar made Mr Marolia's previous wills. Mr Marolia had over time relied upon Mr Nambiar to draft his will. He did the same on 9th January 2024. While Mr Marolia could not sign the will, his intentions were recorded and a will was drafted. It is contained in a document. Having considered the application, the affidavit, the relevant laws I am satisfied that Mr Marolia intended the document (being will instructed on 9th January 2024 – Marked and annexed as NNN-4 in the affidavit in support of Nikhil Narren Nambiar) to constitute his will.

The Court Orders as follows:

1. *That the Will No. 25182 dated 11th May, 2023, Will No. 25729 dated 06th July, 2023 and Will No. 26470 dated 06th November, 2023 lodged by the Applicant be revoked.*

2. *That Probate be granted in favour of the Applicant in terms of the document (being will instructed on 9th January 2024 – Marked and annexed as NNN-4 in the affidavit in support of Nikhil Narren Nambiar).*

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Chaitanya S.C.A Lakshman
Puisne Judge
3rd June 2024

HIGH COURT OF FIJI
SUVA