

IN THE SUPREME COURT OF FIJI

Probate Jurisdiction

Action No. 11 of 1984

BETWEEN:

SOPHIE FONG

PLAINTIFF

and

ERIC HENRY MARLOW

DEFENDANT

sole executor

Mr. S. Rabuka for the Plaintiff
Mr. F.G.Keil for the Defendant

JUDGMENT

The plaintiff commenced this action on 2nd March, 1984, against Keith Alfred Edward Marlow and Eric Henry Marlow as Executors. They were, at that time, Executors and Trustees of the will of the late Alfred Henry Marlow who died at Suva on the 23rd day of February, 1981. Before the hearing of this action the said Keith Alfred Edward Marlow died.

The will of the late Mr Marlow has no provision for replacing a deceased executor and Mr Keil at the hearing applied to strike out the name of the late Mr.K.A.E.Marlow as one of the defendants. An order striking out his name was made with the consent of counsel for the parties.

Probate of the late Mr. A.H. Marlow's will dated 7th August, 1980 was granted to the said K.A.E. Marlow and the defendant on the 13th September, 1983. The defendant is now the sole surviving executor and trustee.

Mrs Fong in her Statement of Claim alleged that at the time of the execution of the will dated the 7th August, 1980 the said A.H. Marlow did not know and approve of the contents of the will and he was not of sound mind, memory and understanding. She seeks (inter alia) an order revoking the said probate. No particulars of the alleged unsoundness of mind were given by the plaintiff.

The defendant delivered a Defence and counterclaimed for relief seeking orders pronouncing against the will dated 14th December, 1973 and a codicil thereto dated the 16th August, 1979. The counterclaim seeks confirmation and pronouncement in solemn form of law for the will of the deceased dated the 7th August, 1980.

No defence was delivered to this Counterclaim.

Mr Bulewa made up copies of Pleadings which included a large number of documents which should not have been included. I have ignored those documents and as no objection was taken to the plaintiff's form of pleadings or failure to deliver a defence to the counterclaim I have ignored these shortcomings.

The will of the late A.H. Marlow dated the 7th August, 1980, being later than the will which the plaintiff alleged was the last valid will of the deceased, the defendant was called on to establish the validity of this alleged last will.

There is no dispute about the fact that the late A.H. Marlow did on the 7th August, 1980 sign each of the three pages of the document which purports to be his last will and testament. Nor is it disputed that the signatures of Robert William Mitchell, then a solicitor of Suva, and Ramesh Chandra, then a personnel officer employed by Marlows Ltd, appear on each of the three pages of the said document purporting to be their signatures as witnesses to the execution of the said will by the said A.H. Marlow.

Mr Mitchell was called to give evidence for the defendant but Mr Chandra was called by the plaintiff. In discussing their evidence the reason for this somewhat unusual situation will be explained.

Mr Mitchell practised as a barrister and solicitor in Fiji for 11 years before leaving Fiji for Queensland. He has prepared in his time a great number of wills which he had executed and personally witnessed.

He prepared the will which the late A.H. Marlow executed on the 7th August, 1980.

When Mr Mitchell came to Fiji he was employed by Messrs. Cromptons and was a partner in the firm for 4 or 5 years before setting up his own practice in Suva.

He had known the late A.H. Marlow for a number of years in business but had no personal relationship with him.

He related in some detail the circumstances leading up to the preparation and execution of the will.

Early in February, 1980, the late Mr. K.A.E. Marlow came to see Mr Mitchell at his office in Suva bringing with him an undated copy of an old will which only had the year 1979 on it. Mr. K.A.E. Marlow gave him certain instructions as a result of which he redrafted the will. This lay in his office for some time which did not surprise Mr Mitchell because he knew the late A.H. Marlow and had knowledge of his estate and his tendency to deliberate for some considerable time on matters affecting his estate before acting.

Early in August, 1980 Mr K.A.E. Marlow went to see Mr Mitchell again. He had with him a photocopy of a codicil which was unsigned and undated.

This would appear to be Exhibit E a document prepared by Messrs. Kato & Company.

Whoever prepared this purported codicil had not seen the will of which it purports to be a codicil (it does not mention whether it is a first or second codicil). Paragraph 7 states:-

"In all other respects I confirm my last will executed this year 1980."

The late A.H. Marlow had executed a will dated 14th December 1973, Messrs. Cromptons prepared a codicil to this will which is dated the 14th December, 1979. There is no evidence that Mr. A.H. Marlow executed a will in 1980 other than the one on the 16th August, 1980. The unsigned codicil clearly was prepared before that will was executed.

Mr Mitchell went with Mr K.A.E. Marlow to Mr.A.H. Marlow's residence where Mr Mitchell went through the draft will he had prepared.

Mr. A.H. Marlow approved the draft with certain alterations which he required. Mr Mitchell noted the alterations. He then produced the photocopy of the unsigned codicil and asked for Mr. A.H. Marlow's instructions.

Mr. A.H. Marlow, according to Mr Mitchell, became agitated and expressed annoyance. He complained that a solicitor had brought the document to him and required that he sign it. He had refused to do so because he had given no instructions for its preparation and it was not in accordance with what he wanted in any event. The solicitor would appear to have been Mr. C. Jamnadas whom the plaintiff in her evidence mentioned as having visited Mr. Marlow.

The codicil expressly stated the intention of setting up a company called Marfong Company Limited "to protect Mrs Sophie Fong and her immediate family." The probability is that the plaintiff instructed Messrs. Kato & Company to prepare the codicil, although she denied at first any knowledge of the document.

The day following the visit to A.H. Marlow's home, Mr Mitchell attended A.H. Marlow at his office with the prepared will for execution. The late Mr K.A.E. Marlow was the only other person present. Mr Mitchell handed the will to Mr A.H. Marlow for him to read. Mr Mitchell then read the will to him quite slowly. The will which he read was the original of Exhibit A.

Mr Mitchell as he read each paragraph enquired of Mr A.H. Marlow whether he understood and approved the paragraph. Mr Marlow, according to Mr Mitchell, voiced his approval to each paragraph.

When Mr Mitchell was reading paragraph 8 of the will, which refers to the plaintiff and her right to live in the testator's house for a year after his death and which contained a bequest of all the furniture and chattels therein other than certain items previously mentioned in the will, he referred to the plaintiff's adopted children. He mentioned he had made provision for them and had deposited with the Public Trustee a sum for their use. The sum was \$4,000.

Mr A.H. Marlow said he had made sufficient provision for them.

After the will had been fully explained to Mr A. H. Marlow, Mr Mitchell asked for another witness and a clerk was called in from the outer office. This was Mr Chandra.

The will was then executed according to Mr Mitchell by Mr A.H. Marlow in the presence of Mr Mitchell, Mr. Chandra and Mr K.A.E. Marlow.

Mr Chandra when he gave evidence stated that Mr A.H. Marlow did not sign the will in his presence. He alleged that Mr K.A.E. Marlow brought the document to him in the outer office and asked him to sign it. He was dismissed by Mr K.A.E. Marlow in September, 1982. He has either forgotten what happened that day or he is not telling the truth about his witnessing the will.

It is obvious he had not told the plaintiff or his solicitors that the will was brought to him to sign in the outer office after Mr Marlow had signed it. There is no allegation in the Statement of Claim that the will had not been executed in accordance with the provisions of the Wills Act. Nor was it put to Mr Mitchell that Mr Chandra was not present when Mr Marlow executed the will and when Mr Mitchell signed as a witness.

I accept the evidence of Mr Mitchell and am satisfied that the will was duly and properly executed by the late Mr A.H. Marlow in the presence of the two witnesses Messrs. Mitchell and Chandra who were both present at the same time and who signed their names in the presence of Mr A.H. Marlow and of each other.

Mr Mitchell went to great pains to see that Mr Marlow understood the provisions of the will. Mr Marlow was, at the time about 95 years of age and Mr Mitchell clearly appreciated that extra care had to be taken with a man of that age who had shown some signs of approaching senility. He was satisfied that Mr Marlow fully understood what he was doing and approved the contents of his will.

The plaintiff and her witnesses have painted a picture of a very old man physically frail and with forgetful and failing memory. There is some evidence of senility which is to be expected in a man of his age.

So far as the execution of his will prepared by Mr Mitchell is concerned there is no evidence that at the time he executed the will he did not know and approve of its contents because he was at that time not of sound mind, memory and understanding.

The instant case is not one like the case of Battan Singh & Another v Amirchand and Others (1948) 1 AER 152, where the testator was affected by disease and had delusions regarding his relatives. The testator in that case chose strangers to be his legatees and the will was held to be invalid.

In Banks v Goodfellow (1870) L.R.5 QB 549 at P.565
Cockburn C.J. delivering the judgment of the Court said:

"It is essential to the exercise of such a power (scilicet, testamentary power) that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, prevent his sense of right, and prevent the exercise of his natural faculties - that no insance delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

Applying those comments to the instant case and comparing the last will with the will dated 14th December, 1973, it is clear that the later will repeats most of the bequests in the earlier will.

The provision made for the plaintiff in the last will is similar to the provision made for her in the 1973 will except that the later will is more generous in giving her not half but the whole of the contents of the testator home other than certain items mentioned in earlier bequests.

One significant change in the last will is the omission of the provision contained in the codicil to the earlier will dated 16th August, 1979, whereby his Malcolm Street property was left to the executors in trust for the two adopted children of the plaintiff.

Mr Marlow was aware of this omission because at the time he executed his last will he informed Mr Mitchell that he had made provision for the children by depositing a sum (\$4,000) with the Public Trustee.

Mr Ramesh Chandra spoke to Mr Marlow the day he executed his last will. They discussed company business. Mr Chandra said he was like any day when he was in the office.

Mr Subhas Chandra said that in September 1979, Mr A.H. Marlow came to Mr Chandra's office. He was depressed and said he wanted to change his will. Chandra said at that time he would sit down and make a draft "pages and pages cutting out this and that." Chandra went on to say that he would make summaries and Mr Marlow would check them. Mr Marlow, he said, would not sign anything he was not sure about.

Dr Vithal gave evidence but his brief notes were not of much assistance to him. His evidence indicates that Mr A.H. Marlow was becoming senile due to old age. Dr Vithal stated in answer to a question from Mr Rabuka:

"Sometimes they may act normally, and sometimes not by that I mean that sometimes they have full understanding - it is a gradual thing - the onset of senility is gradual."


Having considered all the evidence I am satisfied that the defendant has established that at the time he executed his will dated the 7th August, 1980, the late Mr A.H. Marlow, fully understood the nature of his act and its effects. He approved of the contents of his will which was duly and properly executed in accordance with the provisions of the Wills Act. I hold that the will is valid.

That will contained the usual provision revoking all former wills and testamentary dispositions and it follows that it revoked the will dated the 14th December, 1973, and the codicil thereto dated the 16th August, 1979.

The defendant succeeds on his counterclaim.

I confirm the validity of and pronounce for the will of the late Mr.A.H.Marlow.

The plaintiff's claim is dismissed with costs to the defendant on the claim and counterclaim.


R.G. Kermode
J U D G E