IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P.132/96

BETWEEN: **WALTER JACOB von DINCKLAGE** of Tuanaimato, Trustee of the Estate of **MARCELLA MAGDALENE von DINCKLAGE**

Plaintiff

A N D: **FRANCIS von DINCKLAGE** of Tuanaimato, Planter

Defendant

Counsel: KM Sapolu for plaintiff
TK Enari for defendant

Hearing: 11 March and 5 June 1997

Judgment: 15 July 1997

JUDGMENT OF SAPOLU, CJ

Marcella Magdalene von Dincklage of Aleisa (hereinafter referred to as "the testatrix") died on 24 January 1981. She had eleven children, eight sons and three daughters. Her second eldest son, Francis, is the defendant in the present proceedings. The testatrix owned freehold land at Aleisa. The said land was originally owned by her husband but was subsequently passed on to the testatrix. Under her will dated 26

June 1973 the testatrix devised her land at Aleisa to her sons as tenants in common in equal shares. What is now in dispute is whether the defendant is included amongst the testatrix's sons to whom the land has been devised under the will as tenants in common in equal shares.

It would be helpful in this case to set out the relevant clauses of the testatrix's will in full:

> "This is the last will of me Marcella Magdalene von Dincklage of "Aleisa in Western Samoa widow
>
> "1. I revoke all wills and testamentary dispositions at any time "heretofore made by me.
>
> "2. I appoint *my son Francis von Dincklage* to be the sole executor "and trustee of this my will and I do hereby declare that in the "interpretation hereof the expression 'my trustee' whenever used "herein shall (where the context permits) mean and include the trustee "or trustees for the time being hereof whether original or substituted.
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> "3. I give and devise *my land situated at Aleisa* to my trustee and I "direct him after payment of my just debts funeral and testamentary "expenses and all duties upon the whole of my dutiable estate that my "trustee shall hold the said land upon trust for *my eight sons Edward "Frederick Gregory Michael Bernard Albert and Jacob* as tenants in "common in equal shares.
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> "4. I direct that if *any of my sons* shall predecease me without issue "then his share is to be divided amongst *my surviving sons* as tenants in "common in equal shares but in the event of *any of my sons* "predeceasing me and leaving a child or children such child or children "shall take and if more than one in equal shares the share which his "her or their parent would have taken if he had survived me.
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> "5. I direct that in the event of my trustee partitioning *the said land* "then the part to be allotted to my son Jacob shall be the part on which "the dwelling house now occupied by my son Gregory and me is "erected.
>
> "6. I empower my trustee to borrow money upon the security of *the "land or any part thereof* at such rate of interest and upon such terms

"as to repayment and in general as my trustee shall think fit.

"7. I give devise and bequeath all the residue of my real and "personal estate to my daughters Margaret and Theresa in equal shares " as tenants in common.

"In witness whereof I have hereunto set my hand this 26th day of June "1973."

The testatrix then signed her will which signature is attested by two witnesses.

As I understand both counsel in this case, they are in agreement that in the construction of a will the primary task is to ascertain the intention of the testatrix and to give effect to that intention. That intention is to be ascertained from the words used in the will read in the light of the circumstances known or ought to have been known to the testatrix at the time she made her will. This approach seems to me to be consistent with what was stated regarding the construction of a will in two English cases. In *Allgood v Blake (1873) LR8 Exch 160* Blackburn J said at p.*162:*

"In construing a will, the court is entitled to put itself in the position of "the testator, and to consider all material facts and circumstances "known to the testator with reference to which he is to be taken to have "used the words in the will, and then to declare what is the intention "evidenced by the words used with reference to these facts and "circumstances which were (or ought to have been) in the mind of the "testator when he used those words."

In *Perrin v Morgan [1943] AC 399,* Lord Romer at p. 420 said:

"I take it to be a cardinal rule of construction that a will should be "construed so as to give effect to the intention of the testator, such "intention being gathered from the language of the will read in the light "of the circumstances in which the will was made. To understand the "language employed the Court is entitled , to use a familiar expression, "to sit in the testator's armchair."

The general principle stated in these cases has often been referred to as the "armchair principle" in the relevant English and New Zealand case law.

Another relevant general principle of construction of a will I should refer to was stated in the English case of *Re Hipwell, Hipwell v. Hewitt (1945) 2All ER 476* where Lord Greene MR stated at p.477:

> "[The] proper way to construe a will, like any other written document, "is to construe the whole of the document, and not to place prima facie "meanings on particular words, but to place a final and definitive "meaning upon the words arrived at by an examination of the "document as a whole."

That passage was adopted by Turner J in delivering the judgment of the New Zealand Court of Appeal in *Re Laurie (deceased) [1971] NZLR 936 at p.937;* and by Macarthur J in the New Zealand Court of Appeal in *Re Blair (deceased)[1972] NZLR 852 at p.855.*

I turn now to the words used in the will and the circumstances in which the testatrix made her will in June 1973. At that time the whole land at Aleisa which is referred to in the will was owned by the testatrix. Its total area was approximately 55 acres. The testatrix's eight sons including the defendant were all alive at that time. In fact all her eight sons survived the testatrix when she died on 24 January 1981. However, it is not clear whether the testatrix's three daughters were all alive at the time the will was made or only the two daughters mentioned in the will. There was also some evidence that in 1948 or 1950 the defendant's father gave that part of the land which the defendant is presently occupying to the defendant. I will return to that evidence later in this judgment as it features prominently in the argument by counsel for the plaintiff.

In the testatrix's will the defendant is appointed in clause 2 as the sole executor and trustee of the will. He was subsequently substituted in that role by the plaintiff, pursuant to an order of the Court. Clause 3 of the will, which is the principal reason for this dispute, stipulates that the testatrix's land at Aleisa should be held upon trust for her eight sons as tenants in common in equal shares after payment of all debts, expenses and duties. However, only seven sons are expressly named in clause 3; the defendant's name is not included. Both counsel are in agreement that clause 3 of the will by stating that the land at Aleisa should be held upon trust for the testatrix's eight sons and then expressly naming only seven sons contains a mistake. They differ, however, as to what that mistake is.

For the purpose of construction when there is an obvious mistake in the language used in a will, it would be helpful to refer to what was said in *Re Lourie (deceased)[1968] NZLR 541* by Tompkins J at p.543:

> "I think that, as the words of the will itself, without more, show clearly "that there has been an omission or mistake in the language used, that "this opens the way for consideration of extrinsic evidence in the "circumstances known to the testator when the will was made. This "does not extend to admitting evidence of a mistake in drafting the "will, or of a typist's error in engrossing it."

Further on at p.546 Tompkins J went on to say:

> "If on the face of the will there is an ambiguity or obvious mistake or "omission or other difficulty, the Court may consider extrinsic "evidence of the circumstances in which the will was made in order to "assist it in ascertaining the intention of the testator"

As I have already stated both counsel are in agreement that clause 3 of the will contains a mistake, but they disagree as to what that mistake is. Counsel for the

plaintiff argued that the defendant's name was not inadvertently but deliberately omitted from clause 3 of the will. Therefore the use of the word "eight" in clause 3 is a mistake and it should be construed to read as "seven" because only seven of the testatrix's sons are expressly named in clause 3. Counsel for the defendant on the other hand argued that the word "eight" was deliberately and correctly inserted in clause 3 of the will and the mistake is the inadvertent omission of the name of the defendant. Therefore clause 3 should be construed to include the name of the defendant.

After careful consideration of the two opposing arguments, I have decided to accept the position taken by counsel for the defendant. I will now state my reasons for accepting the position taken by counsel for the defendant and then my reasons for not accepting the position taken by counsel for the plaintiff.

In the first place, clause 2 of the will which appoints the defendant as sole executor and trustee of the will uses the expression "my son Francis von Dincklage." In clause 3 of the will the expression "my eight sons" is used. Then in clause 4 of the will the expression "any of my sons" is used twice and the expression "my surviving sons" is used once. It is clear in my view, and as also pointed out by counsel for the defendant in his argument, that in using the expressions "any of my sons" and "my surviving sons" in clause 4 of her will, the testatrix was clearly referring to all her eight sons which included her son Francis, the defendant, mentioned in clause 2 and her seven sons expressly named in clause 3. There is nothing in clause 4 or any other clause of the will to indicate that when the testatrix used the expressions "any of my sons" or "my surviving sons" in clause 4 she did not mean all of her eight sons who

were still alive at the time the will was made. That being so, it follows that in order to achieve harmony and compatibility between the wording of clauses 2, 3 and 4 of the will, clause 3 should be construed to include the name of the defendant while at the same time retaining the expression "my eight sons". In other words the conclusion I have reached is that it was the intention of the testatrix to include all her eight sons in clause 3 but the name of the defendant had been inadvertently omitted.

I am reinforced in that view by the fact that in clause 3 the testatrix gives and devises "my land situated at Aleisa" to her trustee to hold "the said land" upon trust. The expressions "my land situated at Aleisa" and "the said land" used in clause 3 clearly show that the whole of the testatrix's land at Aleisa was being given and devised by the testatrix under her will. There is no suggestion in clause 3 that the testatrix was giving away only part of her land at Aleisa in her will while at the same time reserving or setting aside another part of that same land for the defendant. Clause 5 of the will then contains the direction by the testatrix to her trustee on what to do in the event of partitioning "the said land". This expression "the said land" used in clause 5 clearly refers back to the testatrix's land at Aleisa which was being given and devised under clause 3. Clause 6 of the will then empowers the trustee to borrow on the security of "the land or any part thereof" which in my view is the same land that is referred to in clauses 3 and 5 of the will. It therefore appears to me that the testatrix was dealing with and disposing of her whole land at Aleisa under her will without reserving any part of it for the defendant. In other words if the defendant does not receive any share of the land at Aleisa under the will in the circumstances existing at the time of the will, then he stands to get nothing at all of that land unless his name was included in clause 3 of the will.

Support for that view may be obtained from the sweeping-up provisions of clause 7 of the will where the testatrix gives, devises and bequeaths the residue of her real estate to two of her daughters. It appears to me that any part of the testatrix's real estate which has not been devised under the clauses of the will which precede clause 7, would be caught by the sweeping-up provisions of clause 7 as part of the residue of the testatrix's real estate which is passed on to the testatrix's two named daughters. So if the defendant is not included in clause 3 of the will, then he stands to get nothing of his mother's real estate including the land at Aleisa, because any part of the land at Aleisa which is not disposed of under clause 3 would necessarily become part of the residue of the testatrix's real estate by virtue of the express provisions of clause 7 and therefore passed on to the testatrix's two named daughters.

To recapitulate on what I have said, it appears that the land which is referred to in clauses 3, 5 and 6 of the will was the whole of the testatrix's land at Aleisa. That whole land was devised by the testatrix to all her eight sons under clause 3 of the will. If the defendant is not to be included in clause 3 of the will then he stands to acquire no share under the will of his mother's land at Aleisa or any other part of his mother's real estate. The reason being that the whole of the land at Aleisa has been devised under clause 3 of the will. But even if that is not so as counsel for the plaintiff seems to argue, then any part of the land at Aleisa which has not been devised under clause 3 would necessarily become part of the residue of the testatrix's real estate under the express provisions of clause 7. And the residue of the testatrix's real estate has been devised under clause 7 to two of her daughters. I must add that from my reading of the will as a whole, I have not been able to find any suggestion, expressed or implied,

that when the testatrix devised her land at Aleisa she was, in her mind, reserving or setting aside from her will part of the said land for the defendant.

In deference to the argument presented by counsel for the plaintiff which relied to a certain extent on extrinsic evidence, I will turn to that argument now. Much of the extrinsic evidence on which the argument for the plaintiff was based came from the defendant's testimony. The defendant testified that when he was a young man, his father told him to go and cultivate that part of the land which he is still occupying up to now in order to keep out strangers from encroaching on to that part of the land. That part of the land was originally all bushes and forest. The defendant cleared that part of the land and cultivated it with crops. In 1948 or 1950 that part of the land was given to him by his father to work on, but it was not given to him outright. I accept the defendant's testimony that it was his father who gave him the land to work on and not both his father and mother as alleged in the statement of defence and counterclaim. Then about 1960 the defendant's father died and ownership of the whole land at Aleisa including the part occupied and cultivated by the defendant was transferred to the defendant's mother, the testatrix. This leans more to confirm what the defendant said that the part of land which was given to him by his father was given to him to work on, but it was not given to him outright. In June 1973 the testatrix made her will. Then by deed dated 3 July 1980, the testatrix conveyed the 6-1/2 acres occupied and cultivated by the defendant to the defendant by way of a gift. In this connexion the defendant testified that he continued to render services to his mother when she was left by herself and he was not aware of any services his brothers might have rendered to his mother. The suggestion here seems to be that the gift of 6-1/2

acres from his mother was a reward or token of appreciation for the services rendered to her by the defendant.

The argument by counsel for the plaintiff is that the land which was given to the defendant in 1948 or 1950 was known or ought to have been known to the testatrix when she made her will in 1973. Therefore the testatrix must have intended in her will to give the rest of her land to her other seven sons since the defendant had already been given his share in the land. So when the testatrix expressly named only seven of her sons in clause 3 of her will as beneficiaries of her land at Aleisa, that was in conformity with the intention she must have had. The residue of the testatrix's land after subtracting the 6-1/2acres already given to the defendant in 1948 or 1950 was about 49 acres and that could be easily subdivided amongst the other seven sons in equal shares. Therefore the expression "my eight sons" used in clause 3 of the will is a mistake and the word "eight " should be construed to read "seven". It was also submitted that the gift by deed of 6-1/2acres made to the defendant by the testatrix in 1980 is evidence which goes to confirm that an outright gift of part of the land was in fact made to the defendant in 1948 or 1950.

Notwithstanding the persuasiveness of the argument presented by counsel for the plaintiff, I have after careful consideration been unable to accept it. The cardinal rule of construction of a will is to ascertain the intention of the testatrix from the words used in the will read in the light of the circumstances known or ought to have been known to the testatrix at the time she made her will, and then to give effect to that intention.

From the evidence that I accept, it is clear that what was given to the defendant by his father was permission to work on that part of the land which the defendant has been occupying and cultivating up to now. At the time the testatrix made her will in 1973, the defendant was still occupying and cultivating that part of the land. But ownership of that part of the land was not given to the defendant. When his father died about 1960, ownership of the whole land including the part given to the defendant by his father to work on was transferred to the mother, the testatrix. So what was given to the defendant by his father must have been, in legal terms, a licence to work on part of the land. At the time the testatrix made her will she knew or ought to have known that ownership of the whole land at Aleisa belonged to her. The evidence of the defendant also suggests that the testatrix knew at the time of her will of the permission or licence given to the defendant by his late father to work on part of the land.

We now put these circumstances known to the testatrix at the time she made her will in the background of the words used in the will and consider those words in the light of those circumstances in order to ascertain the intention of the testatrix. If the defendant's name is not included in clause 3 of the will and the word "eight" is construed to read as "seven," then it would mean the defendant acquires ownership of no part of his mother's land at Aleisa or any other part of her real estate because of the provisions of clause 3 and clause 7 of the will read separately or read in conjunction with one another. All that the defendant would have would be a licence given to him by his father to work on part of the land. Not only would that place the defendant in a position of serious disadvantage compared to his seven brothers, but it is also doubtful

whether such a licence survived the death of the defendant's father, or would survive the provisions of the testatrix's will.

Unless the licence granted to the defendant was a contractual licence which is something not clear from the evidence, it is highly doubtful whether specific performance which is a contractual remedy would be available to the defendant to enforce the licence. But even if the licence was a contractual one, its duration is not clear and it is doubtful whether it survived the death of the defendant's father who must have been the other party to the contract.

On the whole, I do not believe that the testatrix would have had any intention of placing her second eldest son, the defendant, in such a position of serious disadvantage and uncertainty compared to her other seven sons. After all the fact that of all her eight sons and three daughters she chose the defendant to be the sole executor and trustee of her will suggests that the testatrix must have had trust and confidence in the defendant and held some special feelings towards him.

I have also already stated in this judgment that it is clear from the relevant clauses of the will that the testatrix was disposing of her whole land at Aleisa under the will leaving any residue of her real estate to two of her daughters. In other words if the defendant is not included in clause 3 of the will then he stands to receive nothing of his mother's real properties under the will or at all. That in my view could not have been the intention of the testatrix.

Perhaps I should point out that the argument by counsel for the plaintiff proceeded on the basis that the defendant was actually gifted by his father that part of the land he has been occupying and cultivating up to now. The reasons why I do not accept that what was given to the defendant by his father was a gift of land but a licence to work on part of the land are these. Firstly, the defendant in his oral testimony said that part of the land was given to him by his father to work on, but it was not given to him outright. And there was no sworn evidence to contradict that evidence. Secondly, if a gift of part of the land was actually made to the defendant in 1948 or 1950, it is somewhat surprising that by the time the defendant's father died about 1960 that gift was till not formalised and registered even though the defendant's father had ample time to do so. And thirdly, the testatrix does not recognise or acknowledge such a gift in her will. It is clear that under clause 3 of her will the testatrix was disposing of her whole land at Aleisa. And in clause 7 of her will she says that any residue of her real estate is devised to two of her daughters.

I cannot help thinking that the present dispute has arisen because, after the testatrix had made her will in 1973, she gifted 6-1/2acres of her land at Aleisa occupied by the defendant to the defendant in 1980 so that it now appears to her other seven sons, or some of them, that if the defendant is also to take an equal share as tenant in common of what is left of the Aleisa land, then that would mean the defendant would receive a much greater share of the testatrix's land than any of his seven brothers. That may truly be so. But it was open to the testatrix to do what she wanted to do with her own land for her own reasons, whatever those reasona might have been. The real question after all is not whether the defendant will gain a much

greater share of the testatrix's land at Aleisa compared to any of his seven brothers, but what was the intention of the testatrix.

Whether what had been done by the testatrix had any connexion with the services the defendant testified he rendered to his mother during her lifetime is something to be noted.

In all then, clause 3 of the will should remain as it is except that the name of the defendant should be added to those of his brothers whose names already appear in that clause.

In the circumstances of this case I make no order as to costs.

TFM Sapolu
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CHIEF JUSTICE

Solicitors:
KM Sapolu for plaintiff
Kruse, Enari & Barlow for defendant