

IN THE SUPREME COURT OF SAMOA
HELD AT MULINUU

IN THE MATTER OF: Section 13 of the
Administration (Procedure)
Rules 1980 and sections 11,
25, 26, 30 of the
Administration Act 1975 and
section 4 of the Declaratory
Judgments Act 1988

BETWEEN: **ILIGANOA DAPHNE
SAPOLU**, female of Vauala

Applicant

A N D: **PUBLIC TRUSTEE**, as the
Administrator of the Estate of
**PATU FALEFATU MAKA
SAPOLU**

Respondent

A N D: **MAKA KOMISI SAPOLU**

Joinder Respondent

Counsel: L. Su'a-Mailo for the Applicant
T. S. Wulf for the Respondent
U. I. Sapolu for Maka Sapolu for the Joinder Respondent

Hearing: 24th, 25th, 26th, 27th, 28th October and 17th November 2022

Decision: 14 December 2022

RESERVED JUDGMENT OF CHIEF JUSTICE PERESE

[1] On 25 September 2020, Patu Falefatu Sapolu (“Patu”) signed a Will, expressed to be his last will and testament. He died just over a year later, on 28 November 2021.

[2] The Public Trustee was appointed Executor and Trustee of the Will.

[3] Iliganoa Daphne Sapolu (“Mrs Sapolu”), Patu’s widow - they had been married for almost 30 years, was first told about the existence of Patu’s Will a few days before the Public Trustee read it the beneficiaries on 17 December 2021.

[4] News of Patu’s Will came as a shock to Mrs Sapolu who says Patu had told her that he did not have a Will, and that during their married life he had discussed with her how he wanted to give his Estate to her, after making provision for his biological children who lived in Australia.

[5] Mrs Sapolu comes to the Court to contest the Will. The more serious of her claims involve allegations Patu’s signature in the Will is a forgery, brought about by fraud and dishonesty committed by two of the beneficiaries - Patu’s sister, Luamanuvao Katalaina Sapolu (“Luamanuvao”), and Maka Sapolu (“Maka”).

[6] Luamanuvao is a significant witness on behalf of the Public Trustee. She and Patu ran a legal consultancy firm after Patu retired from the Bench on 24 April 2019; and she received Patu’s instructions and drafted Patu’s Will.

[7] At the start of the hearing, I declared my role of Chair of the Judicial Services Commission (“JSC”), and Luamanuvao’s membership of the same. Mrs Sapolu was invited to consider if I should be recused from hearing the case. Mrs Sapolu took advice and advised through her counsel that she did not object to my hearing the case.

THE MOTION

[8] The Will appears to have been read out at the Public Trustees Office on 17 December 2021. Mrs Sapolu says she had only become says she decided at that time to challenge the validity of the Will. Work on gathering the evidence in support of the motion started shortly after Christmas 2021.

[9] A Notice of Motion seeking Declaratory Judgment and Orders was filed on 30 May 2022; it was amended at the start of the hearing on 24 October 2022 as I will discuss in some detail below.

[10] The motion addresses three overlapping areas of dispute; (1) a challenge the legitimacy of the Will; (2) challenges aimed at the Public Trustee and his role, and; (3) consequential declaratory

orders to give effect to the administration of an Intestate Estate if the Court holds that the Will is invalid.

[11] The motion seeks:

- (a) A declaratory judgement or order that the will propounded (dated 25 September 2020) is not the last will and testament of the deceased and that the defendant should therefore be declared to have died intestate.

[12] The following grounds are advanced in support of the motion:

- (a) The deceased never made a will and thus died intestate;
- (b) The Public Trustee had failed to follow an appropriate procedure when the Will of 25 September 2020 was read out by reading the will without all beneficiaries present. That the Public Trustee had failed to determine that the Will deposited was sealed, that it has not been tampered with and to take extra steps to determine that it was in fact the last will and testament of the deceased;
- (c) The Will dated 25 September 2020 was not properly attested and executed;
- (d) The deceased did not know nor approved the contents of the will propounded;
- (e) The will propounded was not signed by or made at the direction of the testator in the presence of the two (2) witnesses;
- (f) That the ~~two (2)~~ [amended to 1 at the start of the hearing] witness who attested the will did not sign their names in the presence of the testator and that the two (2) witnesses did not sign the propounded will at the same time;
- (g) ...
- (h) That there were inappropriate acts done by the two beneficiaries to the will propounded. That they were involved in procuring a will that substantially benefits them;
- (i) That there were irregularities in the manner in which the will was deposited but the Public Trustee had failed to take caution and had accordingly accepted the will on its face value as valid;

- (j) The Public Trustee did not follow good practice and required proof of attestation despite the alarming suspicious nature in which the Will dated 25 September 2020 was made;
- (k) That the will dated 25 September 2020 was not deposited by the deceased as per section 108 of the Public Trust Act 1975 but instead by a beneficiary to the will. That the Public Trustee had nevertheless accepted the Will on its face value and had accordingly failed his statutory and fiduciary duty to ensure in good faith that the will was validly made as per section 5 of the Wills Act 1975;
- (l) The Will was only deposited after the death of the deceased on 17 December 2022 by a beneficiary to the will and not by the testator himself;
- (m) The signature of the will dated 25 September 2020 is not the signature of the deceased.
- (n) The propounded will was made dishonestly and fraudulently by the two beneficiaries to the will;
- (o) ...
- (p) The will did not reflect the deceased's instructions consistent with the deceased's state of mind and his intentions made known to the Applicant. That the Will effected a substantial change to the deceased's longstanding testamentary intentions;
- (q) That the deceased as a pedantic person and as a renowned judge would have had his will properly executed and attested by a lawyer;
- (r) ...

[13] The motion was amended by leave at the start of the hearing. These amendments were to the grounds pleaded at paragraph 12(f) of this judgment, as well as the removal of grounds which were no longer being relied on – these were paragraphs (g); the second sentence in ground (m); and paragraphs (o) and (r) in the Motion.

[14] The Respondent, the Public Trustee, filed a Notice of Opposition asserting the Will was valid and that it complied with s. 5 Wills Act 1975.

[15] The Joinder Respondent, Maka, filed an affidavit in support of the Public Trustee's notice of opposition, but he nevertheless sought leave to be joined as a party so that he had his own standing to answer further allegations of dishonesty if they surfaced in the evidence filed on behalf of the Applicant's. I granted the leave for joinder in the interests of natural justice.

[16] Finally, I record that certain parts of the affidavits filed in the proceeding were not led in evidence and do not form part of the record. These parts were not included in the evidence because the issues they purported to address were no longer being pursued. The type of evidence I am referring to concerned a pleading, discontinued at the hearing, that Patu lacked testamentary capacity at the material time as he was both physically and mentally not in a position to give instructions for a will to be made. I record the parts of the affidavits which are affected:

- a. Affidavit of Zaskiya Iliganoa Simone Lesa, dated 19 January 2022 – the removal of paragraphs 12 to 17 (inc), 19, 26, 31, and the first sentence in paragraph 33;
- b. Affidavit of Iliganoa Daphne Sapolu dated 13 April 2022 – the removal of paragraphs 12 up to subheading “No mention of a Will”; para (iii) of section titled Signature on the Will; and the whole of paragraph 15.
- c. Affidavit of Katalaina Maka Sapolu, dated 13 June 2022 – the removal of paragraph 38 – 44 (inc, 49, 50, 95, and 116. Paragraphs 88 (last sentence) and 90 (second sentence) were ruled inadmissible on account of being submissions not evidence.

[17] It must be said at the outset that although Mrs Sapolu alleges fraud and dishonesty there is no direct evidence of fraud or dishonesty on the part of Luamanuvao or Maka, or on the part of anyone else. Indeed, as discussed below, before me is evidence from at least one witness who says he was there and he saw Patu sign the Will on 25 September 2020.

[18] This case involves the drawing of inferences from circumstantial evidence that lead to findings of fraud and dishonesty that can overcome eyewitness accounts.

[19] Given the importance of circumstantial evidence in this case, I interpose the relevant legal principles as a guideline. First, regard is had to the decision of the Court of Appeal in *Fuimaono v Public Trustee*,¹ and the judgment of His Honour Fisher J. His Honour says at paragraph 8:

“8 A circumstantial evidence case requires two steps. The first is to consider each strand individually. Each item of evidence is

¹ *Fuimaono v Public Trustee* [2018] 17

considered to see whether it is relevant, that is to say makes the plaintiff's case more likely or less likely. If an item is relevant, it is also necessary to assess the weight that should be attached to it. The weight to be attached to a single item of evidence can be described as its "probative value". Probative value is the extent to which an individual item of evidence increases or decreases the probability that the ultimate factual proposition is true.

- 9 Once each item of evidence has been individually assessed in that way, the Court must move to the second step. The second step is to consider what happens when all the strands of the rope are pulling together. Only one assessment is permissible at this stage. The question is whether, considered in its totality, the evidence makes the plaintiff's ultimate factual proposition more probable than not. The onus of proof applies to that question alone."

[20] Patu himself observed the following in *DHL v Betham*:²

- "57. The classic explanation of circumstantial evidence or evidentiary fact was given in the old English case of *R v Exall (1866) 4 F & F 922, 928* where Pollock CB said:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then if any one link break, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three strands together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit".

[21] It is against the backdrop of these principles that I now attempt to analyse the evidence.

IS THE PROPOUNDED WILL PATU'S LAST WILL AND TESTAMENT?

[22] The will must satisfy the requirements of s. 5 Wills Act 1975 ("Wills Act"). The relevant provision provides:

"5. Form of will – A will must be in writing and signed by the testator or some other person in the testator's presence and by his or her direction and such signature shall be made or acknowledged by the testator in the presence of at least 2 witnesses as his or her will and the witnesses shall sign their names to the will in the presence of the testator and in the presence of each other at the same time." (Emphasis added)

² *DHL v Betham* [2015] WSSC 55

[23] The Will is in writing and appears to be dated 25 September 2020, with the number 25 being handwritten. On its face the testator has signed the will and before 2 witnesses, Alaifetu and Sainimere, who have both signed their names in the presence of each other at the same time.

[24] The Will is expressed to be the last will and testament of Falefatu Maka Sapolu, also known as Patu Falefatu Maka Sapolu; no other Wills were produced contesting the conclusiveness of the propounded Will.

[25] There are 11 paragraphs in total. The first states that all former Wills made by the testator are revoked, and the second paragraph appoints the Public Trustee of Samoa as the Executor and Trustee of the testator's Will.

[26] The Will itself is only 1 ½ pages long, and it reads as follows:

"THIS IS THE LAST WILL AND TESTAMENT of me, **FALEFATU MAKA SAPOLU** (also known as Patu Falefatu Maka) of Vaoala, Retired Chief Justice, made this 25th day of September 2020.

1. **I REVOKE** all former Wills made by me.
2. **I APPOINT** the Public Trustee of Samoa as the Executor and Trustee of this my Will.
3. **I AUTHORISE** my Executor and Trustee to charge to my estate all reasonable costs, disbursements and any other charges including any taxes for its administration and not to charge these to the beneficiaries of my estate.
4. **I GIVE AND BEQUEATH** thirty thousand Samoa Tālā (SAT\$30,000) to my faithful and loyal housekeeper **USHA KUMARI** and **I DIRECT** my Executor and Trustee to pay this bequest before distributing the balance of my estate.
5. **I GIVE AND DEVISE** the property at Vaoala held in my name to my wife **ILIGANOA DAPHNE SAPOLU** and **MAKA KOMISI SAPOLU** my natural nephew, and by adoption, my brother, who I raised as a son to me since the age of four years, as tenants in common in equal shares subject to my wife **ILIGANOA DAPHNE SAPOLU** having a tenancy in the property for life or until she remarries.
6. **I GIVE AND DEVISE** one and a half acres of my land at Aleisa closest to the main public road to **MAKA KOMISI SAPOLU** my natural nephew, and by

adoption, my brother, who I raised as a son to me since the age of four years and **I GIVE AND DEVISE** the remainder of my land at Aleisa to my children **UELE DENNING SAPOLU**, who has lived apart from me since he was an infant, and **EZRA FALEFATU SAPOLU**, and **JACQUELINE PETIMARA SAPOLU** who have lived apart from me since birth, as tenants in common in equal shares.

7. **I GIVE AND DEVISE** my land at Malololelei to my wife **ILIGANOA DAPHNE SAPOLU** and **MAKA KOMISI SAPOLU** my natural nephew and by adoption, my brother, who I raised as a son to me since the age of four years, as tenants in common in equal shares.
8. **I GIVE AND BEQUEATH** monies held by me in any bank or financial institution wheresoever situate in the following shares:
 - i. two thirds to my wife **ILIGANOA DAPHNE SAPOLU**;
 - ii. one third to **MAKA KOMISI SAPOLU** my natural nephew, and by adoption, my brother who I raised as a son to me since the age of four years.
9. **I GIVE AND BEQUEATH** my Toyota Landcruiser Prado and the Toyota Hilux pickup which are registered under my name and all furniture and chattels at our home at Vaoala to my wife **ILIGANOA DAPHNE SAPOLU**.
10. **I GIVE AND BEQUEATH** my shares in the firm of **PL Strategy Consulting Limited** and all my law books and papers, to my sister **KATALAINA MAKA SAPOLU**.
11. **I GIVE DEVISE AND BEQUEATH** the residue of my estate personal and real whatsoever and wheresoever situate to my wife **ILIGANOA DAPHNE SAPOLU**.

SIGNED by the testator **FALEFATU MAKA SAPOLU**)

(also known as Patu Falefatu Maka Sapolu) in our)

presence and witnessed by us in his presence and in the)[signature].....

presence of each other:

Name: Alai fetu Enari

[signature]

Occupation – [-]

Address – Vaiala

Name: Sainimere Naivila

[signature]

Occupation: Domestic Duties

Address – Vaoala

[27] Both witnesses, Alaifetu Enari (“Alaifetu”) and Sainimere Naivila (“Sainimere”), gave evidence at the hearing. They acknowledged their own signatures and handwriting on the Will.

[28] However, they had starkly different accounts of the circumstances of their signing. They are so different that it is not possible to reconcile them. Only one of them is truthful.

Alaifetu’s account of the circumstances of the signing and witnessing of the Will

[29] Alaifetu, said Patu asked him to witness the signing of his Will. He added that he helped Patu to get off the hospital bed onto a chair next to the bed; a hospital table was placed before Patu and he was given the Will by Luamanuvao.³

“Chief Justice: pau a la’u fesili Alaifetu, o ai na fesoasoani i le toeaina I le taimi lea na tu i luga pe na sii i lalo o le nofoa e saina ai lana uili, o ai lea na fesoasoani ai?
Wit: lau afioga o a’u, sa ‘ou pipi’i aku ma pipii mai ia a’u, se’e malie aku, oga ‘ou avakua lea o le gofoa gofo ai loa, ave ifo ma le laulau fa’akigo ai loa le saigiga o le uili
Chief Justice: pipi’i atu le toeaina i lou aao?
Wit: ia
Chief Justice: ae tulei mālie ai lea o le toeaina i luga o le nofoa?
Wit: kuu aku ai lea o le gofoa gofo mālie ai lea i lalo
Chief Justice: faafetai pau lena o la’u fesili.”

[30] Luamanuvao who was the first witness called on behalf of the Public Trustee gave a similar account of Patu moving from the hospital bed to a chair.⁴

“Chief Justice: Ms. Sapolu thank you for your evidence. I have a couple of matters. You say in your evidence that when Patu saw the will or he realised that you would wanting to talk to him about the will that he wanted to sit up the bed, do you remember saying that? On the morning of the 25th of August 2020?
Wit: Yes, he wanted to be helped off the bed and he sat down and there was a table in front of him
Chief Justice: Was there a chair next to the bed?
Wit: There was a chair like, almost like that chair
Chief Justice: So, an easy chair rather than one of those
Wit: Rather than a, yes.
Chief Justice: plastic chairs it’s difficult to sit on

³ Notes of Evidence (“NOE”) pages 260 and 261

⁴ NOE page 247

Wit: It wasn't a plastic chair your Honour
Chief Justice: Alright, who helped him off the bed?
Wit: Pepsi and Sai."

[31] Alaifetu says Patu signed the Will in front of him and he signed the Will as a witness in front of Patu and the other witness, Sainimere.⁵

"Sua Mailo: o lou mau o lea e ke faapea mai o Paku ga fai aku ia oe ma Sai e saigi le pepa lea
Wit: ia ga sau Paku i lalo avaku le gofoa gofo ai, avaku ma laulau fai loa ma le kala a Paku ia Laina e avaku loa pepa e saigi, lea ga fai mai loa Paku ia maua, o laga uili e make molimauina le saigiga o laga uili, e leai se mea ma ke popole ai kokogu o mea ia i le uili pau le mea o le molimauiga o laga saigi, ma saigi loa."

Sainimere's account

[32] Sainimere began working as a housekeeper for the Sapolu's sometime in 2020 until February 2021. This witness recounted a completely different version of events. She said that she had been asked by Luamanuvao to sign the Will. Sainimere says Patu had been asleep all morning and only woke up to be taken home to freshen up for travel to New Zealand. Sainimere says when Luamanuvao asked her to witness the Will, she saw that it had already been signed, but that at that time Patu was asleep and Alaifetu was not present:⁶ If Sainimere's evidence is accepted – that neither Patu or Alaifetu had signed the Will in her presence, then it is difficult to see how the requirements of the Will's Act are satisfied. The evidence is as follows:

"Sapolu: And that's to the document annexed A, the will. Do you have it in front of ou?
Wit: Yes
Sapolu: And you described yourself as the third signature, or rather your lawyer referred your signature as the third signature is that correct?
Wit: That's me.
Sapolu: Yes. And the second signature? It's Pepsi is that correct?
Wit: Yes
Sapolu: And the first signature the one above.
Wit: It's Falefatu
Sapolu: Falefatu's signature?
Wit: Yes
Sapolu: And he signed when both you and Pepsi were there?"

⁵ NOE page 257

⁶ NOE p 26

Wit: No. Pepsi was not there. When I put my signature Pepsi wasn't there, Falefatu was sleeping."

[33] There are therefore two distinct accounts of the circumstances surrounding the signing of the Will, and I need to analyse which of the two versions is more likely to be reliable. One of the versions cannot be true.

THE EVIDENCE

Patu's hospitalisation

[34] The deceased had been admitted to the Intensive Care Unit of the National Hospital of Samoa at Motoootua shortly after midnight on the 16th September 2020. Between then and the 25th September 2020 when he was medevaced to New Zealand, his family and household employees attended on him daily to give their assistance.

[35] The ICU unit of the hospital had its own medical experts of Doctors and Nurses providing medical care for Patu. However, Patu was a private man and he is said to have preferred the care of those whom he knew for his personal care.

[36] A routine was established involving two shifts. Maka, and Alaifetu, also known as "Pepsi", were with Patu overnight during the "night shift". The day shift seemed to start at around 7am; there were any number of family members who regularly attended on Patu, including Mrs Sapolu, Luamanuvao his sister, and the housekeepers Sainimere Naivila and Usha Kumari.

[37] Alaifetu said he would normally stay until about 8.30am before he would leave the hospital. Maka said he normally left around 7am to take his wife to her work. There was always someone there to care for Patu should he have needed assistance. The "day shift" started at about 7am.

[38] On 25 September 2022, Alaifetu says that he stayed as usual until about 8.30am. Maka says he left the hospital at about 7am to take his wife to work, then went home to rest, before returning to the hospital at about 9am to help prepare Patu for his travel to NZ later in the day. The plan was to take Patu back to his residence at Vaoala to freshen up and then to return to the hospital, from there Patu would be transported to the airport by ambulance.

How did the will come to be made?

[39] Luamanuvao's evidence in chief is that Patu asked her to draft a new Will for him on the afternoon of 16 September 2020, after he had been hospitalised. They went through his assets, most, if not all of which, she was aware of over the years. Luamanuvao's evidence is that she had prepared three earlier wills for Patu in 1988, 1993 and 2001. She carried out the work to draft the 2020 Will as Patu's sister and that there was no solicitor and client relationship. At the time she had only a barrister's certificate. But she said she did not charge for the services she provided. Luamanuvao's evidence is that in her years of practice that she had an extensive Wills and Administration practice. This evidence was not challenged.

[40] Luamanuvao described the process of making the Will as follows:⁷

- “14. After going through his assets, I asked Falefatu who he wished to appoint as the Executor and Trustee of his Will. He thought for a few seconds then said he wanted to appoint the Public Trustee as the Executor and Trustee of his Will. He also asked to make sure that his relationship to all the beneficiaries is set out clearly in the Will.
15. I prepared the Will in accordance with Falefatu's wishes. He took a bad turn on Thursday night, 17 September 2020, and received more treatment on the Friday and over the weekend. I observed that he was not in a condition to discuss his Will I had drafted so I kept it in my backpack that I used to carry all my stuff in when I went to the hospital.
16. The following week, after Falefatu rested from a session of his treatment on Monday, I informed him that I had drafted his Will as he had asked me. He said “fa'akali a la” (*can I wait*). I knew then that Falefatu did not feel able to turn his mind to his Will and I left it at that. About two days later, I was with him at the hospital, when he said “Laina, le mea fo'i lele” (*Laina, that thing*). I knew what he was referring to and said I had the draft Will with me. I read the draft Will to him while he laid on his bed, and as he listened, he made a change. I read out Clause 5 of the Will under which he left the Vaoala property to Ili and Maka as tenants in common in equal shares and when I got to the end of the clause, Falefatu added “or if she remarries”.
17. I continued to read the rest of the draft Will when Usha appeared on the side of the bed where the curtain was open. Usha momentarily stopped then walked away when she saw that Falefatu and I were dealing with something. Falefatu asked who it was and I told him it was Usha. Falefatu then said “Oi, koeikiiki galo ia a'u. Ou ke maga'o e ave se mea ia Usa.” (*Oh, I nearly forgot. I want to give something to Usa. She is loyal and kind*). I asked Falefatu how much he wanted to leave Usha. He thought for a bit then said “kolusefulu afe kālā ae ia muamua kokogi Usa gai lo le isi vaega” (*Thirty thousand tālā but Usa should be paid*

⁷ Affidavit of Katalaina Maka Sapolu dated 13 June 2022 at paragraphs [14]-[17].

first before the others). Usha was commonly called “Usa” at home and Falefatu always called her by that name.”

[41] What Luamanuvao describes above appears to me to be unremarkable. There is nothing in this narrative from which to draw an inference of dishonesty, let alone any impropriety.

What was Patu’s mood on the morning of 25 September 2020?

[42] Usha Kumari, the Sapolu’s long time housekeeper confirms that she went to the hospital on the morning of 25 September 2022. She says when she arrived at the hospital, she saw Pepsi (Alaifetu). Usha described Pepsi as the “Vaiala boy”.⁸ She said Pepsi was there to help Patu to go to the toilet. Usha gave evidence that Patu was looking about, but that he was also asleep, and she recalled they waved at each other and gave each other a hi-five.

[43] Usha’s references to Patu looking about and being asleep makes her evidence somewhat unclear, and I reconcile the two apparently contradictory statements on the basis that during her visit with Patu, he must have been awake enough to look around and to give Usha a hi-five, although at other times he had his eyes closed, which the witness has described as Patu being asleep.

[44] Sainimere’s evidence is that Patu remained asleep through the time she was there, from about 7am, to when Patu was taken to his home in Vaoala to freshen up before the flight to New Zealand. This evidence is consistent with Sainimere’s version of events that Patu was asleep at the time when Luamanuvao asked her to sign the affidavit, as discussed above.

[45] Sainimere said she knew Patu was asleep because at one point she cleared the rubbish bin by his bed and he did not stir. Sainimere said she drew the curtain, which separated the bed from the rest of the room, and she then sat on the floor on the other side of the curtain to sort and fold his clothes, which had been brought to the hospital that morning for Patu’s suitcase for the trip to New Zealand. This evidence conflicts with Usha’s evidence that it was she who folded Patu’s clothes and packed travel bag.

[46] Usha said she did not see anyone on the other side of the drawn curtain – where Sainimere said she was sitting on the floor. It is not necessary to resolve this apparent conflict. There are more significant conflicts in the evidence which leads me to not prefer Sainimere’s evidence.

Was Patu awake and therefore able to sign his will?

⁸ NOE p 46

[47] . The most critical of the conflicts is whether Patu was awake or asleep at the relevant time. Although Sainimere says Patu was asleep throughout her time at the hospital, hers seems to be the lone voice on this issue:

- a. Usha observed Patu looking around the room and they gave each other a hi five. When Usha says Patu was asleep, that evidence must be appreciated in its proper context, Patu had been able to look around the room and he was interactive as well when he felt like the need, as he did with Usha.
- b. Mrs Sapolu said that when she arrived at the hospital to pick up two cheques to pay for the travel to New Zealand and to raise some pocket money. Sainimere was already at the hospital in the hospital room. According to Mrs Sapolu Patu was agitated because he was concerned, she was running behind schedule. Of course, the expression of agitation could only have occurred if Patu had been awake. Luamanuvao also said that when she turned up that morning, she could hear Patu's raised voice of displeasure.
- c. Incontrovertibly, Patu signed two cheques, one for the cost of travel and the other for some pocket money for the trip to New Zealand. He must have been awake at this time, which appears to occur just minutes before he is said to have signed his will.

[48] The preponderance of the evidence is that Patu was cognisant and involved with events going on around him on the morning of the 25th September 2020. I am satisfied that the evidence supports an inference that Patu was alert and therefore able to read and sign the Will.

Signing and witnessing the Will

[49] I have already discussed the circumstances of the signing and witnessing of the Will. However further observations need to be made concerning two of the Applicant's witnesses.

Sieni Tanielu's evidence

[50] The Applicant called Sieni Tanielu, an employee of the Mrs Sapolu, and her affidavit was sworn on 24 October 2022, i.e., the first day of the hearing. Ms Tanielu's said she had been asked by Luamanuvao to sign Patu's Will at the hospital on the morning of 25 September 2020. She said she signed the document Luamanuvao gave her but that it had not been signed by Patu at the time, nor had it been witnessed by any another person.

[51] However, when I asked Ms Tanielu to identify her signature on the Will in evidence, she could not do so, and offered a somewhat cryptic response that she signed another document, which is not in evidence. Mrs Sapolu must surely have known that the Will that she produced in evidence had not been signed by Ms Tanielu. I am left to wonder what happened to the document and whether Ms Tanielu ever signed one? The point was never squarely put to Luamanuvao in cross examination.

[52] Luamanuvao's evidence on this point is that she had turned up at the hospital to hear Patu speaking in a loud and angry voice to Mrs Sapolu. She said Patu was sat up in his bed, he signed two cheques, one for airfares and the other for pocket money. The cheques were given to Mrs Sapolu and she and Ms Tanielu left. As Ms Tanielu walked past Luamanuvao asked her to stay back to witness the Will, but she says she did not pursue the matter further because Mrs Sapolu called out to Ms Tanielu to come go with her to pay for the airline tickets. Luamanuvao's evidence is that Ms Tanielu did not sign the Will.

[53] If Ms Tanielu's evidence is to be believed then Ms Tanielu knowingly acted dishonestly by signing the alleged will purporting to have witnessed Patu signing his last will and testament on 25 September 2022 when in fact she had not.

[54] I reject Ms Tanielu's assertions which are, frankly, far-fetched and self-serving. She seemed to me to be painting herself in a good light before her employer, Mrs Sapolu.

[55] The unstated inference I seem to be invited to draw is that Luamanuvao knowingly participated in dishonesty – by getting Ms Tanielu to act as a witness to a signature that she did not actually witness. If this episode with Ms Tanielu represents one of the strands of circumstantial evidence, I consider that it has little probative value.

Luamanuvao's evidence

[56] Luamanuvao said that after Mrs Sapolu and Ms Tanielu left the attention turned to the signing of the Will, she says at para 26 of her evidence:⁹

“26. When I mentioned his Will, Falefatu asked to be helped off the bed. He was then seated in a chair and the hospital bed table was moved towards where he was seated. At this time, only Pepsi, Sai and I were

⁹ Above n 7 paragraph [26].

with Falefatu. I tried to get a couple of nurses to witness the signing of the Will but Falefatu said that Pepsi and Sai were there already so they could witness it. I then informed Pepsi and Sai that they will witness Falefatu signing his Will, then each will sign as a witness to show that they saw Falefatu sign his Will. Sai was standing to the left of Falefatu next to me, while Pepsi was to the right of Falefatu. Falefatu signed his Will and inserted the date as both Pepsi and Sai watched. After he signed his Will, Falefatu remained seated with the Will in front of him on the hospital table. Sai signed the Will as witness while Falefatu and Pepsi looked on. Pepsi also signed the Will as witness while Falefatu and Sai looked on. I was present throughout the whole process and put away the Will in my backpack after it was duly executed by Falefatu and witnessed by Pepsi and Sai.”

[57] Luamanuvao’s evidence is that she did not read the will to Patu, as she had on a previous occasion, but that she gave Patu the will. The failure to specifically mention that a testator read the will may sometimes be determinative in assessing the validity of the Will.

However, I have no such doubt in this case. The law allows me to take notice of facts which as so well-known and accepted in Samoa that they cannot be reasonably questioned; s.104 Evidence Act 2015. In this case the Will maker had only relatively recently retired from the role of the Chief Justice of Samoa; a position he held for almost thirty years. I have no doubt that the careful and judicious man that he was, Patu would have read the Will and understood what was said in it before he signed. To suggest that Patu simply signed and did not read nor did he understand the Will are not particularly strong submissions.

DOES PROPOUNDED WILL COMPLY WITH THE WILLS ACT?

[59] I am satisfied the Will complies with the requirements of the Wills Act. In other words, I am satisfied that the Will was signed by Patu, the testator, in front of two witnesses, Alai fetu and Sainimere, who were in each other and the testator’s presence when they signed.

[60] Sainimere’s evidence about the circumstances of her signing is not particularly strong, and I prefer the evidence of her fellow witness, Alai fetu, who said that he and Sainimere signed the Will in Patu’s presence.

CHALLENGES RAISED BY THE APPLICANT

[61] The Applicant as identified earlier, relied on circumstantial evidence to support its claim of fraud and dishonesty, and the balance of this decision addresses those aspects of the motion.

[62] In her closing, Ms Sua-Mailo set out the applicant's case as follows:

- a. Patu did not make or sign a will on Friday 25 September 2022;
- b. That the will propounded to be Patu's last will and testament is a product of a dishonest and fraudulent act by the two beneficiaries, Katalaina Maka Sapolu and Maka Komisi Sapolu;
- c. That Patu did not sign the propounded will. That the signature purporting to be Patu's signature on the will is a forged signature;
- d. That the will was not properly attested and executed and therefore do not meet the form as per section 5 of the Willis Act 1975;
- e. The will is therefore invalid as it is not in compliance with the law;
- f. That the office of the public trust had breached its fiduciary duty to the applicant to ensure that the will propounded is in fact the last will and testament of Patu.

[63] My determination that the Will complies with the Wills Act addresses the substance of Ms Sua-Mailo's submissions.

[64] Ms Sua-Mailo also set out the strands of the circumstantial evidence upon which her case relies;

- a. Luamanuvao kept the will to herself from when it was made on 25 September 2020 to a few days before it was read by the Public Trustee on 17 December 2021.
- b. The suspicious way the will was made:
 - i. It was signed at the hospital on the day of Patu's travel to New Zealand, and that this was "rather odd".
 - ii. According to Mrs Sapolu and Sieni, everything was rushed that morning as they were trying to sort out their travel arrangements.
- c. Whether Patu read the Will?
- d. The execution and attestation were kept inconspicuous.
- e. Sai attesting the Will.
- f. Patu's relationship with Mrs Sapolu.
- g. The Will contains dubious references:
 - i. Chief among these references is the description of Maka as having been raised by Patu since the age of 4, when the evidence is that Maka had been raised by Patu's mother, and that when she died Maka left for overseas because there was nothing left for him in Samoa.
 - ii. The Will also referred to Mrs Sapolu being entitled to remain in the Vaoala house if she does not remarry.

- h. Patu would be a dishonest person.
- i. Signature and reverting to use Falefatu.
- j. Forgery.
- k. The challengeable nature of the Will. The submission appears to be that the Will is easily challenged because of these factors:
 - i. Luamanuvao drafted the Will and that she was “compromised” by her conflicts of interest.
 - ii. Luamanuvao held on to the will and did not deposit it with the Public Trustee. Further, Luamanuvao did not tell Mrs Sapolu of the existence of the will until after the funeral.
 - iii. There were no written notes or draft will.

[65] Many of these points have already been examined, and of the others I address them as follows.

Should Luamanuvao have drafted the Will?

[66] Ms Sua-Mailo cross examined Luamanuvao on whether she should have drafted the Will. Luamanuvao, then holder of a Barristers practicing certificate, did not have an instructing solicitor. To this Luamanuvao responded that she was not charging Patu to draw up the Will, but that she drafted the Will as Patu’s sister.

[67] Ms Sua Mailo however then challenged Luamanuvao on whether what she did may have given rise to a conflict of interest, given that Luamanuvao was herself a beneficiary under the Will:¹⁰

“Sua Mailo:	You as Falefatu’s sister you had a conflict am I right?
Wit:	what conflict?
Sua Mailo:	conflict to prepare the will, is that right?
Wit:	No, no, there is no conflict
Sua Mailo:	Do you accept that you are a beneficiary in the will?
Wit:	A very, very minor beneficiary
Sua Mailo:	It doesn’t matter, a beneficiary, is that correct?
Wit:	The rule is, if you are a beneficiary, you cannot witness the will
Sua Mailo:	Are you a beneficiary in the will?
Wit:	yes, a minor beneficiary
Sua Mailo:	Then that means you shouldn’t have prepared this document because of your conflict?
Wit:	There is no conflict

¹⁰ NOE page 200

Sua Mailo: you are also a shareholder for PL Security is that correct?
 Wit: yes
 Sua Mailo: and in the will at parag 10; it says here that "*that all shares will be given to you solely*" is that correct?
 Wit: His shares?
 Sua Mailo: His shares?
 Wit: yes
 Sua Mailo: PL Strategy owns 50 50 by you and Patu, is that correct?
 Wit: yes'
 Sua Mailo: and in the will at parag 10 all his shares go towards you, is that correct?
 Wit: Yes
 Sua Mailo: is this not a conflict to you, still?
 Wit: No, and if Patu thought it was a conflict he won't let me draft his will; and besides the shares are not worth anything we did not make much in that business
 Sua Mailo: Doesn't matter, that is not the question. At parag 6 of your affidavit"

[68] It is settled law that a gift to a witness or indeed a witness' spouse is void, but that nevertheless the witness may still prove the will: s. 6 Wills Act 1975. In other words, though a gift may become void, the other parts of the Will may still be proved. This case, however, concerns a benefit to someone who drafts the will.

[69] Ms Sua-Mailo's challenge to the appropriateness of Luamanuvao's role appears to principally rely on the high authority of *Tanner and Others v Public Trustee and Others*,¹¹ a decision of the New Zealand Court of Appeal, which in turn referred to the fundamental principles stated by Parke B. delivering the opinion of the Judicial Committee in *Barry v Butlin*:¹²

"The rules of law according to which cases of this nature are to be decided, do not admit of any dispute....These rules are two; the first is that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

[70] What does this mean?¹³

¹¹ [1973] NZLR 68

¹² (1838) 2 Moo PCC 480, 482

¹³ Above n12 at 484, 485

“The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the *onus* is imposed on the party propounding a Will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the Will being himself a Legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business worth £100,000, leaves the bulk of his property to his family, and a Legacy of £50 to his confidential attorney, who prepared the Will: would this fact throw the burden of proof of actual cognizance by the Testator, of the contents of the Will, on the party propounding it, so that if such proof were not supplied, the Will would be pronounced against? The answer is obvious, it would not. **All that can be truly said is, that if a person, whether attorney or not, prepares a Will with a Legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances;** for instance, the *quantum* of the Legacy, and the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. (Emphasis added)

[71] Plainly, the burden rests with Luamanuvao to show the Court the instrument propounded, the Will, does express the real intention of the deceased. Where the person who prepare the will is also a beneficiary such a fact is, at most, a suspicious circumstance of more or less weight, according to the facts of each case, and in some case of no weight at all, varying according to circumstances. This is altogether different to the situation where a person who witnesses a will is also a beneficiary, that disposition is treated as void.

[72] Looking first at the legacies.

- a. The company PL Strategy Ltd was incorporated on 1 April 2020 (“PLSL”), and although it was not a law firm, it advised on matters relating to the law. PLSL is no longer operating. Luamanuvao’s evidence is that she has written to the Registrar of Companies to advise that Patu had passed away and the Company would not be seeking a new business licence. No evidence has been led about the value of the shares bequeathed to Luamanuvao.

- b. In so far as the legal books and papers were concerned, it would not be difficult to imagine that many of those texts and papers are of only sentimental value, which Patu wanted to share with someone who respected and valued, and would not doubt protect the privacy of his life's work.

[73] I am satisfied that the company has no discernible value, and that it will cease operating when the current business licence expires, and I am also satisfied the books and personal papers have only sentimental value to someone who would appreciate texts which are likely not of current edition, and Patu's other personal reflections.

[74] I am satisfied that Luamanuvao has established the righteousness of the gifts to her. In respect of the value of the assets gifted, when viewed as against the whole of the Estate of lands, vehicles, cash at the bank and so forth, the gifts to Luamanuvao seem to fall in the category of the £50 gift referred to in *Barry v Butlin*.

Expert witness

[75] The next point I address is the issue of forgery. The Applicant instructed an expert witness, who in her report said:

“The purpose of my examination is to determine whether or not the signature in the name of P F Sapolu on the questioned Will has been completed by him or another person.”¹⁴

[76] After viewing the original Will, Ms Morrell's report concluded the:

“[S]ignature pictorially resembles the reference signatures, I note areas of excess ink which I consider is likely due to pen lifts and/or hesitation which are both signs of the indicia of forgery”.¹⁵

[77] In cross examination, Ms Morrell discussed her position as follows: her reserve as follows:¹⁶

“Wulf So just to be clear your conclusions for your findings is inconclusive, it's far from conclusive?”

Wit: It's not inconclusive, I said there are indications, that's not inconclusive. If it was inconclusive I would have said

¹⁴ Report provided by Linda Morrell, page 3

¹⁵ Above n14, page 5

¹⁶ NOE p76, 77

inconclusive. There are indications with the evidence that I have seen and examined, there are indications that suggest to me that this signature is a result of a copy by or a simulation by another writer attempting to make it appear like Mr. Sapolu signed the will. It's not inconclusive.

Wulf: Well you're no longer saying he could have signed it himself?

Wit: That obviously cannot totally be excluded because otherwise I would be conclusively that it is by someone else. But the indications or the evidence indicate to me are not – (is my opinion) that could well be an attempted forgery by someone else.”

[78] After Ms Morrell gave her evidence, there arose an issue about the two cheques which Patu signed on 25 September 2020 just before he signed his Will.

[79] Copies of the cheques had been exhibited to Luamanuvao's first, dated 13 June 2022, and third affidavit, dated 14 October 2022. Ms Sua-Mailo objected to the cheques being admitted on the basis that they should have been put to a few her witnesses, including Ms Morrell.

[80] The duty to put questions in cross-examination arises under s. 76 Evidence Act 2015. The obligation on the cross examiner:

“In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that **contradict the evidence of the witness**, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.” (Emphasis added)

[81] Clearly, where a witness' evidence is sought to be challenged with reference to other evidence which contradicts the evidence of the witness, then opposing counsel is obliged to put the contradiction to the witness. However, the signatures on the cheques do not by themselves contradict Ms Morrell's evidence. It follows therefore that there is no duty on Mr Wulf to put these cheques. It would of course have been a different situation if Mr Wulf intended to introduce another expert's report based on the two signed cheques which contradicted Ms Morrell's evidence.

[82] Even if it might be thought that Mr Wulf should have put the two cheques to Ms Morrell, the Applicant should have in any event briefed Ms Morrell about the existence of two signatures which were signed at about the same time as the Will.

[83] Given that the Applicant had closed her evidence, Ms Sua-Mailo asked to reopen her case to give the expert the opportunity to give evidence about the signatures on the cheques. It was clear from Ms Morrell's evidence in cross examination that she had not been provided with any other

document dated 25 September 2020.¹⁷ I granted leave for the Applicant to call further evidence from her expert and directed the banks to make available the originals for Ms Morrell's inspection. Ms Morrell was still in the jurisdiction.

[84] Ms Sua-Mailo however later in the day advised that the Applicant did not wish to call further evidence from Ms Morrell. No clarification was given to explain the situation.

[85] However, it became clear in closing submissions that Ms Sua-Mailo appeared to be satisfied that Ms Morrell's opinion was sufficiently probative to prove forgery in the civil jurisdiction of this Court. At paragraph 12.7 which addresses forgery, counsel submits:

For the purposes of the matter before the Court, the applicants respectful submission is that it would be enough for the applicant to prove on the balance of probabilities, that civil standard that the will was forged. This was the court's position in *P v Ah Far*.

[86] It is convenient to interpose here the relevant authorities which establish a relatively high level of proof where allegations of actual fraud or conscious dishonesty are involved, as they are pleaded in this case. Patu, the then Chief Justice of Samoa held in *Ah Far v Ah Far*:

Actual fraud or conscious dishonesty is the species of fraud in respect of which the common law and equity exercise concurrent jurisdiction. It is trite law that he who alleges fraud must prove it. It is the plaintiffs who are alleging actual fraud and therefore they bear the onus of proving fraud. The required standard of proof is the civil standard of proof but to a higher probability that is commensurate with the fact to be proved. In *Hornal v Neuberger Products Ltd [1957] 1 QB 247* which was a case of fraudulent misrepresentation, Denning LJ said at p 258.

“The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law.”

In *Three Rivers District Council v Bank of England* which was concerned with the tort of misfeasance in public office, Lord Hobhouse of Woodborough when dealing with the question of fraud states:

“The law quite rightly requires that questions of dishonesty be approached more vigorously than other questions of fault. The burden of proof remains the civil burden - the balance of probabilities - but the assessment of the evidence has to take account of the seriousness of the allegations and, if that

¹⁷ NOE p 75

be the case, any unlikelihood that the person accused of dishonesty would have acted in that way.”¹⁸

[87] In addition to complying with the higher standard applicable to proceedings involving dishonesty and fraud, Ms Morrell’s expert opinion must also meet the statutory test in s. 16 Evidence Act 2015. An opinion by an expert offered in proceedings is admissible if the fact finder is likely to obtain substantial help from the opinion in understanding other evidence or ascertaining any fact that is of consequence to the determination of the proceeding.

[88] In my view, Ms Morrell’s evidence does not assist me to decide whether Patu’s signature is a forgery and I do not admit it into evidence.

- a. at the time of the alleged signing, Patu was very ill, he needed 24-hour care, he needed to be assisted to go to the bathroom and to move off his bed into a chair. The report is tone deaf to Patu’s physical discomfort in that it does not refer to these physical infirmities or limitations, nor their effect on such things as the fluency of Patu’s signature. I am not satisfied that sufficient account was taken of Patu’s medical condition, which were serious enough to require him to seek urgent assistance in New Zealand, and how they may have affected his usual writing style: I refer to the following exchange with Ms Morrell.¹⁹

“Chief Justice: Ms. Morrell I just have one question and that is, I understand what you say about the letter “F” and also about the number of patches of ink; but accepting, putting to one side that “F” which it appears obvious to me is different to his normal signature as that appears in the cheque that you’ve looked at because it doesn’t have the cross bar. Putting that to one side, is the rest of the flow of the signature consistent with what else you saw of Mr. Sapolu’s signature?

Wit: Yes, overall the pen path was similar to what the pen path of his other signatures were, yes.

Chief Justice: And is that one of the reasons that you are concerned about expressing a definitive view, it’s because of the ambiguity if you will, there you’ve got a funny looking “F” but the rest of the signature looks –

Wit: Plus the excess ink obviously –

Chief Justice: Yes, plus, yes.

Wit: Yes, that’s why my opinion is qualified.”

- b. In addition to the failure to have reasonable regard to Patu’s physical limitations, there is one further aspect of the evidence which taints probative value and reliability of the

¹⁸ *Three Rivers District Council v Bank of England* [2001] 2 A11 ER 513 at page 569.

¹⁹ NOE pg 85. The reference to the cheque is a reference to Plaintiff’s Exhibit 6, a cheque dated 2 March 2020.

expert evidence. The opinion that the signature is a forgery – signed by someone other than Patu, is qualified. It is not a conclusive opinion in this regard. The failure to examine and comment on the signatures on the cheques shortly before the Will only exacerbates the level of unease, I have about placing a lot of reliance on this opinion.

- c. The Applicant's serious allegation is that Luamanuvao and Maka committed fraud and were dishonest. The civil standard of proof in these kinds of cases is high, not as high as the criminal standard, but higher than the likely standard.
- d. Applying the first part of the two-stage test in *Fuimaono*,²⁰ I conclude the probative value of the expert's opinion is low, and it does not provide me with substantial help in deciding whether a forgery has occurred and whether that forgery is attributable to Luamanuvao and Maka.

DECISION

[89] I am of the clear view that Patu had his last will and testament prepared by his sister, as described by Luamanuvao. In his final few hours in Samoa before he left for New Zealand and the medical assistance he needed, he got off his sickbed and sat down on a chair next to it, he took a copy of his Will from Luamanuvao, read it over to ensure that it reflected how he wanted his estate to be distributed, and then signed the Will in front of Alaifetu and Sainimere, whom he had asked to be his witnesses.

[90] I come to this view upon the following findings.

- (a) First, I prefer the evidence given by Luamanuvao. I found her narrative of events to be cogent. The Will had been the subject of at least one re-draft, and Luamanuvao explained how the terms of the Will were settled and her previous experience with drafting her brother's Wills.
- (b) Luamanuvao says she carried the final document in her back pack, which she gave to Patu when he was ready. Patu had been awaiting the issue of a visa to enter New Zealand for medical treatment, and so once the visa was issued steps were taken to get on the next available flight out. In other words, the issue of the visa sparked off the signing of the Will which had been a few days in the making.

²⁰ Above n1

- (c) Mrs Sapolu claims the Will was the product of Luamanuvao and Maka's dishonesty. Mrs Sapolu has not proved her claim. There is no direct evidence of dishonesty, nor is there any or sufficient probative circumstantial evidence which when considered in its totality makes Mrs Sapolu's factual proposition more probable than not.
- (d) Mrs Sapolu's attempt to discredit the existence of the Will, by her assertion that Patu told her that he did not have a Will, is met by the evidence of her own witness, Sainimere, who said she signed the Will on 25 September 2020, and that when she signed it, the Will had already been signed by Patu. Indeed, both witnesses identified their signatures on the Will.
- (e) I was impressed by Alaifetu as a witness. He appeared honest and genuine in his answers. He was also a disinterested witness; it may be that he was the only witness of fact who did not have anything to gain under the Will, and nor was there any suggestion that he may have been looking for favours, such as employment. At one point he was cross examined about who had asked him to witness the Will. The evidence Luamanuvao gave earlier in the hearing is that she had asked Alaifetu to be a witness. However, when pressed about who had asked him, Alaifetu stuck to his evidence that it was Patu who asked him to be a witness to his Will. Alaifetu answered questions promptly, without unnecessary hesitation, and the fact that he was at the hospital at the relevant time, and therefore able to act as a witness, is confirmed by Usha, one of the Applicant's witnesses.
- (f) On the other hand, I express my findings in relation to some of the Applicant's witnesses, including the Applicant, in the following way:
- (i) In terms of Sainimere, she presented as a poor and at times confused witness. She struggled to express herself in the English language. She was extremely hesitant and took some time, sometimes an inordinate amount of time, to answer questions, perhaps hoping that Counsel would just go on to another question. However, given the language difficulties I look past what might otherwise be grounds to hold a witness to be evasive.
- (ii) It was the substance of her evidence that I found troubling. There were serious conflicts between her evidence and that given by other witnesses. Sainimere said that Patu was asleep all morning. But, this conflicts with Mrs

Sapolu, and Luamanuvao's evidence that Patu was awake to sign two cheques, which Mrs Sapolu and Sieni took with them to town to pay for the flights and get some pocket money. It also conflicts with Usha's evidence that she and Patu gave each other a hi-five. If Sainimere was even in the room as she says, she could only have been a couple of meters away from where Patu was lying or sitting, and it is difficult to see how she could have missed all the activity.

- (iii) I also reject the evidence given by Mrs Sapolu – (1) that Patu told her that he did not have a will; (2) Patu wanted her to have everything except for 4 ½ acres he wanted to give to his biological children living in Australia; and (3) that Patu was a Samoan matai and could give his Estate away in a mavaega to her. I reject the Applicant's evidence on the basis that I am persuaded that s. 5 of the Wills Act is satisfied, there is a Will and that therefore Patu's Estate is to be administered in accordance with this Will. Whatever may have been said within the privacy and during Patu and Mrs Sapolu's marriage is met by the fact that Patu had a Will dated 25 September 2020.
- (iv) I note that Tammy Jade Soon said in her evidence that she had overheard a conversation between Patu and Mrs Sapolu (her biological mother). The conversation took place in a one-bedroom apartment in Auckland on about 28 October 2020. Ms Soon was not in the same room as her parents, but she says she could overhear their conversation and she heard the Applicant say that he didn't have much, didn't have a will, and that he would leave everything to the Mrs Sapolu.
- (v) Ms Soon's evidence of the conversation is clearly hearsay, and cannot be admitted to prove the truth of its content. However, the Court may admit the statement if the Court considers the circumstances relating to the statement provide reasonable assurance that the statement is reliable, and either the maker of the statement is unavailable (and being deceased satisfies) or a Judge considers that undue expense or delay would be caused if the maker of the statement were required to give evidence: ss. 9(2) and 10(1) Evidence Act 2015.
- (vi) The timing of the alleged conversation on 28 October 2020, would mean that it took place just over a month after Patu signed his Will. I am not prepared

to accept that Patu openly misled or deceived the Applicant about not having a Will, when he had only just signed a Will the month earlier. The prospect that Patu could mislead or deceive Mrs Sapolu in this way gives me considerable cause for concern as to the reliability of the evidence, and I accordingly reject the evidence as inadmissible.

- (g) Ms Sua-Mailo submitted that Patu would not have referred to Maka as someone he had raised since the age of 4, because such an assertion was factually incorrect. In my view, the criticism misses the broader picture, which might be reasonably expected of someone whom for decades was responsible for administering and applying the Administration Act 1975. Patu wanted to provide for his wife and biological children, which he does. Except for the provisions in favour of Maka, the Will reflects the general nature of the discussions that Mrs Sapolu described in her evidence.
- (h) Patu chose to refer to Maka in the way that is recorded in the Will. The reference to raising Maka as his son records a moral duty Patu felt he owed to Maka.

RESULT

[91] The Applicants Motion is dismissed.

[92] The Respondent is to file an application for Probate of the Will of the late Patu Falefatu Maka Sapolu.

[93] The Caveat against grant of administration of the Estate of Patu Falefatu Maka Sapolu, dated 13 April 2022, is discharged forthwith.

[94] Costs are awarded in favour of the Respondent and the Joined Respondent. Counsel for the Respondents are to file and serve their memoranda for costs by 31 January 2023. Any reply from the Applicant is to be filed by 14 February 2023.



S. Perese

CHIEF JUSTICE