7 OF 1952 W 2

IN THE HIGH COURT OF AUSTRALIA

FINCK AND ANOTHER

V.

GRAMP AND OTHERS

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on FRIDAY, 13th JUNE, 1952.

J. J. Gourley, Govt. Print., Melb.

C.7163/51

FINCK & ANOR.

V.

GRAMP & ORS.

O R D E R

Appeal dismissed with costs.

FINCK & ANOR.

v.

GRAMP & ORS.

JUDGMENT

DIXON C.J.
WILLIAMS J.
KITTO J.

FINCK & ANOR.

V.

GRAMP & ORS.

DIXON C.J.
WILLIAMS J.
KITTO J.

JUDGMENT

This is an appeal from the Full Supreme Court of South Australia which, by a majority, dismissed an appeal from a judgment of Paine A.J. refusing probate of a document purporting to be the last will and testament of Hugo Edwin Gramp who died on 11th August 1950. The question at issue on the appeal is essentially one of fact. It is whether the document was duly executed and attested as required by sec. 8 of the Wills Act 1936(S.A.). The document is dated 7th July 1950 and bears the signatures of the deceased and of two other persons, M. O. Riedel and Margaret W. Jeffree. The signature of the deceased is at the foot of the will and the signatures of Riedel and Jeffree are below an attestation clause in the following words "signed by the testator as and for his last will and testament in the presence of us both present at the same time who in his presence and in the presence of each other have hereunto subscribed our names as witnesses". Accordingly the document on its face satisfies the requirements of the section. There is a strong presumption that a document so signed and attested, particularly where there is a proper attestation clause, is a duly executed will and the burden of proving clearly that it is not in fact a valid will lies on its opponents.

In the present case the evidence of Riedel would, if accepted, prove that the document was signed by Gramp in his presence and that of Sister Jeffree and that they then signed in the presence of G r a m p and of each other as stated in the attestation clause. But his evidence was not accepted.

It was rejected by the learned trial judge. He was described as an unscrupulous and untrustworthy person. On the other hand the evidence of Sister Jeffree was accepted by His Honour. He said that she struck him as being a good witness, a person of calm and deliberate habit, and as likely to go about her affairs with a clear head. He said "I have no hesitation in accepting Sister Jeffree's evidence, in preference to that of Riedel".

This is a clear conclusion in favour of the credibility of Sister Jeffree as against Riedel, and there are no circumstances in the evidence which would authorise an appellate Court, consistently with well established principles, reversing such a conclusion. Accordingly the only argument really open to the appellant is that the presumption already mentioned is so strong that it should not be replaced by the evidence of Sister Jeffree.

Her evidence, so far as material, is that Riedel arrived at the hospital about 4 p.m. on 7th July, that he went into the bedroom of the deceased, that soon afterwards he came out and obtained a writing pad from her, that he re-entered the room and came out again and asked her to witness the will of the deceased. His Honour then takes up the narrative. He said "When she went in, the document was on the table which must have been at least 12 feet or possibly a little more from the deceased's eyes as he lay in bed in his normal position. Then Riedel said 'This is the last Will and Testament of Mr. Gramp' and showed Sister Jeffree where to sign and she signed and left the room. She did not see the document again. I am quite satisfied to accept Sister Jeffree's evidence that while she was in the room the deceased neither spoke nor made any sign to show that he acknowledged the document as his will, and that the will remained on the table all the time she was in the room, also that neither the deceased nor Riedel signed the document while she was in the room".

The authorities show that for a will to be properly attested the witnesses must both sign it after the deceased has either signed or acknowledged the will. It could possibly be inferred from Sister Jeffree's evidence that Gramp acknowledged the will after she had entered the room and therefore in the presence of both witnesses. But the difficulty is that Riedel had signed before the acknowledgment.

We were asked to draw the inference that Riedel signed after Sister Jeffree because she said that she did not notice the signature of the deceased or Riedel on the will. The will is in the handwriting of Riedel. The signature of Gramp is well above the place where Sister Jeffree signed. Her signature is immediately below that of Riedel and his description as Accountant, Tenunda. But his signature is not easy to decipher. It could easily have escaped her notice. There are numerous cases in which the Court has relied on the presumption and admitted documents to probate where the evidence of one or even both witnesses was against validity. But there were in these cases circumstances which justified the Court refusing to accept the witnesses as truthful or reliable. In the present case the learned judge has accepted Sister Jeffree as a truthful and reliable and observant person. In Harris v. Knight, 1890 15 P.D. 170, Lord Lindley said at p. 179 that the presumption in favour of due execution is not warranted where observance of the required formalities is proved, nor has it any place where, as here, such observance is disproved. The case is not one in which a Court of Appeal should try to form any opinion as to what judgment it should have given if it had seen the witnesses itself, per Lord Atkin in Powell v. Streatham Manor Nursing Home, 1935 A.C. 243 at pp. 255-256. This was the view taken by the majority of the Full Supreme Court, and in our opinion they were right.

The appeal should be dismissed with costs.