

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HPP 61 of 2019

Lekh Ram aka Lekhram
Plaintiff

v.

Isikeli Lui
Defendant

Counsel: Mr Sushil Sharma for the plaintiff
Mr F. Vosarogo for the defendant
Date of hearing: 2nd June, 2022
Date of Judgment: 12th April, 2023

Judgment

1. The plaintiff alleges that the defendant coerced his daughter Daisy Jessica Lekhram to execute her Will of 3rd July, 2018, by undue influence. The defendant is the executor under the Will. The plaintiff, in his statement of claim states that he and his de facto wife looked after her. She was admitted to Labasa hospital in May, 2017, for “*right breast tumour with anaemia secondary to bleeding*”. A mental examination revealed that she was unkempt, poor judgment and insight into her illness with paranoid delusions and auditory hallucinations. The plaintiff states that a medical report confirmed that she had a mental problem. It is further alleged that Daisy lacked understanding and testamentary capacity at the time she executed her Will. On 15th April, 2019, Daisy passed on.

2. The defendant, in his statement of defence of states that Daisy did not live with the plaintiff and his wife, nor was she cared by them. She was ill, but was of sound mind. She obtained independent legal advice and issued instructions for her Will on her own without undue influence and pressure from him. She had sound mental capacity to make decisions. The defendant seeks an order declaring that her Will of 3rd July, 2018 be declared her last Will.
3. The plaintiff in his reply to the statement of defence states that Daisy was residing next to his house. The defendant induced and took her under false promises to depose her Will in his favour.

The hearing

PW2

4. The plaintiff, (*PW2, Daisy's father*) in evidence in chief said that Daisy's biological mother passed away in 2003. He took full care of her. He lived in Bulileka. Daisy lived alone 50 meters away. He admitted her to hospital in 2017. She suffered from breast cancer and mental illness. After she was discharged from hospital in July,2018, she stayed with the defendant for 3 to 4 days. The defendant influenced her to go to his house. *PW2* said that it was a total lie that the defendant and his wife looked after her then or at any other time. He was very close to Daisy. He gave her a house purchased by him and his former wife. The defendant's wife lied to the Doctor that she went to stay with the defendant, as he was not looking after her. He never had any problem with her. She was not better after being discharged. She was alright when she took medication.
5. In cross examination, he said that he remarried in 2010. Daisy and the defendant were first cousins. They knew each other for a lifetime. He did not talk much with his other daughter, Clarissa. The defendant, uttered "*big lie(s)*" that he, as a caring cousin took care of her at her home, when they found her unkempt, foul smelling, bleeding and hungry and also in hospital, since he did not look after her. His went daily in his wheel chair to see her. He obtained a medical report regarding Daisy from Labasa hospital. It transpired that Daisy had obtained a DVRO against his wife. On 3rd July, 2018, Daisy had changed her primary caregiver from him to the defendant.

It was put to PW2 that he discharged her from hospital against medical advice, as testified by PW1, (*Dr Fareena Fatima, Medical Officer, Psychiatry, Labasa hospital*). He replied that Daisy wanted to be discharged, as she was bored in hospital and wanted to come to his home, but the defendant took her to his house.

6. In re-examination, PW2 said that he together with his wife and mother were frequently in touch with Daisy every morning, mid-day for long periods and long nights till 1 am. The foul smell was due to her sickness. She could not bathe.

The medical evidence

7. PW1 said that Daisy was first admitted to the Stress ward on 15th June, 2018. She saw her on the 18th. She conducted a mini mental status examination- a test on her cognitive abilities. She produced her report. She was noted to be unkempt, foul smelling with bleeding of her right breast. She was disheveled. She had poor judgment and insight into her illness with paranoid delusions that her breast mass was due to witchcraft and someone pulling out her breasts. It was essentially a tacit hallucination, commonly held view by a lot of the public that the disease was due to witchcraft. She was assessed as paranoid schizophrenia. PW1 said that she commenced her on Haloperidol, 5 mg tablets. She refused to have surgery, as the surgical team advised her that the tumour was not cancerous and she had no one to care for her. Her father had signed her outpatient against medical advice on 15th May, 2017, and undertook the responsibility to give her medications and bring her back for reviews. She was discharged on 27th June, 2018.
8. Daisy came for a review on 3rd July, 2018. She told her that she lived with her grandmother and then moved in with her cousin, the defendant. Her father and his wife had gone into her house and took her lease documents, nailed her doors and refused to give her keys back. She reported the matter to the Police and got her keys back, but the lease documents were still with him. She decided to exclude her father as primary carer and changed the primary care notification. She showed an improvement in her psychiatric state. She was advised by the surgical team of the pros and cons of surgery. She did not want surgery. She improved with medication. From 25th June to 3rd July, 2018, a person can definitely improve.

9. In cross examination, PW1 said that she saw Daisy multiple times, (at least 6) till her discharge on 27th June,2018. She came back on 3rd July,2018. She was on antipsychotics, which helped her to regain a better perception of her reality. She did not refuse to take antipsychotics nor blood transfusions. She appeared neatly dressed, calm, cooperative and in a good mood. Her speech was normal and relevant. She denied any auditory or visual hallucinations. She did have delusions on the cause of her breast tumor in that she felt it was caused by witchcraft. However, she had good judgment on self preservation. She agreed to continue to take medication under supervision and came back to clinic later. According to her carer, Daisy was sleeping well and her appetite was good. She had been taking her medications. PW1 said that generally they ask the carer of the patient. They did not notice any unusual behavior like laughing or talking to herself. PW1 said that the report she produced was “*absolutely*” not a report on Daisy’s mental capacity. It was merely presented as her treatment plan.

10. In re-examination, PW1 said that on 3rd July,2018, she found Daisy relevant. She did not display any obvious symptoms of unusual behavior. She was calm and cooperative. She spoke clearly and logically, except for her delusion of someone pulling her breast.

DW1

11. The defendant, (DW1) said that Daisy was his first cousin. Both of them attended the same schools simultaneously. He lived in Vunivau. In 2017 and 2018, he took food to her every two days. She was usually alone. Neither her father nor his wife were there when he visited. DW1 said that he took charge of care of Daisy in 2018. He took food for her every 2 days, cleaned her place and convinced her to go to hospital. His wife and mother in law also took care of her. Daisy was discharged from hospital, as her father had asked for an early discharge. On 3rd July,2018, Daisy changed her primary caregiver. DW1 said that he was the only one looking after her. He did not influence her regarding her deposition in her Will. After 3rd July,2017, she spoke once about her Will. She did not appear to be confused over her Will.

12. Between 2017 and 2019, Daisy and her father were not in good terms. Even when she was admitted, she informed the Doctors and nurses that she does not want to see him. She hated her stepmother. There was a DVRO against her stepmother.
13. DW1, in cross examination said that he dropped Daisy at the Mobil Station Service. She requested that she goes alone to Gibson & Co. He waited for her in his vehicle. He was not present when the Will was signed and witnessed at Gibson & Co on 3rd July,2018. Daisy gave instructions regarding her Will to Mr Ajitesh of Gibson & Co. He was able to look after her as he worked as an Electrician at home. His wife was a Manager at Chicken Express. Daisy always wanted to go back to her house in Bulileka. She gave him Power of Attorney.
14. In re-examination, he said that a Police Report was not lodged against him alleging that he forced Daisy to sign her Will.

The determination

15. The plaintiff challenges Daisy's Will of 3rd July,2018, on the grounds that she did not have testamentary capacity at the time she executed her Will and the defendant exercised undue influence and coerced her into executing same.
16. The defendant seeks that the Will of 3rd July, 2018, be declared her last Will.
17. ***TRISTRAM AND COOTE'S PROBATE PRACTICE***, (32nd Ed) at pg 852 provides :

Onus of Proof

The onus of proving that the will propounded was executed as required by law is on the claimant or party propounding it. The onus is a shifting one. It is for the person propounding the will to establish a prima facie case by proving due execution. If the will is not irrational, and was not drawn by the person propounding it and benefiting under it, the onus is discharged unless or until, by cross-examination of the witnesses, or by pleading and evidence, the issue of testamentary capacity or want of knowledge and approval is raised. The onus on these points is then again on the person propounding. As to other allegations the onus is, generally speaking, on the party making them. (emphasis added)

18. **Halsbury's Laws of England**,(4th Ed) Vol 17(2) at para 304 states:

Presumption of due execution. The principle omnia praesumuntur rite esse acta [1] applies where the will is regular on the face of it, with an attestation clause and the signatures of the testator and witnesses in their proper places [2]. This presumption of due execution applies where there is a proper attestation clause, (footnotes omitted)

19. I find that Daisy's Will of 3rd July,2018, is regular on the face of it with an attestation clause, witnessed and duly executed. The Will complies with the law relating to last wills.

20. The plaintiff contends that Daisy did not have testamentary capacity at the time of executing her Will. PW2 said that she had a mental problem and used to talk to herself and laugh.

21. **TRISTRAM AND COOTE'S PROBATE PRACTICE**,(*op.cit*) at pg 863 cites the following passage as annotated by the Court of Appeal in **Sharp v Adam**,[2006] EWCA Civ 449 as to the test as to "testamentary capacity" :

"It is essential to the exercise of such a power that a testator [a] shall understand the nature of the act and its effects;[b] shall understand the extent of the property of which he is disposing;[c]shall be able to comprehend and appreciate the claims to give effect; and with a view to the latter object;[d] that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural facilities - that no insane 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".(footnotes omitted)

22. The plaintiff called Dr Fatima, the Medical Officer, Psychiatry from Labasa hospital to support his contention that Daisy did not have testamentary capacity.

23. Dr Fatima said that when she reviewed Daisy on 3rd July,2018, she found her calm, cooperative and in a good mood. She was neatly dressed. Her speech was normal and relevant. She did not have any auditory or visual hallucinations. She was relevant and did not display any obvious symptoms of unusual behavior. She spoke clearly and logically. She did have delusions on the cause of her breast tumor in that she felt it was caused by witchcraft. She had good judgment on self preservation. Daisy was on medication and showed improvement from 25th June to 3rd July,2018. According to her carer, Daisy was sleeping well and her appetite was good. She had been taking her medications. Dr Fatima said that generally they ask the carer of the patient. They had not noticed any unusual behavior like laughing or talking to herself. She agreed to continue to take medication under supervision and come back to clinic later.
24. Dr Fatima said that her report was “*absolutely*” not a report on Daisy’s mental capacity. It was merely her treatment plan.
25. I find that there is nothing to suggest that cancer of her breast had affected her mental state. The delusion of someone pulling her breast due to witchcraft was according to Dr Fatima, a common delusion held by a lot of the public.
26. In my judgment, the medical evidence establishes that Daisy was capable of making her own rational decisions on 3rd July,2018, and had testamentary capacity when she executed her Will. She was of sound mind and deposition when she executed her Will on that day
27. On the contention of undue influence, PW2, in evidence in chief said that Daisy gave him a call from hospital and said that the defendant asked her to sign her Will. He rushed to hospital and found that Daisy had already “*chased*” him out of the ward.
28. It transpired in his cross examination that he did not call the Police nor report that the defendant was trying to get her to sign her Will.

29. *Halsbury, Laws of England*, Vol 17(2) para 323 states:

What constitutes undue influence. A will or part of a will may be set aside as having been obtained by undue influence....To constitute undue influence there must be coercion; pressure of whatever character, whether acting on the fears or the hopes if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.(footnotes omitted)

30. In *Rajendra Dutt Maharaj v. Harry Ram Lochan*, (1979) 25 FLR 156 the Court of Appeal cited the following passage from *Williams & Mortimer or Executors, Administrators and Probate* (1970 Ed.) pp.161 & 162,

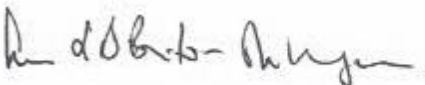
While the overall burden of providing a Will lies on those who propound it, such burden is, in general, discharged by showing that the Will was duly executed and that the testator had testamentary capacity. On these matters being shown, those alleging undue influence must prove it; for as already stated, undue influence cannot be presumed. It is not sufficient to show that the circumstances attending the execution are consistent with its having been procured by undue influence, it must be shown that they are inconsistent with any other hypothesis.(emphasis added)

31. The Court of Appeal cited the following two passages from the case of *Wingrove v Wingrove*,(1885) 11 P.D. 81 at 82:

*To be undue influence in the eye of the law must be – to sum it up in one word – coercion.
It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence.*

32. In the present case, the fact that Daisy spent 3 to 4 days with the defendant and his wife after she was discharged from hospital does not in my view, impute undue influence by the defendant. It was not disputed that the defendant was not present at Gibson & Co at the time of the Will was executed to exert undue influence.

33. Daisy spent a few days with the defendant, after she was discharged. The evidence reveals that the defendant and his wife cared for her. They always brought her food and tidied her house, as they found her unkempt and smelling offensively, as also testified by PW1.
34. In my view, the defendant's conduct in looking after his cousin Daisy throughout reflects a caring person.
35. As *TRISTRAM AND COOTE'S PROBATE PRACTICE*, (op.cit.) page 870 states :
- Appeals to affection, ties or kindred, gratitude for past services, or pity for future destitution are legitimate;*
36. In my judgment, the plaintiff has not established his contentions that Daisy lacked testamentary capacity and undue influence was exerted by the defendant.
37. The plaintiff's action to set aside Daisy's Will fails.
38. I declare the Will of 3rd July, 2018, to be the last Will of Daisy Jessica Lekhram.
39. **Orders**
- a. The plaintiff's action is declined.
 - b. I declare the Will of 3rd July, 2018, to be the last Will of Daisy Jessica Lekhram.
 - c. The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 2000.00.


A.L.B. Brito-Mutunayagam
JUDGE
12th April , 2023

