

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

HPP Action No. 15 of 2020

IN THE MATTER of the **ESTATE OF RAJA**
RAM late of Vuci South Road, Nausori, Fiji,
Deceased, Retired, Intestate

BETWEEN: **ANIL KUMAR** of 72 Aspring Ave, Manukau, Auckland, New Zealand,
Automotive Technician, **SATISH KUMAR** of 23b Church Street, Onehunga,
Auckland 1061, New Zealand, **RAJENDRA KUMAR** of 3C Omana Street,
Papatoetoe, Auckland, New Zealand, Workshop Supervisor, **ASHOK KUMAR** of
Whanganui City, Wellington, New Zealand, General Labour, and **RAJ KUMAR**
of Nukuálofa, Tonga, Managing Director.

PLAINTIFFS

A N D: **SURSATI** of Vuci Road, Nausori, Fiji, Domestic Duties

DEFENDANT

Before: Mr. Justice Thushara Rajasinghe

Counsel: Ms. A. Singh for Plaintiffs
Mr. K. Singh for Defendant

Date of Hearing: 14th April 2025

Date of Judgment: 18th June 2025

JUDGMENT

Introduction

1. The Plaintiffs commenced this proceeding by issuing a writ of summons to challenge the validity of a Will dated 26 January 2016, which the late Mr. Raja Ram purportedly executed. The Plaintiffs contend that this Will does not represent the solemn form of Mr. Ram's final testament and seek orders to that effect. The contested will appointed the Defendant as the sole Executor and Trustee of the Deceased's estate.
2. Following the conclusion of the pre-trial process, the substantive hearing took place and ended on 14 April 2025. The Plaintiffs called four witnesses in support of their claim. The Defendant, in response, provided evidence from two witnesses, including herself. At the end of the hearing, both parties submitted their respective closing submissions. Having carefully considered the evidence presented at trial and the submissions of Counsel, I now deliver judgment in this matter.

Factual and Evidential Background

3. The six Plaintiffs are the biological children of the late Mr. Raja Ram from his first marriage. The Defendant is Mr. Ram's second wife, with whom he had two sons. Based on the pleadings and the evidence presented during the hearing, it is not in dispute that the Defendant initially became involved with the Ram family in the capacity of a nanny and housemaid. During this time, she was engaged in caring for the Plaintiffs' mother, who was in ill health. The relationship between the Defendant and the Deceased evolved when the Defendant entered into a relationship with Mr. Ram while his first wife was still alive and residing in the same household. The Plaintiffs' mother, Mr. Ram's first wife, passed away around 2011. Thereafter, Mr. Ram continued to reside in the family home with the Defendant. By this time, all six plaintiffs were living abroad.
4. According to the evidence presented by the Plaintiffs, they had arranged for one of their cousins and his family, who resided in Ba, to care for their late father, Raja Ram. However, this arrangement failed due to interference from the Defendant, who allegedly mistreated the

cousin and his family, forcing them to leave. Subsequently, the Defendant left for New Zealand without informing Mr. Raja Ram and allegedly demanded money from their joint bank account as a condition for her return.

5. Kamla Priya Dharshani, Raja Ram's daughter and the Plaintiffs' first witness, flew back to Fiji from Hawaii—where she has been living since the early 1990s—after hearing her father expressed concerns about potentially losing all his assets to the Defendant. Kamla stayed with her father for two weeks and then arranged for the second Plaintiff, Shatish Kumar, to come to Fiji and care for him. Shatish stayed for a few days before the Defendant returned to Fiji. Despite her alleged demand, no money was given to facilitate her return.
6. While the Defendant was in New Zealand, Raja Ram executed a Will on 9 September 2011, appointing Shatish Kumar as the sole Executor and Trustee. This Will was prepared and executed by Mr. Thirath Sharma, a solicitor.
7. Upon the Defendant's return to Fiji, all three of Raja Ram's children testified that she persistently obstructed their efforts to communicate with their father. She allegedly intervened in their phone calls and limited their opportunities for private interaction. Raj Kumar, the third Plaintiff and a frequent visitor due to his business trips from Tonga, testified that the Defendant was always nearby during his visits, making conversations with his father difficult. Between 2011 and 2019, Kamla made several visits to Fiji but asserted that she was never able to properly reconnect with her father because of the Defendant's interference.
8. The Plaintiffs later discovered that Raja Ram had married the Defendant around 2014 but had kept it secret for over a year. He eventually confided in Raj Kumar, claiming he had been tricked into the marriage under the false promise made by the Defendant and her son so that it would help him obtain Permanent Residency in New Zealand. This promise, according to him, was never fulfilled.

9. Raja Ram passed away on 21 January 2019. At his funeral, the Defendant became aggressive toward the Plaintiffs and claimed she had a new Will made in her favour. Her son displayed a photograph of this Will, stored on his phone.
10. Mr. Thirath Sharma testified that Raja Ram visited his office on 26 January 2016 and requested a new Will, revoking the 2011 Will. Mr. Sharma noted that Raja Ram appeared well and coherent, stating that he wished to leave something for the Defendant out of concern that his children would not support her after his death. Mr. Sharma drafted and executed the new Will accordingly.
11. The Plaintiffs do not dispute the existence of the 2016 Will but assert that it was executed through the Defendant's undue influence. While the original statement of claim alleged senile dementia and fraud, the Plaintiffs' Counsel clarified in her opening address that the challenge was based solely on undue influence, and the hearing was limited to this issue.
12. The Plaintiffs seek a declaration that the 2016 Will is invalid on the grounds of undue influence and non-compliance with the Wills Act, asserting it does not reflect the true intentions of the Deceased. Curiously, they do not seek to validate the 2011 Will but instead ask the Court to declare that Raja Ram died intestate. This raises a significant legal question: whether a Court can declare a person died intestate despite the existence of a Will. However, the Court deferred ruling on this issue for determination in a more suitable case.
13. In her defence, the Defendant denied obstructing communication between Raja Ram and his children. She explained that the trip to New Zealand and the subsequent marriage were initiated by Raja Ram himself, aiming to secure a New Zealand residency visa. She firmly denied any undue influence in making the 2016 Will in her favour.

Principle of Undue Influence

14. With the evidential background outlined, the next step is to consider the legal principles relevant to a dispute of this nature.

15. Section 4 of the Wills Act states that anyone over the age of 18 has the legal capacity to make a Will. Section 6 outlines three key requirements for the valid execution of a Will, one of which is the signature of the Testator. This signature must be made with the intention of giving effect to the document as the Testator's Will.
16. The leading authority on testamentary capacity is the well-known judgment of Cockburn CJ in **Banks v Goodfellow (1870) LR 5 QB 549**. The New Zealand Court of Appeal, in **Woodward v Smith [2009] NZCA 215**, succinctly summarized the principles established in **Banks v Goodfellow**. In that case, Baragwanath J held that:
- i) *Because it involves moral responsibility, the possession of the intellectual and moral faculties common to our nature is essential to the validity of a will*
 - ii) *It is essential to the exercise of such a power that a testator:*
 - a) *understands the nature of the act and its effects; and also the extent of the property of which he is disposing;*
 - b) *is able to comprehend and appreciate the claims to which he ought to give effect;*
 - c) *be free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; 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.*
 - iii) *Unsoundness of mind arising from want of intelligence caused by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement is equally cause of incapacity.*
But
 - a) *though the mental power may be reduced below the ordinary standard,*

yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.

- b) It is enough if the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.*
- iv) It is not necessary that the testator should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms.*
- v) In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.*
- vi) A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business.*
- vii) Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all;*
- viii) Nor must the testator possess such capacity to the same extent as previously. His mind may have been in some degree weakened, his memory may have become in some degree enfeebled; and yet there may*

be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament.

ix) But if that standard is not met, he will lack capacity.

17. The primary consideration of undue influence is whether any form of pressure has overridden the will of the Testator. Not all influences are unlawful. Affection, kinship, gratitude for past services, pity for future destitution, *etc*, are not necessarily illegitimate influences. However, any type of threat or pressure that leaves the Testator without the courage to resist or that overwhelms his judgment, discretion, or wishes constitutes undue influence. (*vide; Green v Green, [2017] 2 NZLR 321 para 36*).
18. The principle of undue influence is founded in unconscionability, where equity asserts that it is unconscionable for an individual to rely on a transaction that results from overpowering the Will of the person who executed that transaction. Thus, the key requirement of undue influence is the absence of free will, rather than the malevolent intent or unconscionable motive of the person applying the pressure or influence. (*vide; Green v Green, [2017] 2 NZLR 321 paras 39 - 42*)
19. In order to satisfy that the undue influence has been proven, the Court must evaluate the evidence as a whole so as to satisfy whether the circumstances raise a more probable inference in favour of the alleged undue influence. (*vide; Green v Green, [2017] 2 NZLR 321 paras 47*).

Evaluation of the Evidence

20. Having considered the relevant legal principles and approaches in assessing the principle of undue influence, I shall now proceed to evaluate the evidence presented during the hearing to determine whether the late Raja Ram was subjected to undue influence by the Defendant when he executed the last Will dated 26th January 2016.

21. It is evident that certain aspects of the evidence provided by the Plaintiffs' witnesses constituted hearsay evidence. Specifically, incidents concerning the failed arrangement of the cousin from Ba to care for the late Raja Ram, as well as the Defendant's visit to NZ. Most of the time, the three children of the late Raja Ram, who provided evidence, were not present in Fiji to observe the alleged conduct of the Defendant. They predominantly heard about the conduct of the Defendant from their late father, who is now deceased and unable to give evidence. The Court invited the learned Counsel for the parties to address the issue of how to evaluate the hearsay evidence in their respective closing submissions. Unfortunately, I find that neither the learned Counsel for the Plaintiff nor the Defendant provided any helpful submissions on this issue.
22. Section 3 (1) of the Civil Evidence Act 2002 states that hearsay evidence should not be excluded. Section 4 of the Civil Evidence Act stipulates the procedure for giving notice to adduce hearsay evidence. However, the failure to provide such a notice does not affect the admissibility of hearsay evidence, but the Court will consider it when considering the weight of such hearsay evidence under Section 6 of the Act. Section 6 of the Civil Evidence Act provides the factors that could be taken into consideration when weighing the hearsay evidence. Section 6 of the Act states:

In estimating any weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following—

- a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;*
- b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;*

- c) *whether the evidence involves multiple hearsay;*
- d) *whether any person involved had any motive to conceal or misrepresent matters;*
- e) *whether the original statement was an edited account or was made in collaboration with another or for a particular purpose,*
- f) *whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.*

23. The Supreme Court of Fiji in **Mobil Oil (Australia) Ltd v Digitaki [2010] FJSC 4; CBV0008.2008S (12 October 2010)** has discussed the scope and the boundaries of Part 2 of the Civil Evidence Act, with special focus on Sections 4 and 6 of the Act. In **Mobil Oil (Australia) Ltd v Digitaki (supra)**, the Supreme Court was asked to answer the following question certified by the Court of Appeal, that:

"The question we certify to be of significant public importance is as follows:

WHETHER on the proper construction of Section 6 of the [Civil Evidence Act 2002](#), the Trial Judge must record all considerations relevant to weighing of hearsay evidence or whether it is sufficient for the Trial judge to have the considerations in mind when assessing the weight that should be given to the evidence but to state what those considerations were."

24. Having outlined the historical development of hearsay evidence in civil proceedings since the 1938 Evidence Act in the United Kingdom, the Supreme Court explained the scope of Section 6 (a) to (f) of the Act, where it observed:

34. *It is clear that our domestic section 6 of the Evidence Act 2002 Cap 44 is the equivalent of section 2(1) of the Evidence Act 1938. This is the key section which serves to keep hearsay evidence out of finding the facts in situations when the policy for the hearsay rule at common law must be the dominant influence in the particular case. At the heart of most civil disputes is a clash of evidence as to what happened or what was said by one person to another. The principal means of resolving such disputes is the giving of direct evidence by the protagonists so that demeanor can be observed and the witness exposed to cross examination by counsel for the other parties.*

35. *At the same time, it serves to emphasize that the history since 1938 is a history where the evidence at the edge of the factual framework of disputes should be agreed or made the subject of statements. Where every fact at the edge must be proved by direct evidence in court the cost of bringing non-controversial witnesses to court becomes prohibitive and the proceedings become longer and with disproportionate costs.*

36. *The elements of section 2(1) of the Evidence Act 1938 contained in section 6 of the Evidence Act 2002 are firstly in the instruction that the court must have regard to all factors going to reliability or otherwise. Secondly, they are in particular (b) concerning whether the hearsay statement is contemporaneous to the events described. Thirdly it is in particular (d) about having regard to motives or incentives that a person may have to conceal or misrepresent matters.*

37. *Particular (a) requires assessment as to whether it would have been reasonable and practicable for the maker of the statement to attend and give evidence. Particular (f) requires an assessment as to whether the use of hearsay is a device to prevent proper evaluation of its weight. In our opinion (a) and (f) are concerned with the same factors. Saying positively that a witness whose evidence is controversial should attend is not much removed*

from saying negatively that where a witness's evidence is controversial but vulnerable to cross examination they should not be able to avoid being cross examined.

38. Particular (c) goes to the increased unreliability where there is secondary or multiple hearsay. Particular (e) is new in the 1995 Evidence Act and again relates to motives to conceal or misrepresent matters. Particular (f) requires the judge to be on guard for the signs of concealment on misrepresentation in action.

25. The Supreme Court subsequently addressed the aforementioned certified question posed by the Fiji Court of Appeal, stating that if the hearsay evidence pertains to uncontroversial facts, the Judge should admit it and accord it weight. Conversely, if the hearsay evidence is central to the dispute or controversial, it is necessary to provide reasons justifying its admission, in accordance with the factors outlined in Section 6 of the Act (*vide Fiji in Mobil Oil (Australia) Ltd v Digitaki (supra) para 47 and 48*).
26. In her evidence, Kamla stated that their cousin from Ba informed her that the Defendant was making it difficult for them to live with the late Raja Ram. This arrangement was made after their mother's death. The Plaintiffs attempt to establish through this incident that the Defendant intended to isolate their late father from others and ensure that he remained under her control. There is no discernible reason preventing the Plaintiffs from producing the cousin who made those allegations against the Defendant. Consequently, the Court should not give significant weight to this evidence regarding the allegations made by the cousin.
27. The Defendant's visit to New Zealand and her alleged demand for FJD 40,000, claiming it was needed for her return, was one of the central aspects of the Plaintiffs' allegations against her. According to the Plaintiffs, the Defendant suddenly left their home, appeared in New Zealand, where she stayed with her son, and demanded FJD 40,000 to come back. However, the Plaintiffs failed to provide evidence that their late father held such a substantial sum in

his joint bank account. She returned less than two months later and continued to reside with the late Raja Ram.

28. Although Kaala visited her father after hearing that the Defendant had left him unattended and that he was anxious about losing his assets, she did not make any concrete plans or solutions to protect him from the Defendant upon her return. The Plaintiffs simply departed, leaving their late father and the Defendant alone at home. According to Kamala, she called her late father twice daily while the Defendant was in New Zealand, but the frequency of these calls diminished once the Defendant returned to be with her late father.
29. Kamla made several trips to Fiji between 2011 and 2019, but she spent only a few days with her late father and did not take any action to save him, despite the possibility that he was living under the influence of the Defendant and lacked the freedom to exercise his own free will and volition. Raj Kumar affirmed during his testimony that there was a discussion about applying for Permanent Residency in New Zealand for the late Raja Ram, as the Defendant already had it.
30. The Defendant asserted that she went to New Zealand to apply for a Permanent Resident visa for her late husband. This was the idea of the late Raja Ram, and she went there as part of the plan. Considering that several of the late Raja Ram's children were living in New Zealand permanently, including the son he had with the Defendant, it was probable that he also wished to move to New Zealand permanently with her. Considering these reasons, I do not find any reason to accept the allegation made by the Plaintiffs regarding the Defendant's visit to New Zealand in 2011.
31. The late Raja Ram eventually married the Defendant *circa* 2014, keeping it a secret from his children. He later informed Raj Kumar during one of his visits that he had been deceived into this marriage by the Defendant and her son, who had promised him that once married, they would arrange his residence visa for New Zealand; however, they did not fulfil this promise. Raj Kumar confirmed during cross-examination that his late father conveyed this information while the Defendant was present. If the late Raja Ram communicated this

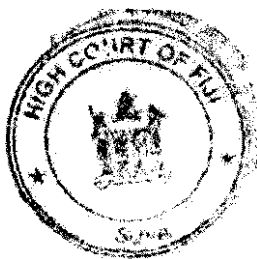
information, accusing the Defendant of deceiving him into the marriage, in her presence, the central flank of the Plaintiffs' allegation becomes redundant.

32. The issue of undue influence by the Defendant mainly stems from the allegation that she did not allow the late Raja Ram to speak freely, as she was always nearby, preventing him from communicating freely with his children. The Plaintiffs assert that the Defendant's behaviour prevented the late Raja Ram from informing them about the second last Will he was compelled to make by the Defendant.
33. If the Defendant had such influence, preventing the late Raja Ram from communicating important issues of his life with his children, as claimed by the Plaintiffs, then he would obviously not be in a position to blame the Defendant in front of her, alleging that she tricked him into marrying her. On the other hand, if he did, then he could have informed the Plaintiffs that the Defendant unduly influenced him to make the last Will on the 26th of January 2016, despite her continuous presence during any of the conversations he had with the Plaintiffs.
34. Considering the reasons outlined above, I find that the Plaintiffs have failed to satisfy that the Defendant unduly influenced the late Raja Ram, preventing him from communicating and connecting freely with his children.
35. Mr. Sharma, the solicitor who drafted and executed both the last Will of the late Raja Ram, explained in his evidence that the late Raja Ram visited his office alone on 26 January 2016 and requested the execution of a new Will. According to Mr. Sharma's testimony, it was evident that the late Raja Ram knew and understood the implications of executing another Will. He informed Mr. Sharma that he wished to leave something to the Defendant, as he was concerned that she would not be adequately cared for upon his death.
36. As I previously outlined, the late Raja Ram's concern regarding the Defendant's potential future destitution does not constitute undue influence that undermined the free will, discretion, and wishes of the late Raja Ram. (*vide; Green v Green*, [2017] 2 NZLR 321 para 36).

37. In her evidence, the Defendant explained that she was not aware of the second last Will until it was executed. Her late husband then informed her about it. She denied the Plaintiffs' allegation that she always prevented her late husband from communicating and connecting with his children freely. The property where the late Raja Ram lived with the Defendant and his children was actually given to him by the Defendant's father, though it was not clear whether it was a gift or a sale.
38. The Defendant made a counterclaim in her statement of defence, seeking an order for FJD 6000 as legal costs. However, the Defendant adduced no evidence to establish her claim during the hearing.
39. In conclusion, I find that the Plaintiffs failed to establish that the last Will executed on the 26th of January 2016 was made under undue influence by the Defendant.

Final Orders:

- i) The Plaintiffs' claim in the Statement of Claim is dismissed.
- ii) The Defendant's counter claim is dismissed.
- iii) The Will dated 26th of January 2016 is valid and admitted by the Court.
- iv) The Cost of this action is summarily assessed at FJD 2500.



A handwritten signature in black ink, consisting of stylized initials and a surname.

.....
Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

18th June 2025

Solicitors

Kohli & Singh for Plaintiffs

K. S. Law for Defendant.