BIMLA WATI (f/n RAM ADHAR) v PREM CHAND (son of SHIV NARAYAN alias SHIU NARAYAN) (HPP9 of 2004)

HIGH COURT — CIVIL JURISDICTION

SINGH J

27 June, 6, 7 August 2007

Succession — wills and codicils — application to declare will invalid — whether deceased had mental capacity to understand nature and extent of property and claims when will executed — will not executed in accordance with provisions of Wills Act.

The deceased owned a freehold land. The deceased's first marriage begot eight children including the Defendant. The deceased married the Plaintiff a year after the death of his first wife. While admitted at a hospital, the deceased executed a will. The deceased appointed the Defendant as executor of the will and trustee. The deceased absolutely gave all his property to his grandson.

The Plaintiff applied for declaration of invalidity of the will. The Plaintiff gave evidence that the deceased was in a serious condition when he was admitted to the hospital and that he survived on intravenous drips. The Plaintiff alleged that at the time of execution of the will, the deceased suffered total loss of memory. She alleged that the deceased was unable to comprehend matters and the extent of his property and claims to which he should give effect.

Held — (1) The court found that the will had been executed in accordance with the requirements of the Wills Act. The deceased and the two attesting witnesses all appear to have executed their signatures in the presence of one another.

(2) The court found, however, that there was grave doubt as to the mental capacity of the deceased at the time of execution to understand the nature and effect of the document the deceased was executing.

(3) The court declared that the will of the deceased was invalid and ordered that the grants of probate in favour of Defendant be revoked.

Application granted.

Cases referred to

J J Bishop v P J O'Dea and Anor [1999] NZCA 239; *Public Trustee v Bick* [1973] 1 NZLR 301; *Watkins v Public Trustee* [1960] NZLR 326, applied.

Banks v Goodfellow (1870) LR 5 QB 549; *Peters v Morris* (CA99/85, 19 May 1987, unreported); *Ranby v Hooker* (Court of Appeal, Wellington, CA 172/96, unreported); *Re White* [1951] NZLR 393; *Victor Janson Ho v Kenneth Michael Ho* ABU 6/1996, cited.

Fulton v Andrews (1875) LR 7 HL 448; [1874–80] All ER Rep 1240, considered.

V. Maharaj for the Plaintiff

W. Hiuare for the Defendant

Singh J.

Background

Shiu Narayan lived at 40 Volavola Road, Tamavua. He owned freehold land comprised in Certificate of Titles 16819. He was married to Ram Rati. She begot him eight children being six sons and two daughters. All the children are over 21 years of age. Ram Rati died in 1990. After Ram Rati's death Shiu Narayan married Bimla Wati the Plaintiff, on 4 March 1991. There are no children from this latter union.

On 2 September 2002 Shiu Narayan was admitted at CWM Hospital, Suva. He executed a will on 6 September 2002. In that will he appointed his son Prem Chand as executor and trustee and gave all his property to his grandson Ravin Chand son of Prem Chand absolutely. He died 6 days later while still admitted at CWM Hospital.

Plaintiff's claim

The legal wife Bimla Wati who was not given anything is challenging the validity of this will. She alleges that at the time of the execution of the will the deceased suffered total loss of memory and was unable to comprehend matters and the extent of his property and claims to which he should give effect. Further she alleges the will was not executed in accordance with the provisions of the Wills Act.

The mere fact that a person is admitted to hospital or that they die soon after making a will does not render them incapable of making or executing a will. It is more one's mental capacity to fully comprehend the extent of one's property and one's obligations at the time of making of the will which is of significance.

Evidence — Regarding deceased's condition

It is not denied by anyone that the will was executed while the deceased was admitted in hospital. The cause of death was chronic obstructive airway disease. His son Vijay Chand testified that he visited his father a few days before his death. He did not specify the date. However, he said that his father could not recognise him or remember his name. He said that he saw ink on his father's thumb so he presumably visited his father after the execution of the will.

Lila Wati, the daughter of the deceased but who lives some 6 miles away stated she visited her father almost every day in hospital. She noticed that her father could not recognise anyone as his condition deteriorated after admission.

Bimla Wati the wife stated that when her husband was admitted to the hospital, he survived on intravenous drips. Opposed to this piece of evidence is the evidence of Ravin Chand the sole beneficiary who stated that in the mornings he would take food to his grandfather and he ate it. Bimla Wati also told the court that she was in the hospital beside her husband when the will was signed and her husband did not open his eyes and even if he did he could not recognise people.

Opposed to the Plaintiff's evidence is the evidence of the beneficiary Ravin Chand who stated that the deceased could talk and wanted to make a will. He also said his grandfather could recognise people. Sanil Deo one of the attesting witnesses also stated that the deceased at the time of the execution of the will could talk and said the will was all right before the deceased signed the will.

The evidence as it stands shows that just over 11 years prior to his death the deceased was of sound mind to marry the Plaintiff. There is no evidence of long term mental illness or forgetfulness; the only disease he suffered from was asthma which is not a mental illness. However the deceased had been admitted to hospital for 4 days prior to the execution of the will and he remained in hospital for 6 further days till his death. His condition must have been sufficiently serious for doctors to admit him in the hospital. I accept Bimla Wati's evidence that her husband was surviving on drips. She spent her time or most of the time beside his bed. The hospital folder confirms this fact. She spent most of her time beside her husband; she would have noticed how he was being fed far better than those who only made fleeting visits to the hospital. If the deceased ate, I am certain in my mind that she would have assisted him eat his food seeing that he lay on the bed.

Testamentary capacity — Legal principles

On the face of it, the will has been executed in accordance with the requirements of the Wills Act. The deceased and the two attesting witnesses all appear to have executed their signatures in the presence of one another. The law on this aspect is well summed up by the New Zealand Court of Appeal in *Re White* [1951] NZLR 393 at 409 as follows:

> If a will rational on the face of it is shown to have been executed and attested in the normal manner prescribed by law it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counter-balance that presumption, the decree of the court must be against its validity unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it.

The above proposition of law was applied by the Court of Appeal in *Victor Janson Ho v Kenneth Michael Ho* ABU 6/1996.

Of greater assistance is the New Zealand Court of Appeal decision in *J J Bishop v P J O'Dea and Anor* [1999] NZCA 239 where legal principle applicable and the approach to be taken when testamentary capacity is an issue is set out step by step. Those legal principles are:

(1) In probate proceedings those propounding the will do not have to establish that the maker of the will had testamentary capacity, unless there is some evidence raising lack of capacity as a tenable issue. In the absence of such evidence, the maker of a will apparently rational on its face, will be presumed to have testamentary capacity *Re White* [1951] NZLR 393 and *Peters v Morris* (CA99/85, 19 May 1987, unreported).

(2) If there is evidence which raises lack of capacity as a tenable issue, the onus of satisfying the Court that the maker of the will did have testamentary capacity rests on those who seek probate of the will: *Public Trustee v Bick* [1973] 1 NZLR 301 and *Peters v Morris* (supra).

(3) That onus must be discharged on the balance of probabilities: *Watkins v Public Trustee* [1960] NZLR 326. Whether the onus has been discharged will depend, amongst other things, upon the strength of the evidence suggesting lack of capacity.

(4) In order to establish capacity, when in issue, those seeking probate must demonstrate the maker of the will had sufficient understanding of three things:
   (a) that he or she was making a will and the effect of doing so ("the nature of the act and its effects")
   (b) the extent of the property being disposed of
   (c) the moral claims to which he or she ought to give effect when making the testamentary dispositions.

   These three matters derive from the leading authority of *Banks v Goodfellow* (1870) LR 5 QB 549 as cited by this Court in *Ranby v Hooker* (Court of Appeal, Wellington, CA 172/96, 16 September 1997, unreported) (16 September 1997) and in *Peters v Morris* (supra).

(5) If incapacity before the making of the will has been established, those seeking probate must show the will was made after recovery or during a lucid interval. In such a case the will is regarded with particular distrust and there is, in the first instance, a strong presumption against it, particularly if it displays lack of moral responsibility in the nature of the dispositions: 4 Halsbury's Laws of England, Vol 17, at para 904.

Instructions for contents of the will

The matter of concern in the case is the manner in which instructions were given. Prem Chand the trustee testified that he had nothing to do with the making of the will. However, the attesting witness stated that Prem Chand was outside the hospital inside the car which brought him and Mr Maharaj the solicitor to hospital. Prem Chand tried to distance himself from the making of the will saying he did not know how this will came to be made. The attesting witness further stated that it was Ravin Chand and Ravin Chand's father namely Prem Chand came to their law office asking to have a will made and gave instructions.

The instructions for the making of the will of Shiu Narayan were given by either one or possibly two persons neither of them the testator. The result was a will in which the father became the trustee and the son became an absolute beneficiary. Further at the time of execution of the will the beneficiary was present in the hospital. The choice of solicitor too was certainly not that of the testator.

In considering the case one cannot ignore the existence of an earlier will of the deceased dated 19 March 1986 in which he gave his former wife a life interest and his two sons Abhay Chand and Dharmend Chand became ultimate beneficiaries. Both of these sons have been disinherited in the latter will but no reason has been advanced for this change in attitude.

The deceased had eight children and a wife. Although the wife may only have lived with him for 11 years, there is no evidence that she had been unkind to the deceased. She stood by his bedside in time of crisis. There is no evidence that the couple's marriage was unhappy or unstable. None of the step children who testified including Prem Chand spoke of any hostility between the Plaintiff and the deceased. She apparently had been accepted as step mother by the children. Given this situation would a person in the right frame of mind exclude the wife from the matrimonial property especially in a case where she is illiterate and has nowhere to go.

In *Fulton v Andrews* (1875) LR 7 HL 448; [1874–80] All ER Rep 1240 the court held that those who are instrumental in having a will prepared and take benefit under the will bear the onus to show that the transaction was proper. Lord Hatherley at LR 7 HL 471–2 expressed his opinion as follows:

> There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

Ravin Chand in his evidence stated that the deceased told him to keep the grandmother meaning the Plaintiff with him and let her stay there and not to chase her from the house. This points in the direction of the testator wanting security of shelter for his wife during her life time. Yet the will is absolutely silent on this.

Mr Hiuare submitted that the wife had agreed to stay with Ravin Chand and his father and that is why no provision in the will has been made for her.

I treat Ravin Chand's evidence with a great deal of reservation. He has gained under the will. His evidence too changed. He initially stated in cross-examination that he paid for the mortgage on the property. This property had been bought by the deceased in 1977 and a mortgage given as security for payment of purchase price. When told that the property was bought in 1977, when he was only about 7 years old, he changed his story to say he began payments when he turned 20. He was again caught as the time for payment of mortgage debts was 3 years from 1977. He then stated that he got the money from his father to pay the debt. However around about 1977 the father's previous convictions show that his father was in prison for at least 6 months from August 1977.

I do not believe either Prem Chand or his son Ravin Chand when they say the Plaintiff left the matrimonial house of her own accord. I am persuaded on balance of probability that the Plaintiff soon after her husband's death was forced out of the house and then they rented it out. It extends the level of credulity a bit too far when the Defendant asserts that the Plaintiff willingly abandoned a secured shelter to go out and beg for shelter. She is presently staying with relatives while the Defendant rents out the premises and keeps the proceeds. It needed a court order for the Defendant to part with rental proceeds to the Plaintiff.

The Plaintiff says that at the time of the execution of alleged will, she was told that the purpose of document was to save the property from the City Council, Prem Chand told the court that the arrears of city rates was $17,000. Prem Chand has his own house on the property as well. That would be a good reason to save the property as loss of property because of rates would be a loss to him as well. Whatever was said to the Plaintiff about council seizing property would be within the hearing distance of the deceased. I find that seizure of property by council was mentioned to the Plaintiff.

As far as the signature of the attesting witness is concerned, I cannot say whether it is Mr Joseph Maharaj's or not. There is no expert evidence on handwriting. Joseph Maharaj's photo was shown to the Plaintiff. Her evidence was that the person in the photo was not one of the witnesses. Her main reason for saying that is that the person who signed on the will had no beard. I do not know when Mr Maharaj's photo was taken. It may be that at the time of the execution of the will he had no beard. People often grow beards and also cut them. Hence I cannot attach any weight to this piece of evidence in the absence of evidence that the photo was taken at the time of the execution of the will.

The Court of Appeal in *Ho* stated that before a will can be admitted to probate, "it must be shown that the testator was a person of sufficient mental capacity; that in the absence of any evidence to the contrary it will be presumed that the document has been made by a person of competent understanding; that once a doubt is raised as to the existence of testamentary capacity, an onus rests on the person propounding the will to satisfy the Court that the testator retained his mental powers to the requisite extent; that in the end, the tribunal must be able to declare that it is satisfied of the testator's competence at the relevant time, but that a will will not be defeated merely because a residual doubt remains as to that matter".

Having considered the evidence in its entirety I am left in very grave doubt as to the mental capacity of the deceased at the time of execution to understand the nature and effect of the document he was executing.

Findings of fact

My findings are that the will was signed in hospital by the deceased who was seriously sick and on drips. I also find that the deceased at the time of the execution of the will had difficulty recognising even his own family members. I further conclude that the instructions for the will were not given by the testator but by either Prem Chand or Ravin Chand or both together. Ravin Chand became the sole absolute beneficiary. I also find that the deceased was incapable of understanding and comprehending the consequences of what he was signing and in particular that his wife would have no rights to his property. I further find that Ravin Chand was present by the bedside at the time of the execution of the will and paid for its preparation.

Orders

I declare the will of Shiu Narayan father's name Latchmi Narayan dated 6 September 2002 invalid. I also order grants of probate in favour of Prem Chand to be immediately revoked. The Plaintiff is entitled to her costs. I order costs summarily fixed in the sum of $3000.

Application granted.