IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 169 of 2008

BETWEEN : **MURRE J.S. NAIDU** also known as Swamy Naidu (father's name Murri Appal Swamy Naidu also known as Appal Sami) of Samabula, Suva, Accountant.

PLAINTIFF

A N D : **NARAYANAMMA** (father's name Rangal Swamy Naidu) of Namaka, Nadi.

1ST DEFENDANT

A N D : **NARAYANAMMA** (father's name Rangal Swamy Naidu) of Namaka, Nadi, the Executor and Trustee of the estate of Murri Appalswamy Naidu also known as Appal Sami (father's name Murri Appana) late of Namaka, Nadi and in propria personam.

2ND DEFENDANT

A N D : **DHANSURJA NARAYAN** (father's name Appal Sami) who is known as Murri Appal Swami Naidu of Namaka, Nadi, School Teacher.

3RD DEFENDANT

A N D : **REGISTRAR OF TITLES**

4TH DEFENDANT

A N D : **ATTORNEY GENERAL OF FIJI**

5TH DEFENDANT

Appearances: D. S Naidu for the Plaintiff
Babu Singh & Associates for the Defendants
Date of Hearing: 05.06.2019 & 07.06.2019
Date of Ruling: 07 February 2020

RULING

INTRODUCTION

1. The plaintiff, Murre JS Naidu (**"Naidu"**), and the third defendant Dhansurja Narayan (**"Dhansurja"**) are brother and sister. They have two other brothers and five other sisters. The first defendant, Narayanamma, was their mother. She died on 31 January 2009. Their father was the late Murri Appalswamy. He died in 1969.

2. This is a tussle between brother and sister over how the assets of their parent's estate should be distributed.

3. It appears to be common ground from the pleadings that Narayanamma and Murri were co-owners of two very prime real property in Namaka in Nadi. These were, firstly, land comprised in Certificate of Title Number 6895 and secondly, land comprised in Certificate of Title Number 16654. Narayanamma held 2/3 interest in each land while Murri held 1/3 interest in each.

4. Naidu's substantive cause of action is founded on allegations that after Murri died, his 1/3 undivided interest in both lands passed to Narayanamma in her capacity as administratrix of Murri's estate. However, what Narayanamma did, in collusion with Dhansurja, was to transfer Murri's interest to herself one way or another and to sell of the lands without properly accounting to the beneficiaries of Murri's estate the portion of the proceeds of sale to which the estate of Murri is beneficially entitled.

5. Notably, Naidu alleges *inter alia* that Narayanamma and Dhansurja colluded in the mid-2000s in their various fraudulent dealings with both lands to the detriment of Murri's estate. That this allegation is pleaded is important in the preliminary issue that I am dealing with now.

WHAT AM I DEALING WITH NOW

6. Naidu's Writ of Summons and Statement of Claim were filed on 05 September 2008. At the time of course, Narayanamma was still alive. However, a little over five months after the filing of these originating processes, she passed on in January 2009.

7. After Narayanamma's passing, the dispute between brother and sister took a different turn. As I noted in my earlier Ruling (see **Naidu v Narayanamma** [2018] FJHC 298; HBC169.2008 (18 April 2018))

> Upon her death, the plaintiff would file a Notice of Motion on 17 February 2011 firstly, to inform the Court of her passing and secondly, to seek Orders to be substituted as first defendant and also as second defendant. He was seeking these Orders pursuant to his being granted Probate No. 49875 with Will attached on 28 June 2010 over the estate of

Narayanamma. The Will attached was purportedly executed on 17 December 1991 (**"1991 Will"**) by Narayanamma by affixing her left thumb mark thereon.

33. Dhansurja responded to the above Notice of Motion by filing a cross Notice of Motion on 20 March 2011 seeking Orders that she be substituted as executor/trustee of the estate of Narayanamma and, accordingly, that she also be substituted as first and second defendant. She seeks these Orders on the basis of a Will purportedly executed by the late Narayanamma on 01 April 2004 (**"2004 Will"**).

8. In this instance, what I have to determine is which of the two Wills should prevail. Once I determine this, then Naidu's case against the estate of Narayanamma and Dhansurja will continue.

1991 WILL

9. Naidu has proven the 1991 Will in common form. Notably, Narayanamma executed the said 1991 Will by affixing her left thumb mark thereon. In this 1991 Will, Naidu is the appointed executor trustee. He was given Probate No. 49875 by the High Court pursuant to the 1991 Will. As to be expected, the testamentary bequests in that Will favour him greatly.

2004 WILL

10. Dhansurja relies on a Will purportedly executed by the late Narayanamma on 01 April 2004 (**"2004 Will"**). Like the 1991 Will, Narayanamma also executed the 2004 Will by impressing her left thumbprint on the instrument.

11. As I had noted in my earlier Ruling (**Naidu v Narayanamma** [2018] FJHC 298; HBC169.2008 (18 April 2018), Naidu has proven the 1991 Will in solemn form. The onus is on Dhansurja to prove the latter 2004 Will, which if she does, would automatically revoke the earlier 1991 Will.

APPLICABLE LAW

12. A party who seeks to propound a Will bears the burden of proving it (see Lord Hanworth MR in the **Estate of Lavinia Musgrove, Davit v Mayhew** [1927] P264 at page 276[i].

13. At common law, to establish that a Will was duly executed by the testator, the executor must call one of the attesting witnesses, if any was available (**Bowman v Hodgson** (1867) 1L.RP and D 362).

14. However, the evidence of the attesting witness is not necessarily conclusive as the Court may still receive evidence in rebuttal (see **Vere – Wardale –v- Johnson and Others** [1949] P 395 cited by Mr. Justice Callanchini in **Chandra v Chandra** [2012] FJHC 1080; HPP41119.2003 (14 May 2012).

15. It has been held by the New Zealand Court of Appeal that the party propounding a Will does not have to establish testamentary capacity (see New Zealand Court of Appeal in **J.J. Bishop v P.J. Odea & Another** – (1999) NZCA 239).

16. If a Will is *"apparently rational on its face"*, the maker will be presumed to have testamentary capacity (**Re White** [1951] NZLR 393 (CA) and **Peters v. Morris** (CA 99/85: judgment 19 May 1987).

17. However, if *"there is some evidence raising lack of capacity as a tenable issue"*, then the party propounding of the Will must then establish capacity (**J.J. Bishop v P.J. Odea & Another**).

18. In **Naidu v Kaveri** [1967] FJLawRp 3; [1967] 13 FLR 201 (15 December 1967), Knox-Mawer J. said:

> Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. Barry v. Butlin (1838), 2 Moo. PC 480; Fulton v . Andrew (1875) LR 7 HL 448; Brown v . Fisher (1890) 63 LT 465; Tyrell v . Paynton (1894) P. 151; Finny v . Govett (1908) 25 TLR 186; In re Begley, [1939] LR 479.

19. Section 6 of the Wills Act provides as follows:

"Execution generally

6. Subject to the provisions of Part V, a Will is not valid unless it is in writing and executed in the following manner:

a) it is signed by the testator or by some person in his presence and by his direction in such place on the documents as to be apparent on the face

of the will that the testator intended by such signature to give effect to the writing as his will;

b) such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and

c) the witnesses attest and subscribe the will in the presence of the testator.

THE PROCEEDINGS

20. At the hearing before me, the third defendant called the following witnesses:

(i) Babu Indra Shekar Singh (**DW1**)

(ii) Dhansurja Narayan (**DW2**)

21. The plaintiff called the following witnesses:

(i) Murre Janarda Swami Naidu (**PW1**)

(ii) Jitendra Singh (**PW2**)

ATTESTING WITNESS CALLED

22. **DW1** is a solicitor with over thirty-five years' experience. He was one of the two attesting witnesses to the 2004 Will. The other attesting witness was one Shashi Shalendra Prasad (**"Prasad"**) who was **DW1**'s clerk at the time.

23. While **DW1** was the only one of the two to give evidence before me, it is not necessary at common law that both attesting witnesses be called.

2004 WILL APPEARS TO BE "RATIONAL ON ITS FACE"

24. The 2004 Will was tendered through **DW1**. He was the solicitor who took instructions for the said Will and also supervised its drafting in his law firm. As I have said, he was also one of the two attesting witnesses.

25. There is no notable irregularity in the form or in the substance of the said Will.

IS THERE EVIDENCE RAISING LACK OF CAPACITY AS A TENABLE ISSUE?

26. It is common ground that Narayanamma had been sickly, had suffered a stroke, and had been wheelchair bound for many years when she executed the 2004 Will. The principles for determining testamentary capacity were summarized in **Banks v. Goodfellow** (1870), L.R. 5 Q.B. 549 (Q.B.) by Cockburn CJ at 565 as follows:

> *It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall 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 been made Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.*

27. In his evidence, **DW1** accepted that Narayanamma had some limitations and difficulties due to her stroke. However, while Narayanamma may have been physically incapacitated, her mental faculties were in full working order. **DW2** said the same thing. **DW1** said Narayanamma was able to get up and sit up on her bed against the headboard.

28. **DW1** said that before Narayanamma executed the Will, he wanted to make sure that Narayanamma understood what was on the Will and that what was on the Will was in accordance with her instructions to him. He did this, firstly, by reading the Will to her and, secondly, by explaining the Will to her.

29. **DW1** identified the Will and tendered it as **DEX 2**.

30. I observe that **DW1** had known the family of Narayanamma for many years - mainly through his association with her son in law, Mr. Adi Narayan and

Narayan's wife, **DW2**, who is one of Narayanamma's six daughters and the party propounding the 2004 Will.

31. The evidence of **DW2** is that **DW1** and her (**DW2's**) husband were childhood friends who grew up in neighboring villages. This fact alone puts **DW1** in a potentially compromising position. The couple obviously have a vested interest and stand to benefit tremendously from the 2004 Will.

32. **DW1**'s close association with the family obviously meant that he was well familiar with Narayanamma's physical and mental state. I accept this as true.

33. **DW1** and **DW2** both said that the late Narayanamma, although was wheelchair bound and had a stroke, understood everything around her very well. I have no reason to doubt this. I find that Narayanamma had testamentary capacity at all material times.

WAS THE 2004 WILL SIGNED BY NARAYANAMMA? DID SHE INTEND BY SUCH SIGNATURE TO GIVE EFFECT TO THE 2004 WILL

34. **DW1** gave evidence of how he obtained instructions from Narayanamma. He said that at some point in 2004, during one of his social calls to the family, Narayanamma told **DW1** of her desire to make a Will. **DW1** said he took her instructions on 30 March 2004.

35. **DW1** said the first thing he established was whether or not Narayanamma would sign in writing by longhand, or, whether she would leave a thumbprint. He also set out to determine whether Narayanamma understood what she was about to do, and whether or not she had capacity.

36. **DW1** tendered the instruction sheet dated 30 March 2004. He identified the thumbprint thereon as being that of Narayanamma. This was marked **DEX1**.

37. **DW1** said after taking the instructions, he would have returned to his office and have a proper Will prepared in accordance with the instructions with the help of his clerk, Shashi Shalendra Prasad. Prasad was also well known to the family for many years.

38. In cross-examination, **DW1** said there was no need to write anything about Narayanamma's health conditions on the instruction sheet. He said his own inquiries about her health were sufficient.

39. The following cross-examination followed:

Q. *I see that on the instruction sheet, she placed her signature by putting her left thumb print.*

A. *Yes*

Q. *Did you know she was left handed?*

A. *I didn't know…but I made sure that I took an imprint of her left hand by putting something solid and strong so that we have a good imprint.*

Q. *You did not know whether she was left handed or not?*

A. *I am not aware of that*

Q. *Now, I see that there was no witness to that signature on the instruction sheet.*

A. *No, and again, there was no need for that.*

Q. *And there is nothing on the instruction sheet apart from your own writing as to who actually took the instructions!*

A. *No ..other than the fact that I took it…and I have deposed that also the fact that it is my writing. So I am very clear that I am the author of that instruction.*

Q. *I am told that she had some difficulty in speaking because of her stroke on the right side of her body?*

A. *My answer is that she had no difficulty in speaking and she was just ….if I could put it in a colloquial way, "good as gold". Because I had regular communications with her and discussion. She was fine.*

Q. *Her being bed ridden and suffering a stroke. Didn't you think right to have obtained a medical certificate as to her mental capacity because ..if I may…you said that she was okay physically which she was not. But as to her mental capacity, didn't you think it right to obtain a medical certificate before taking any instructions for the Will, Mr. Singh?*

A. *No. Two things. Physical inability – I was aware of that. I was fully aware as to why she was on bed. I was fully aware of her incapacitation by virtue of being in a wheel chair and her bottom half. Secondly, on her mental capacity, she was fine and fit as a fiddle. There was no further inquiry by me to; either seek a medical report or to take her to a Doctor or to have a doctor present as to whether she understood what her instructions were and generally what our communications. Which I would treat it as our talanoa sessions, she was fine. There was nothing that made me as a Lawyer and Is ay this again I am not a Doctor to prompt me to ensure or to check her mental capacity. Her mental capacity was good as gold.*

Q. *And did you Mr. Singh, you said that at the time she was when you had the will done, she was putting her left thumb mark?*

A. *Yes.*

Q. *Why didn't she sign instead?*

A. *She was unable to sign. She was just unable to hold a pen in her hand and scroll with it and ....I opted for a thumb Another situation is ...where a person is illiterate then we opt for a thumb. And here, she was unable to have ability to have scrolling writing done. And so it was my decision and choice to make sure that she then put a thumb print as her signature.*

Q. *Does that mean that she had been signing previously?*

A. *I am not sure about that.*

Q. *You do not know if she was ever able to sign?*

A. *I don't know but I did ask her to put a pen together to sign and I was aware of the fact that she was not able to do that. Hence I went there with stamp pad. This is an inquiry I had done prior to the 30 March.*

40. **DW1** said that only he and Prasad were present when Narayanamma executed the Will. He made sure Dhansurja was nowhere nearby the room where the instructions were given.

41. Asked if he helped Narayanamma put her left thumb print, **DW1** said "absolutely correct" without hesitation.

42. Admittedly, I did raise an eyebrow on this at first because I felt that **DW1**'s approach could be interpreted as an interference on his part with Narayanamma's exercise of her natural faculties. Did he simply lift the hand of the helpless Narayanamma and impress her thumbprint on the Will, without her authority.

43. However, upon a closer reflection, I accept that DW1 only lifted Narayanamma's hand and help her impress her thumbprint on the document after first ascertaining her intention to give effect to the 2004 Will.

44. As I have said, I was a little concerned that **DW1's** long friendship with **DW2** and **DW2's** husband, and taking into account that **DW2** is in fact propounding the 2004 Will, that **DW1** might have worked in collusion with **DW2** and husband to see that Narayanamma executed the 2004 Will.

45. In her state, Narayanamma was, no doubt, vulnerable. However, there is nothing in the circumstances of this case to suggest that **DW1** might have colluded with **DW2** and her husband to exploit Narayanamma's vulnerability to their advantage. In saying that, I am accepting as true that **DW1** also had a close bond with Narayanamma

46. **DW1** is a solicitor with over 35 years' experience. He said he knew Narayanamma and her family for many years as a friend. **DW1** visited the family often for many years on a social basis. He also attended to some legal matters for them too.

47. I also accept **DW1**'s evidence that, whilst taking instructions from Narayanamma, **DW1** inquired with her as to why she was making no testamentary bequests in favour of her other children. **DW1** said in chief that Narayanamma felt for her daughter and her grandchildren. She wanted to bequeath her daughter the house in Namaka and to the grandchildren, the little chunks of land behind that house.

48. **DW1** said he knew that Narayanamma had other children and wanted to be sure that Narayanamma was absolutely clear about the particular bequests for which she wanted to instruct him on this occasion. He said Narayanamma told him that she had already given her other children chunks of land or money from the proceeds of sale of property to Yees Cold Storage.

49. **DW1** said Narayanamma told him that he had already given her son Murre JS Naidu $350,000. She had told him that Murre JS Naidu never really cared for her or ever came to see her and that she was very happy with her daughter Narayanamma. He said Narayanamma also told her that her grandchildren, Narayanamma's children, also cared for her equally.

50. When put to him in cross-examination that Dhansurja had deposed in an affidavit that Murre JS Naidu was given $250,000 in cash out of the sale proceeds to Yees Cold Storage, **DW1** conceded that he may have been mistaken about the amount but the gist of the matter is that Narayanamma had given everything to her children.

51. This, however, must remain an issue for latter proceedings, whether Narayanamma really gave land and money to her other children.

52. **DW1** was cross-examined extensively about the sale of the property to Yees Cold Storage and how the proceeds of sale was applied by the late Narayanamma. When asked, he said he did not know for a fact if Narayanamma really did give money to her sons including Murre JS Naidu. He said all he knew was what Narayanamma told him.

SOME FURTHER COMMENTS

53. Narayanamma's testamentary capacity only became an issue to Naidu after her death because he desires to take over her estate based on the 1991 Will. Notably, Naidu alleges fraud and collusion against Narayanamma and **DW2** in the same timeframe around which testamentary incapacity is alleged. Could a person who lacks testamentary incapacity be capable anyhow in committing fraud and collusion?

CONCLUSION

54. I hold that the 2004 Will is solemnly proved. Costs Reserved.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka

[i] Lord Hanworth MR said thus:

"It is clear that the onus of proving a will lies upon the party propounding it, and secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this rule little further – he must show that the testator knew and approved of the instrument as his testament and intended it to be such.