

CHANG WEI LU, WAKIL DIRI UNTUK HARTA PESAKA CHAN GUAN NYAI, SI
MATI V CHANG LEE MOOI
High Court, Pulau Pinang
24 February 1996
(Guaman Sivil No 22-284-89)
Abdul Hamid b Hj Mohamed, J

Probate and administration — Forgery — Onus on plaintiff — Balance of probabilities — Expert evidence — Handwriting expert — Duty of court — Undue influence — Lack of mental capacity

Abdul Hamid b Hj Mohamed, J

The plaintiff is the brother of the defendant. He is the personal representative of the estate of their father, Chang Guan Nyai who was the husband of Lee Lan Yin, the plaintiff's and the defendant's mother, also deceased. There was a house registered in the name of Lee Lan Yin (the mother). The plaintiff alleged that Chang Guan Nyai (the father) being the widower of the mother was the sole beneficiary of the mother's estate. The plaintiff alleged that three days before the mother's death she purportedly transferred the said property to the defendant. He alleged that the signature on the transfer document (Form 14A) was different from the usual signature of the mother and that it was a forgery. Further, and in the alternative, it was alleged that at the time of the execution of the transfer, the mother (transferor) was not in full command of her faculties and did not know what she was signing. Further * 2893 and in the further alternative, it was alleged that she executed the said document under undue influence. The plaintiff, in brief, prayed for a declaration that the transfer of the said property to the daughter (defendant) was null and void and that the defendant hold the property as trustee and on behalf of the mother's estate, and other related orders.

The defendant of course denied the allegation of the plaintiff.

First the alleged forgery.

The plaintiff's first witness on this issue is PW1, a handwriting expert from Jabatan Kimia, Petaling Jaya. She gave evidence that she examined the purported signature of the deceased on the transfer form, compared it with other signatures also purported to be hers on other documents like the International Passport and Savings Account Passbook. She found the signature on the transfer form "not similar" to the others.

Another witness is PW6, a nephew of the deceased. He gave evidence that his aunt (the deceased) was not educated but only learned to sign her name in Chinese. He had seen her signing her name before a lawyer. Shown the signature on Form 14A, he said it was different from her signatures on other documents. He said the character at the centre was totally different. Furthermore, he said that there were two additional strokes on the last character of the signature.

We then come to the evidence of the plaintiff himself. He said his mother was illiterate. However she practised on her own to sign her name in Chinese characters. He said he was familiar with her handwriting. He also said the signature appearing on the Form 14A is not his mother's signature. He said his mother did not know how to write her second name in simplified form. Only people educated in Chinese would know how to do that. Regarding the last character he said she did not write the two strokes.

Besides the evidence about her handwriting there is also the evidence about her condition during the last few days before her death which the plaintiff used to suggest that she could not have signed the transfer form.

In this regard, we have the evidence of Dr Chong Tek Heng (PW4). He went to see her at her house on the day she died. She was unconscious and was gasping when he arrived. * 2894

“It was a terminal case of liver cirrhosis and Hepato Renal Failure. It means the function of the liver and kidney was gone.”

However, he did not treat her earlier and could not say what her condition was 3 days before he saw her.

Another doctor, Dr Por Seng Kim (PW5) also gave evidence for the plaintiff. He gave evidence that the deceased's last admission to the hospital was on January 11, 1989. She was discharged the following day. According to him

“She was critically and terminally ill. She was in coma. She was conscious on admission but in coma at the time of discharge. She died on 12 January 1989.”

However, he did not know her condition three days before she died, in other words, one day before she was admitted. The doctor admitted quite frankly and I must say, honestly, that he could not speculate.

The defendant gave evidence. She had been with the mother ever since the mother moved to Penang from Dungun, Trengganu. She stopped schooling after Form 3 to help her mother. During her illness she was the only one who looked after the mother. Regarding the brother (plaintiff) she said that he was beyond control. He asked the mother to buy a motorcycle for him but did not pay the instalments. He fought with people, failed his LCE Examination. He was sent to a private school. Again he “fought with people” in the school. Since one sister was in Taiwan, he was sent there.

She went on to say that on January 9, 1989, her mother asked her to take her to the office of BT Lee, an advocate and solicitor practising in Penang. She took her there. Her mother asked her to wait outside. Later BT Lee asked her to go in. She said BT Lee told her that her mother wanted to transfer the property to her. He asked her to sign one document. She signed.

According to her, BT Lee had been her mother's solicitor for a long time. He came to pay his last respects to her mother. But plaintiff threw things at him and chased him away. Even the wreath sent by BT Lee was thrown out by the plaintiff.

The defendant testified that the signature on the transfer form was her mother's. * 2895

Mr BT Lee, the lawyer also gave evidence, although I must say, he appeared to be reluctant to do so. He confirmed that the signature of the solicitor who attested the transfer form was his signature. He confirmed that the signature of the transferor was that of Lee Lan Yin — the deceased. He said “This person appeared before me when the signature was executed.”

Under cross-examination, he said that he had known Lee Lan Yin since 1987-1988. (She died in 1989). He reiterated the same story though in more detail. He said that when the deceased signed the transfer form, only he and she were in his room.

The plaintiff is alleging forgery. Therefore the plaintiff must prove it. Proof is on a balance of probabilities — see *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 AMR 16:612; [1993] 1 MLJ 182 MA. In the same case, Anuar J (as

he then was) in delivering the judgment of the Supreme Court said, amongst other things that,

“The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of witnesses it has seen and heard and taking into account any expert evidence on the point. Of course a trial judge is not entitled to abdicate his function by allowing the expert to determine the question.”

On the evidence of a handwriting expert the learned Judge (as he then was) said:

“In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to this conclusion is not worth the paper on which it is written and reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate tribunal.”

In the case of *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64 Hashim Yeop A Sani J (as he then was) said at p 67:

“Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the * 2896 court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.”

The handwriting expert in this case does not even read Chinese characters. However, I am prepared to accept that it does not really matter as she was trained to study the characteristics of handwriting, not to decipher what is written.

I would consider the whole evidence for the plaintiff on the matter and weigh it against the whole of the evidence for the defendant on the matter, of course bearing in mind that the burden of proof lies on the plaintiff.

On the plaintiff's side, the handwriting expert's evidence carries very little weight. The plaintiff is an interested party just like the defendant. PW6, the nephew appeared to be over-zealous. PW4, the doctor who saw her on the day she died, could not say what her condition was three days before she died. PW5, the doctor who treated her said she was conscious when admitted to his hospital.

On the other hand, the defendant, like the plaintiff is an interested party. I consider her evidence of little value, just as the plaintiff's.

However, something should be said about Mr BT Lee and his evidence. First he appeared to be quite reluctant to come to Court. However he gave evidence that the deceased signed the transfer form in his presence. Frankly and honestly, I had my doubts whether he was speaking the truth. But neither can I say that he was not telling the truth.

The evidence of both sides are more or less even. In the circumstances, I fall back on the burden of proof. I asked myself whether the plaintiff had proved his allegation that the transfer document was forged, on the balance of probabilities. I am afraid, the answer is in the negative.

Undue influence and lack of mental capacity

As has been said earlier, the defendant stopped schooling after Form Three to assist the mother. Throughout the years until the mother died, the defendant was the one who lived with her, looked after her and cared for her. The brothers and sisters were either abroad or lived somewhere else. Now it * 2897 is alleged that she was in a position of undue influence of the mother.

Learned counsel for the plaintiff referred to s 161 of the Evidence Act 1950:

“Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.”

Chan Sek Keong J in *Lai Kwee Lan and Anor v Ng Yew Lay and Anor* [1990] 1 MLJ 211 @ 216 has this to say about this provision:

“The general rule, of course, is that he who asserts must prove. However, s 113 of the Evidence Act (Cap 97, 1985 Ed) reverses this burden where one party is in a position of active confidence to the other. This section is nothing more than a restatement of the principle in equity which, in the words of Lord Kingsdown in *Smith v Kay* [1989] 7 HL Cas 750 11 ER 299 at p 799: “... applies in every case where influence is acquired and abused, where confidence is reposed and betrayed.” In such cases, equity presumes undue influence until the contrary is proved. There are certain personal relationships which equity regards as giving rise to the presumption of undue influence, because one party is deemed to be in a position of dominance *vis-a-vis* the other, e.g. parent and child, trustee and beneficiary, doctor and patient etc.”

It was not disputed that the defendant lived with her mother ever since they moved to Penang and that she alone looked after the mother when the mother was ill. On the other hand, she is the daughter and the mother cannot be said to be a person who can be easily influenced. She (the mother) was prepared to go to court, to obtain custody of her daughter's (another daughter) children from that daughter of hers. Furthermore if she could be influenced, she would have transferred the house to the defendant much earlier. In the circumstances, I do not think the daughter can be said to be in a position of active confidence.

Even if she was, there is no evidence to suggest that she unduly influenced the mother to make the gift. Indeed, for her sacrifices that would be the most natural thing for a mother to do.

As regards the allegation of lack of mental capacity, for the plaintiff we only have the evidence of the two doctors. No doubt she had been in and out of * 2898 hospital. But at her age that should be quite normal. The point is that the doctors could not say what her condition was three days before she died. The plaintiff was in Taiwan. The cousin of both the plaintiff and defendant (PW6) did *not* visit his aunty during her last two months because his father had died.

On the other hand, for the defendant, we have the evidence of the defendant who lived with the mother and was looking after her. We also have the evidence of the advocate and solicitor who attested the deceased's signature. On the balance of probabilities, it was not proved that when she executed the transfer form she lacked the mental capacity to do so.

For these reasons the claim was dismissed with costs.

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