



IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2009 No. 237

KAY-MARIE LEWIS

Applicant

-v-

KATHY-ANN LEWIS

-and-

STEPHEN LEWIS

Respondents

**RULING ON STRIKE-OUT APPLICATION**

(In Chambers)

Date of Hearing: November 30, 2009

Date of Ruling: December 2, 2009

Mr. Kenrick James, James & Associates,  
for the Applicant

Ms. Narinder Dosanjh, Christopher Francis & Forrest,  
for the Respondents.

**Introductory**

1. In the present action, which began as a defence to proceedings for possession of an apartment legally owned by the Respondents in the Magistrates' Court, the Applicant seeks to set aside a voluntary of the parties' former family home ("the Property") to two of her siblings on the grounds of presumed undue influence.

2. The voluntary conveyance was purportedly made by the parties' parents to the Respondents on March 21, 1996. By earlier wills dated July 7, 1993 made by each of the parties' parents ("the Will"), the property was devised to the 2<sup>nd</sup> Respondent and another sister, Rene Lewis (paragraph 3, in each case). The father died in 1997 and the mother died in 1998. The operative Will if the voluntary conveyance were to be set aside would be the mother's Will, as it appears that she and her husband were joint tenants so that his interest would have passed to her under the doctrine of survivorship.
3. The Respondents apply to strike-out the present action on the grounds that the Applicant lacks the standing to assert the undue influence claim. This is based on the argument that if the voluntary conveyance is set aside, the position under the Will would be restored and she would have no beneficial interest in the Property in any event.

### **Applicable law and facts**

4. Ms. Dosanjh submitted that the position was obvious on the evidence and did not refer to any authority. Mr. James' only response was to submit, also without the support of relevant authority, that the dealings with the property after the making of the Will (albeit attempted dealings by his client's account) resulted in the relevant provisions of the Will lapsing, so that the property fell to be dealt with as in the case of intestacy under the Succession Act. He was unable to identify any legal principle which could operate in such a surprising way as to invalidate a disposition in a will in circumstances where the Property had not been validly disposed of *inter vivos* before the testator's death, merely because an attempt to dispose of it had been made.
5. Although Mr. James did refer the Court to section 21 of the Wills Act 1988, this provision states that any lapsed gifts fall into residue (in which case the sole beneficiary would be the 2<sup>nd</sup> Respondent). Further this provision relates to gifts under a will which fail because the beneficiary dies before the testator or testamentary gifts which are themselves held to be contrary to law. Section 21 of the 1988 Act provides as follows:

#### **"Lapsed and void devises**

*21 Unless a contrary intention appears from the will, if a devise fails or is void by reason of the death of the devisee in the lifetime of the testator or by reason of being contrary to law or otherwise, any real estate or interest comprised or intended to be comprised in that devise is deemed to be included in the residuary devise (if any) contained in the will."*

6. The undue influence claim is not asserted against the provisions of the Will, but against the subsequent voluntary conveyance. The doctrine of presumed undue influence can have no operation in the context of seeking to impugn the validity

of a will if the testator possessed testamentary capacity when the will was executed.

7. I reserved judgment to satisfy myself that my provisional view of the law of undue influence was in fact sound. According to *‘Snell’s Equity’*, 30<sup>th</sup> edition (Sweet & Maxwell: London, 2000): (a) “*equitable fraud...entitles the victim to rescind the transaction procured by or tainted with it, and to regain the position in which he was before the injury*” (paragraph 38-01); and (b) “[g]ifts and bargains procured by undue influence...may be said aside by the victim.” This confirms that an applicant seeking to set aside a transaction on the grounds of undue influence must be a victim in the sense that they are either (a) the person directly wronged, (b) their estate representatives, or (c) third parties with a legal or equitable interest in the property in question.
8. If the voluntary conveyance made in 1996 were to be set aside, the Property would have continued to belong to the parties’ parents until the father’s death in 1997, and then it would have belonged to their mother until her death in 1998. It would then have devolved to her estate representatives to be disposed of in accordance with the Will. According to Halsbury’s Laws, 4<sup>th</sup> edition Volume 17(2), paragraph 335: “*All property, whether personal or real, to which a deceased person was entitled for an interest not ceasing on his death now devolves upon his personal representative.*” The Applicant was not a beneficiary in respect of the property in dispute under the Will. So if the Applicant is restored to the position she was in before the undue influence on her parents of which she complains, she would still have no entitlement to an interest in the property.

### **Conclusion**

9. It follows that it is plain and obvious that the Applicant has no tenable right to seek to set aside the voluntary conveyance on the grounds of undue influence. The action is accordingly ordered to be struck-out.
10. Unless either party applies to be heard as to costs within 21 days, the Respondents are awarded the costs of the action to be taxed if not agreed on the standard basis.

Dated this 2<sup>nd</sup> day of December, 2009

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KAWALEY J