

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0001 OF 1997S
(High Court Civil Appeal No. HBC0011 of 1996S)

BETWEEN:

JULIE DOYLE

Appellant

AND:

PHYLLIS LATOUR DOYLE
TRUSTEE CORPORATION LIMITED

Respondents

AND:

CIVIL APPEAL NO. ABU0003 OF 1997S
(High Court Civil Appeal No. HBC0011 of 1996S)

BETWEEN:

TRUSTEE CORPORATION LIMITED

Appellant

AND:

PHYLLIS LATOUR DOYLE

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Hon. Sir Ian Barker, Justice of Appeal

Hearing:

Thursday, 4th November 1999, Suva

Counsel:

Mr. V. Kapadia and Ms. S. Begum for
Phyllis Latour Doyle
Mr P. Knight for Trustee Corporation Limited
Mr. M.B. Patel for Julie Doyle

Date of Judgment: Friday, 12 November 1999

JUDGMENT OF THE COURT

These appeals have been heard by a Court of 2 Judges pursuant to s.6(2) of the Court of Appeal Act Cap. 12.

There are two appeals against a judgment of Byrne J delivered in the High Court on 25 November 1996. By consent, the appeals were heard together.

Facts

The facts are not in dispute. The respondent, Julie Doyle ('the former wife') is the former wife of Patrick Joyce Doyle, late of Sigatoka, Company Director ('the deceased'). He died on 13th March 1990 at Nadi : probate of his Will was granted onth8 May 1990 to Anthony William Cooper, of Suva, the Manager in Fiji of Burns Philp Trustee Company Limited ('Burns Philp'), which company was the sole executor and trustee named in the Will. Burns Philp, although incorporated in New South Wales, was registered in Fiji under the Trustee Corporation Act Cap.66. The estate was sworn for probate at \$236,000 but neither this Court nor the High Court was provided with an up-to-date statement of the estate's financial position. We were told from the Bar that the estate had been distributed almost entirely to the sole beneficiary.

The appellant, Phyllis Latour Doyle ('the widow') is the widow of the deceased. She is the sole beneficiary in his estate. An affidavit from the Managing Director of the appellant, Trustee Corporation Limited ('the Trustee') revealed that Burns Philp had been placed in liquidation in New South Wales on 3 December 1990. Burns Philp, whilst in liquidation, changed its name to BPTC Limited (in liquidation) ('BPTC') on 30th July 1991. BPTC, by deed dated 10 July 1992, appointed the the Trustee as trustee of a number of estates and trusts in Fiji previously administered by BPTC, including the estate of the deceased.

There was not filed in the High Court, as there should have been, an affidavit from the Trustee giving an account of its Burns Philp's or BPTC's stewardship of the estate of the deceased and of the present state of the estate's assets, liabilities and income. In particular, the Trustee should have revealed when the executorship had ceased. Given that the widow was the only beneficiary, one would normally have expected that, between May 1990 when probate was

granted and January 1996 when the former wife issued proceedings, any prudent executor would have gathered in the assets and transferred them to the beneficiary in her own right, however making some provision to cover any potential claim. However, we infer, without opposition from counsel, from the fact that BPTC transferred to the Trustee its trusteeship of the deceased's estate, that its executorship had terminated at least by the date of the deed of appointment of new Trustee. Counsel agreed that, although BPTC had been joined as a party, if the claim by the former wife were to succeed, the Trustee would be the party liable, subject to any right of recovery from the widow and/or BPTC.

The Court should also have been informed as to what provision, if any, had been made by the Trustee or its predecessor to cover the potential claim of the former wife which must have been known to BPTC and the Trustee. We were informed from the Bar that the statutory procedure whereby a trustee can require a claimant to bring a claim or else forfeit his or her rights, had not been utilised.

Letters exhibited to the former wife's affidavit indicate that the Trustee was still involved in the management of the estate in 1994-5, and acted as a conduit between the widow's solicitors in Fiji and former wife's New Zealand and later Fiji solicitors. The former wife's solicitors had been justifiably anxious to obtain replies to their letters. Reasons for the apparent delays in replying by the widow and/or her solicitors were not explained to the Court.

The former wife and the deceased married in 1948. By 4th June 1975, they had been separated for some time. After separation, the deceased stayed in Fiji and the former wife went to New Zealand. Each had issued divorce proceedings against the other: he in Fiji, she in New Zealand. On that date, the deceased and the former wife signed a Deed of Settlement

of their matrimonial affairs. It is not necessary to set out in full this deed (which complied with all legal requirements for a deed). The deceased agreed to transfer to the former wife a half-share in a property in New Zealand and to pay \$F70,000 to the wife from the disposition of a company. Both agreed to withdraw their divorce petitions (with the deceased paying the costs). After the withdrawal of both divorce petitions, the former wife was to file a fresh petition in the Magistrates' Court in Fiji on the grounds of the deceased's adultery.

The relevant portion of the deed is the following provision: "**The husband shall pay the sum of \$F360 (three hundred and sixty dollars) per month to the wife for the rest of her life or until her re-marriage.**" The expression 'the husband' in the deed included his executors, administrators and assigns.

The wife duly commenced fresh divorce proceedings in Fiji. On 20th February 1970, a decree nisi was pronounced which included the following provision: 'The Court doth further order that the Respondent (i.e. the deceased) pay maintenance to the Petitioner ('the former wife') at the rate of \$360 (three hundred and sixty dollars) per month with effect from 22nd January 1976'. The decree nisi, which was made absolute on 21st May 1976, contained no reference to the Deed of Settlement made on 4th June 1975. Nor was there any sanctioning by the Court of the Deed of Settlement as would have been possible under s.87(1)(k) of the Matrimonial Causes Act Cap. 51 ('The Act').

The deceased paid the maintenance until his death. As at the time of the hearing in the High Court, the Trustee and the widow had not paid anything further. We were informed from the Bar that, after the judgment in the High Court, the Trustee had paid \$20,000 on account of the arrears in an effort to gain a stay of Byrne J's judgment.

The former wife, aged about 72 at the date of the hearing in the High Court, sought an additional \$70,000 as a lump sum in settlement of her future maintenance entitlement under the deed and/or the decree. She alleged, without any medical or actuarial evidence, that this figure represented a fair assessment of the future amount which could be due to her, given her then good health. She detailed her financial and personal circumstances which were not good. These circumstances are irrelevant to the interpretation question as indeed are the circumstances of the widow which (we were informed from the Bar) are not good either.) The circumstances of the parties would of course have been relevant to any application to the Court to vary or cancel the maintenance order contained in the decree nisi. However, none was ever made.

We were also informed that the widow has issued proceedings against the Trustee alleging deficiencies in the administration of the estate by BPTC and/or the Trustee. The Trustee may have a claim for indemnity against BPTC with a possible recovery, from a fund of \$50,000 held by the Government of Fiji as a statutory deposit paid by Burns Philp upon its registration in Fiji as a trustee corporation.

Course of Proceedings in High Court

The former wife's proceedings were intituled with reference to the Act (sections 87 and 101), to the divorce proceedings of 1976 and to the Court's inherent jurisdiction. She sought in her first statement of claim against the Trustee:

- (a) leave to enforce the maintenance order made in the decree nisi, leave being required by s.101(2) of the Act.

- (b) arrears of maintenance at \$360 per month from the date of death of the deceased.
- (c) the \$70,000 lump sum.
- (d) costs.

Later the application was amended to seek a declaration against all defendants that the deed was in full force and effect. BPTC was added as a party and was represented by counsel who represented the Trustee.

In his reserved judgment, delivered after 3 appearances before him, and the filing of written submissions, Byrne J. granted application (a) above. He also entered judgment for the arrears (then \$25,260) and awarded the former wife a further \$60,000 instead of the \$70,000 claimed for future maintenance. Judgment for these amounts was entered against the Trustee only. The Judge also ordered that indemnity costs be paid by the Trustee to the former wife on the basis that the widow had more detailed submissions disputing the former wife's right to future maintenance and her obvious need.

The widow's basic appeal is against the Judge's finding that the former wife's right to continuing maintenance depended on the Deed of Settlement, that the deed was valid and enforceable and that it had not been extinguished on the death of the deceased. She further submitted there was nothing in the decree nisi which authorised maintenance to be paid to the former wife after the death of the deceased since liability to pay was extinguished upon the death of the deceased. In other words, the submission was that the decree nisi superceded the deed.

The Trustee supported the widow in her appeal.

Both appellants further submitted

- (a) That the Judge erred in awarding lump sum future maintenance at all or at the figure of \$60,000
- (b) That the order for indemnity costs was unjustified.

At the commencement of the hearing before us, counsel for the former wife very properly conceded that the award for a lump sum for future maintenance could not stand. If the Deed is in still force, it confers only a right to periodic maintenance. There can be no liability on the estate of the deceased to pay any lump sum for future maintenance. This Court also indicated to counsel that it could not see any justification for an award of costs against the appellant on an indemnity basis. All three counsel agreed with the Court's view.

We note that there was no warrant for the Judge's method of calculation of a lump sum. It is any plaintiff's duty to prove quantum as well as liability and this plaintiff had clearly failed to discharge that onus in respect of the future maintenance. As elementary requirements, there would have had to be some evidence of

- (a) The plaintiff's health, by affidavit from a medical practitioner.
- (b) actuarial calculations of her life expectancy.

- (c) the present value of the benefit paid now instead of monthly over the period of her life expectancy.

There would then have to be a contingency deduction by way of percentage to cope with the possibility of the former wife's premature death or sooner re-marriage.

The Trustee, in parts of the 1994-5 correspondence, (particularly a letter dated 26 September 1996) appeared to support the former wife's claim, whilst averring that it was neutral. However, in this Court, it foresook a trustee's neutral stance, normal in situations such as the present, and supported the arguments made for the widow. As a party, it was entitled to charge its stance but the consequence of its doing is that by becoming partisan, it could be treated as an opposing party where costs are concerned should the former wife be successful.

The Trustee had two independent further grounds of appeal i.e.

- (a) judgment should have been entered against BPTC as executor and not against the Trustee and
- (b) the former wife's claim under the Deed should not have been formulated under the procedural umbrella of a claim under the Act but should have had a simple claim in contract in summary judgment proceedings.

As to ground (a), we have already indicated our view that BPTC was functus as executor because it had transferred its trusteeship to the Trustee as part of a sale of its trusteeship

business as a going concern. Counsel agreed that if there be any liability on the estate, then the proper party to suffer judgment being entered against it is the Trustee, subject to

- (a) any judgment being confined to the assets of the trust estate and
- (b) its rights (if any) of indemnity against BPTC and
- (c) its rights (if any) to trace and recover against the widow any money wrongfully paid to her..

After some discussion, counsel agreed in writing that the following matters required resolution by the Court.

1. Are the provisions of the Deed of Settlement dated 4th June 1975 relating to the payment of maintenance contained in Clause 1 of the Deed valid and enforceable against Trustee Corporation Limited?
2. Does the maintenance order contained in the Decree Nisi survive the death of Patrick Joyce Doyle?

These questions are not easy to answer and require some consideration of authority.

Legal Considerations

At common law, an agreement to pay maintenance for the life of the wife which in terms bound the husband's executors is not invalid. See Kirk v. Rose [1937] A.C.491. There, a separation agreement, in the then common form, was expressed to bind the husband's estate. The agreement provided for the payment of **"a clear weekly sum of £2 during her life for the maintenance and support of herself subject nevertheless to the provisions and conditions hereinafter contained."** The wife had agreed to what were then usual covenants, such as indemnifying the husband against any debts which she might contract and continuing to lead a chaste life. The House of Lords overruled the Court of Appeal which had held by a majority that, because the whole basis of the agreement was that the parties live apart, after the husband's death they could no longer continue to live apart. Therefore, the whole basis of the contract had disappeared. The House of Lords rejected this view and held that the clear, simple words of the contract meant what they said. The husband's estate had to pay the maintenance to the wife.

The Fiji Matrimonial Causes Act was modelled on the Australian Act of the same name. It provides that orders, inter alia, for spousal maintenance may be made at the granting of a decree. Section 87 of the Act sets out a whole range of options available to the Court on making a decree including the power to approve a Deed of Settlement (s.87(1)(k)).

In this case, the parties did not ask the Court to approve the Deed of Settlement, entered into in contemplation of the divorce proceeding which both had agreed was to be the vehicle for dissolving their marriage. It is easy to understand why. The provisions of the Deed were spent upon the making of the decree nisi. As Byrne J. pointed out in his judgment, there

was a mechanism in the Deed which allowed the wife to continue with her existing divorce proceedings if the husband failed to comply with Clause 1 (payment of maintenance), Clause 2 (payment of \$70,000) and Clause 3 (transfer of house property). In the result, the only matter which required attention at decree nisi stage was the wife's maintenance.

The question is whether the provision in the Deed which purports to bind the estate still applies once the parties opted into the statutory system for a maintenance order. By so opting, the parties gained the right to apply to have the Court increase, decrease or even extinguish the maintenance, should circumstances so dictate. They chose never to exercise that right. Had they done so, the Court hearing any application may well have taken into account the words of Lord Atkin in Hyman v. Hyman [1929] A.C. 601,629. **"I could well understand the Court coming to the conclusion that the parties' pre-estimate of the wife's reasonable needs was judicious and that the allowance, continuing as it does after the husband's decease, and being independent of any fluctuations in the amounts of his fortune, needed no supplement"**.

Hyman's case is authority (if any were needed) that an agreement to pay maintenance at a stated amount does not remove the right of a wife to apply to the Court for more maintenance, even when a wife had covenanted not to apply for more maintenance; such a covenant is void against public policy. See also, Brooks v. Burns Philp Trustee Co. Ltd. (1969), 121 C.L.R. 432.

Australian cases (which are somewhat difficult to assess because of the number and length of the judgments) point to the view holding that a maintenance order is a personal liability which ceases on death. The Australian position was summarised by Jacobs, P in

Lake v. Quinton [1970] 1 NSWLR 111, 113-4.

“Section 87(1)(h) of the Matrimonial Causes Act provides that the Court in exercising its powers under the part of the Act dealing with ancillary relief may do any or all of a number of things, including making a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order. One of the powers which the court can exercise under that part of the Act is that referred to in s.84(1), namely, to make such order it thinks proper in proceedings with respect to the maintenance of a party to a marriage. This language is appropriate to an order which extends beyond the life of the spouse against whom the order is made, but a very real question arises whether upon the true construction of the Act an order which in its terms take effect beyond the life of the spouse against whom it is made can be enforced under the provisions of the Act or has any efficacy as an order made under the Act: see Johnston v. Krakowski (4). It is strongly arguable that a majority of the Court, which of course would bind this Court, held as part of the ratio decidendi of the case that any order made under the Matrimonial Causes Act is purely personal to the parties, and, whatever its terms, comes to an effectual end upon the death of one of the parties. The decision was considered at some length by this Court in Felton (formerly Oser) v. Oser (5). It was held by this Court in the latter case that Johnston v. Krakowski (6) is authority for the view that under the Act orders for maintenance must be made during the lifetime of the spouses. The High Court was divided upon the question whether, provided the order was made during the lifetime of the spouses, it could in any way be enforced after the death of the party against whom it was made. Kitto J. (7) with whom Windeyer J. and Owen J. agreed (8) took the view that the order could have no force whatsoever after the death of the party. He thereby gave a very limited construction to s.104(2) which is in the following terms: “104. (2) A decree made under this Act may be enforced, by leave of the court by which it was made and on such terms and conditions as the court thinks fit, against the estate of a party after that party’s death.” Barwick CJ. (9) with whom McTiernan J. agreed (10) expressed the view that the Act provided for the making in the lifetime of the husband of orders for maintenance of his wife upon the basis that orders so made could operate and be enforced after his death. Menzies J. (11) did not find it necessary to deal expressly with the point, but I think that it may be said that he took the view correspondent with that of Barwick CJ. upon this point. The seventh member of the Court was Taylor J. who said (12) that an order under the Act creates a personal liability on the husband to pay which comes to an end of his death, so that if an order be made to continue for the duration of the wife’s life, notwithstanding the earlier decease of her husband, it is necessary that the order be secured if it is to have any efficacy after the death of the husband. He did not deal with s.104(2), but it would seem that, in his opinion an order made under the Act ceased to have a continuing effect upon the death of the party against whom it was made. Lastly in this relation I should say that the view of Kitto J. (13) as to the operation of s.104(2) was that it only applied so as to enable arrears which had accrued during the lifetime of the party to be recovered.”

The dissenting judgment of Hutley, JA in Lake v. Quinton [1973] provides a contrary view on s.104(2) of the Australian Act.(i.e. s.101(2) of the Fiji Act)

“An order for the ex-spouse’s life should mean what it says. Nor should decrees of courts, particularly of superior courts be qualified or cut down so as to have an effect other than their transparent effect, unless imperatively necessary. A decree of a court should be an instrument that parties are able to act upon without any suspicion of hidden limitations. This is particularly so in the field of divorce. The property arrangements and orders for maintenance may be the divorced spouse’s sole support for the rest of his or her days.

It follows that it is irrelevant in these proceedings whether or not the order of the court in question has been validly made, in the sense that there is no legal error involved in making it. Having been made, it could only be attacked by the deceased in his lifetime by appeal, and he could have applied for variation, but he could never have sought any orders from another division of the Supreme Court on the basis that the order made was ultra vires. In my opinion the executor is in no better position than the deceased. He is in a worse position in that he cannot apply for a variation of the order nor can he appeal. In any proceedings brought under s.104(2) by Helene Howes, he may be able to set up these matters as providing a discretionary basis for the refusal of the Court to allow the order to be enforced. As to what matter can be raised as a proper basis for the discretion under s.104(2) I express no opinion.”

In Johnston v. Krakowski, (1965) 113 C.L.R. 552, referred to in the quotations, a majority of the High Court of Australia appears to have read down the clear words of s.104(2) of the Australian Act allowing for enforcement of maintenance orders after the death of the party liable with the leave of the Court. Kitto, J’s rationale at 562 was: **“This provision does not purport to convert an order against a party, which is in its nature, personal to him, into an order which on his death may be made binding upon his legal personal representatives.”**

Like Hutley JA in Lake v. Quinton at 139, we have great difficulty in reconciling the views expressed in some but not all of the judgments in Johnston v. Krakowski with the

apparently clear words of a statute which purports to give the right, with leave of the Court, to apply to enforce a maintenance order against the estate of the person ordered to pay.

One would imagine that questions of competing equities could be canvassed before the Court on a leave application (e.g. respective financial positions of the former wife and the widow). No information was before Byrne J. concerning the means of the widow; he had information about the circumstances of the former wife which were not good. It is not surprising, therefore, that he exercised his discretion under s.101(2) in her favour, absent any other information, assuming of course that he had jurisdiction to make an order under s.101(2).

We consider that the Judge did have jurisdiction under s.101(2). The opinions on the comparable Australian subsection were probably *obiter*, since Johnston v. Krakowski was concerned with the constitutionality of a Victorian statute giving a former wife the right to sue for testamentary provision out of the estate of her former husband. The question for the High Court of Australia was how this right conflicted with the Commonwealth Statute. We are not bound by the apparent view of the majority. We find the views of Hutley JA quoted above and of Barwick CJ in Johnston v. Krakowski more compelling. Indeed they seem to be supported by English authorities such as Hyman v. Hyman. We note, too, that some doubts seemed to have been expressed about Johnston v. Krakowski in the later High Court of Australia case of Felton v. Mulligan, (1971) 45 ALJR 525, 528, 543.

Hutley JA at 139 of his judgment, in Lake v. Quinton suggested clarification of the law in Australia because, as he saw that Act as interpreted by the High Court, “**may provide only illusory protection for the divorced spouse.**” However, the position in that country is now academic because of the Family Law Legislation created a completely new regime for

matrimonial disputes. Fiji however has not yet gone the way of both Australia and New Zealand with family law reform. The obsolete Act is still force here. We cannot hold that Act can be interpreted so restrictively at some of the Australian authority suggests.

It follows from what we have said that the decree nisi maintenance order could, with leave of the Court, bind the estate of the deceased. Byrne J. exercised his discretion correctly to give that leave.

We think too that the provision for maintenance in the Deed survived the decree nisi although the Deed became secondary to the maintenance orders because of the latter's susceptibility to variation and extinction. The only difference between the two was that the Deed by its terms, bound the husband's estate. There was nothing contrary to public policy in such a provision in the deed, (Kirk v. Rose) (Supra). The Deed's existence would also be a factor in deciding to grant leave under s.101(2). Accordingly in our view, the Judge was correct both to uphold the deed and to grant leave under s.101(2).

The declaration made by Byrne J. will stand as will judgment for the arrears. As indicated at the hearing, we disagree with the Judge that this was a proper case for indemnity costs. In our view, the widow was quite justified in contesting the claim. As can be seen from this judgment, the legal issues were quite difficult. She was fully within her rights in contesting the claim. We agree with the Judge that the scale of costs, as at the date of his judgment, was out of touch with reality. The widow should suffer the normal consequences of unsuccessful litigation i.e. to pay the successful litigant a reasonable contribution by way of party-and-party costs.

We endorse the view taken by this Court in South Pacific Recordings Ltd. v. Yates (Civil Appeal 39 of 1996). We commend that case to High Court Judges as a useful authority on the fixing of costs. For the reasons stated in Yates, we consider a lump sum allowance appropriate for party- and- party costs.

The former wife is entitled to a reasonable contribution to her costs in the High Court against the husband's estate. The costs order should reflect the fact that the former wife did not succeed on her claim for a lump sum for future maintenance. However it should also reflect the delay in 1994-5 on the part of the widow and/or the Trustee in replying to the former wife's solicitors' letters.

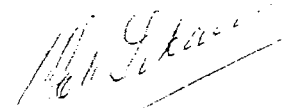
We think that a reasonable party and party award for the High Court hearing is \$1,250 plus disbursements as fixed by the Chief Registrar. As to the costs in this Court, the respondents have succeeded on the orders for future maintenance and on the indemnity costs order. We therefore think an appropriate award is \$1,000 plus disbursements as fixed by the Chief Registrar. Both costs orders are to be against both the Trustee (as representing the estate of the deceased).

For the reasons given, we answer in the affirmative both the questions posed on page 9 of this judgment.

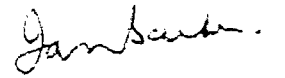
Result

1. Appeal allowed in Part.
2. Declaration made by Byrne J. affirmed.

3. Judgment for arrears of \$25,920 against Trustee affirmed.
4. Judgment for \$60,000 for future maintenance quashed.
5. Order for indemnity costs quashed.
6. Trustee to pay to \$1,250 costs plus disbursements as fixed by the Chief Registrar for High Court trial.
7. Trustees to pay \$1,000 plus disbursements as fixed by Chief Registrar to former wife as costs on this appeal.



.....
Sir Moti Tikaram
President



.....
Sir Ian Barker
Justice of Appeal

Solicitors:

Messrs. Sherani and Company, Suva for P. L. Doyle
Messrs. Cromptons and Company, Suva for the Trustee Corporation
Messrs. M.B. Patel and Associates, Suva for J. Doyle