IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 24 of 2013

IN THE MATTER OF ZAID BUKSH late of Lot 73 Kaikai Street, Nepani, Nasinu, Sales manager, Deceased, Intestate.

AND

IN THE MATTER of an application by **ANSHU PRAVEENA CHAND** pursuant to Section 3(1), 5, 6(1)(a), 6(1)(g), 7 and 9(b) of the Succession, Probate and Administration Act, Cap. 13.

APPLICANT

BEFORE : Justice Deepthi Amaratunga

COUNSEL : Ms. Saumatua S. for the Plaintiff

Date of Hearing : 30th May, 2013
Date of Judgment : 24th July, 2013

JUDGMENT

A. Catch Words

Defacto partner's rights under Succession, Probate and Administration Act – Whether the Defacto partner is entitled for Letters of Administration on ex-parte originating motion. Distinguished *Re Alifereti Veimosi* 2010 FJHC33: HBP 62.2010 decided on 14th July 2010.

B. INTRODUCTION

1. The Notice of Originating Motion of the applicant seeks an order that the Applicant be entitled to apply for Letter of Administration on the basis that she

is surviving wife, despite their marriage unregistered. The death certificate of the deceased did not indicate a name of spouse. The applicant seeks an order of the court for a declaration that she is entitled for the application for Letters of Administration bases on her defacto relationship and the application is made on ex-parte.

C. ANALYSIS

2. The starting point of the appointment of an administratrix is Succession, Probate and Administration Act [Cap 60] as amended from time to time. The principal enactment was O*rdinance No. 20 of 1970, Order 29 (September 1970),* amended by *Acts Nos. 14 of 1975, 24 of 1976, 12 of 1985* Succession, Probate and Administration (Amendment) Act, 1985, Act No 12 of 1985, (4th July, 1985), Succession, Probate and Administration Act, 2004, Act 11 of 2004, (7th July, 2004) and Succession Probate and Administration (Amendment) Decree 2011 (Decree No 40 of 2011).

3. The long title (preamble) of the legislation state as follows "**AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO SUCCESSION, PROBATE AND ADMINISTRATION OF ESTATES OF DECEASED PERSONS"**

4. The Section 5 state that the provisions contained in the said legislation is self-contained one which overrides all laws in force in Fiji and should not be considered with other laws for any interpretation and has to be in accordance with the said Act. Section 5 of Succession Probate and Administration Act states as follows:

> **PART III-DISTRIBUTION ON INTESTACY**
>
> *Distribution of real and personal estate of intestate*
>
> **5. Notwithstanding anything to the contrary contained in any laws in force in Fiji** at the date of commencement

> of this Act, the property of an intestate dying on or after the date of commencement of this Act shall be distributed in accordance with the provisions of this Act, and **no person shall have any right, title, share, estate or interest in such property except as provided in this Act.** (emphasis is mine)

5. In the "Australian Legal Dictionary" (Butterworths-1997) the word 'notwithstanding' is referred to as follows

> 'Notwithstanding (Latin- non obstante) – not to stand against or in the way of 1. Despite, in spite of, although, nevertheless 2. However, even though, but yet. 3. **In legal drafting, used to signal and overriding condition, for example, 'notwithstanding anything to the contrary contained in this agreement**'. (emphasis added)

6. In 'WORDS AND PRASES legally defined' (3rd Edition – supplement 2006) Lexis Nexis Butterworths, at page 560 the word notwithstanding is defined in the following manner

> "NOTWITHSTANDING
>
> [61] I do not find this argument persuasive. While I agree that "notwithstanding" in subsection 9(2) and 11(1) [of the Canadian Human Rights Act] indicates an exception to an earlier provision, in my view it does nothing more than create that exception. In Engineered Buildings Ltd and City of Calgary. Re (1966) 57 D.L.R(2d)322, at page 325 the Alberta Supreme Court, Appellate Division held that "notwithstanding anything in this Act " means "that where the facts come within that subsection no other part of the Act applies". Similarly, in Mitchell (Re) (1996), 25 B.C.L.R (3d) 249, at paragraph 17 the British Columbia Supreme

> Court concluded that "a provision beginning with 'notwithstanding X' creates an exception to X"
>
> [62] To construe "notwithstanding" as including the additional meaning of "to the contrary" would require that the word notwithstanding was being used to resolve an inconsistency or conflict between the relevant provision. But in the provisions referred to by the applicants, no such inconsistencies or conflicts exist. Therefore, the use of "notwithstanding" in these instances signals only and exception to an earlier provision

7. In 'STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES' (7th Edi, 2006, Sweet & Maxwell London) page1805 the word notwithstanding is defined as follows

> 'NOTWITHSTANDING. "Anything in this Act to the contrary notwithstanding is equivalent to saying that the Act shall be no impediment to the measure, and precisely corresponds to the words in the second saving of the Statute of Uses……"

8. The above legal definitions from the respective dictionaries indicate that word 'notwithstanding' creates an exception to the general and in this instance the exception is to all other laws in Fiji as regard to administration of the property of a dead person. This would simply override all other laws and in such an instance it is a wrong contention to rely on another laws to interpret the provisions contained in the Succession Probate and Administration Act as it is clearly stated that it should remain an exception to all other laws. No person would acquire '**any right, title, share, estate or interest in such property except as provided**' in the Succession Probate and Administration Act, as regards to obtaining of the Letters of Administration.

9. The provision regarding the grant of Letters of Administration is contained in Part IV of the Succession, Probate and Administration Act and it states as follows

> **GRANTS OF LETTERS OF ADMINISTRATION**
>
> *Persons entitled to grant*
>
> **7**. The court may grant administration of the estate of a person dying intestate to the following persons (separately or conjointly) being not less than 21 years of age-
>
> (a) **the husband or wife of the deceased**; or
>
> (b) **if there is no husband or wife, to one or more of the next of kin in order of priority of entitlement under this Act** in the distribution of the estate of the deceased; or
>
> (c) <u>any other person</u>, whether a creditor or not, *if there is no person entitled to a grant under paragraphs (a) and (b) resident within the jurisdiction* **and** fit to be so entrusted, **or** *if the person entitled as aforesaid fails, when duly cited*, to appear and apply for administration." (emphasis added)

10. The present application is made ex-parte originating motion seeking an order in terms of Order 8 of the High Court Rules, 1988 Sections 3(1), 5,6 (1)(a), 6(1)(g) of the Succession, Probate and Administration Act Cap 13. It is noteworthy that the Originating Motion has omitted the all important provision contained in Section 7 of the Succession, Probate and Administration Act Cap 13 which is the case in point of this application. I do not know whether it was a deliberate omission or not, but in any application for Letters of Administration the primary consideration is Section 7 of the Succession, Probate and Administration Act

Cap 13, and any reference to any other law is secondary and may amounts to misleading of the court and this might have resulted in her already obtained order which is annexed to the application as APC5 as supporting material for this application.

11. I cannot see any reasons given for that order annexed as APC5 and perhaps would have obtained ex-parte basis using the same tactics as they tried in this court. In Norwich Pharmacal Company and Others V Commissioner of Customs and Excise [1973] 3 WLR 164 Lord Reid said

> '[8] To apply the mere witness rule to a case like this would be to divorce it entirely from its proper sphere. Its purpose is not to prevent but to postpone the recovery of the information sought. **It may sometimes have misapplied in the past but I see no reason why we should continue to do so."** (emphasis added)

12. I do not think I can describe the annexed APC5 better and the above quote will apply to it. In any event I do not think that I am bound by that order when the statute law is unambiguous. In my judgment the consideration of Section 7 of the Succession, Probate and Administration Act Cap 13 is paramount in any application seeking Letters of Administration and any disregard to that provision of law can be considered as *per incuriam*.

13. In accordance with Section 7 (a) of the Succession, Probate and Administration Act, the surviving husband or wife obtains priority over other parties who are entitled in order of entitlement under the Act, and more specifically in terms of Section 6 (1) of the Act which deals with succession to property on intestacy. The contention of the Applicant is that she should be considered as 'wife' of the deceased, despite there was no registered marriage between the deceased and the Applicant. The Applicant states that she had a 'de facto' relationship with

the deceased for 17 years. This originating motion was filed ex-parte and there is no evidence to verify the truth of what was stated, but even assuming those facts as correct, the Succession, Probate and Administration Act, which is a self-contained provision which overrides all other provisions of the laws relating to the issues relating to intestacy as per Section 5 of the Succession, Probate and Administration Act and there is no recognition of de facto wife in the said Act, though children born out of de facto relationship are recognized under certain circumstances in the Succession, Probate and Administration Act. The express inclusion of children born out of de facto partner and non-inclusion of defacto partner is clear indication of the intention of the legislature that defacto partner is excluded from the administration of the estate on the basis of her de facto relationship and cannot be considered as surviving wife, for the purposes of the said Act.

14. Whether a de facto partner should be considered as the "surviving spouse" in terms of the Succession, Probate and Administration Act should be left to the legislation and this can be done only through an amendment to the Succession, Probate and Administration Act. The latest amendment to the Section 6 of the Succession, Probate and Administration Act which amended the order of priority and expanded the entitlement of the surviving spouse did not thought it fit to include de facto wife as the surviving wife though the children born out of de facto relationship is considered on par with the children born out of wedlock provided they satisfy the requirement contained in the said Act.

15. In **Ghaidan v Mendoza** [2004] 3 All ER 411 at LORD MILLETT in interpretation of word "surviving spouse" as regard to Rent Act (UK) held

[2004] 3 All ER 411 at 446 para 101

> **'In my opinion all these questions are essentially questions of social policy which should be left to Parliament**. For the reasons I have endeavoured to state it is **in my view not open to the courts to foreclose them by adopting an interpretation of the existing legislation**

which it not only does not bear but which is manifestly inconsistent with it." (emphasis added)

16. I fully agree with the said reasoning, but in that case the issues were different and also there were other laws supporting the interpretation of 'surviving spouse' and also the Human Rights Laws. In the present application the considerations of the provisions contained in Section 7 of the Succession, Probate and Administration Act Cap 13 is *sine qua non* for any application for Letters of Administration. If there is no husband or wife Section 7 (b) applies and next of kin in the order of priority of entitlement under Section 6 will obtain the right to apply for the administration of the property of the deceased. If not Section 7 (c) applies and the present application is not under Section 7(b) or (c), as the applicant seeks an interpretation to fall under Section 7 (a).

17. The express inclusion of only the children born out of de facto relationship, in the Succession, Probate and Administration Act, impliedly excludes the de facto wife and any such inclusion cannot be through interpretation of word 'wife' unless through an amendment to the legislation. There is no interpretation of words 'husband' or 'wife' in the Act. That does not mean that court can give any interpretation to the word 'surviving spouse' in order to include a defacto partner. Such interpretation should not be encouraged unless there are some other provisions in the Act that supports it. The express inclusion of the children born out of illegitimate or de factor relationships are included in the definition of 'child' but no such interpretation is found regarding the words 'husband or wife' in the Act. If the legislation desired to include the de facto partner, it could have easily done so by inclusion of a definition as done with the definition of 'child'.

18. The exclusion of any specific interpretation to words 'husband or wife' can only lead to one interpretation and that is the marriage registered under the laws of Fiji and legally recognized as wife or husband as the case may be. If anything other than the normal meaning was meant it could have expressly stated as

done in the case of children born out of defacto relationship. Such children born out of defacto relationship, subject to certain conditions, are on par with other children born out of lawfully wedded spouse. When the legislation thought to include such children, but left the spouse out of any special interpretation, indicate the intension and that is to exclude the de facto partners from the said provision in the Succession, Probate and Administration Act.

19. The provisions contained in the Succession Probate and Administration Act prevails notwithstanding any other laws of Fiji, and any recognition of de facto relationships as regards to the Family Law cannot be imputed to law relating to succession unless through an amendment to the Succession Probate and Administration Act. I do not consider that exclusion of de facto partner from the administration of property of the deceased as a lacuna. I think there is a strong reasoning behind the exclusion, considering procedure in the grant of probate and letters of administration. The simplicity and certainty in the system of such grants are the corner stone and if 'defacto' partner is to be considered as a 'surviving wife or husband' there are serious implications in the manner which these issues are dealt by the court at the moment with less intervention of the judicial officer and time of the court. These applications need speedy and quick disposal and also certainty, which is essential in any legal system. If these considerations are disregarded, the present system would not efficiently facilitated to cater to the litigants who seeks probates and letters of administrations. If the de facto partner is recognized as 'surviving spouse', its implications on social fabric as well as its impact on the present non-contentious probate rules as well as the administrative and judicial impact needs to be assessed and if not the existing system would be abused by any person who claims to be a defacto partner, in order to delay due administration of estate which would also create more waste and uncertainty and delay and may unduly favour such a party. So, this can only be done by legislative amendment after considering its judicial impact as well as the impact on the social fabric at large.

20. The Applicant had cited a ruling of Master, in the case of In *Re Alifereti Veimosoi* [2010] FJHC 33; HBP 62.2010 decided on 14th July, 2010 where Master had interpreted 'surviving wife' and excluded the registered wife of the deceased from FNPF contributions. I can distinguish the said decision on several grounds. Firstly, it was not a matter relating to grant of probate or Letters of Administration, but a distribution of FNPF contributions which has to be in accordance with the law in terms of the Section 35 of the FNPF Act. In that case there were considerations of children's welfare, though the ruling has not specifically dealt on that issue.

21. Secondly the issue was not fully argued in the said case, since there was no proper representation of the parties before the court and more specifically the decision of Re *Mohammed Hassan* [1989] 35 FLR 107, which was the only reported decision, which I could find, regarding the distribution of FNPF contribution and interpretation Section 35 of the FNPF Act, was not considered. This decision determined how the FNPF should be distributed 'according to law' when the FNPF Act itself in Section 43(2) excludes the FNPF contributions from other laws and state that such contributions does not form part of estate. The important issue is, in spite of Section 43(2) which excludes all other laws, the distribution of FNPF has to be in accordance with the law. In the said judgment Justice Fatiaki held, that it meant in accordance with the Section 6 of the Succession Probate and Administration Act hence for the distribution of FNPF contribution has to be in accordance with the law of succession contained in the Section 6 of the Succession Probate and Administration Act since that is the prevailing law relating to the entitlement of the beneficiaries.

22. The exclusion of the money in credit to deceased with FNPF from the estate of deceased, is done with a purpose and that is to exclude any claims to it from other parties. It is also clear that the purpose is to secure the money with the FNPF, after death from any claim on any debt of the deceased. This can be done by exclusion of the said money that is in credit to the deceased, but when that money is to be distributed there is no need to exclude the law relating to the succession to property on intestacy to distribute it. So, the purpose behind the

exclusion of the said money from the estate do not apply when it is to be distributed among the beneficiaries and Section 6 of the Succession Probate and Administration Act must apply as that is the only law relating to distribution of money of a dead person.

23. Thirdly the issue of interpretation of 'child' contained in the Section 6 of the Succession Probate and Administration Act and exclusion of special interpretation to 'husband or wife' was not discussed in the said ruling. The express inclusion of child born out of defacto relationship and non inclusion of a special definition for 'surviving spouse' should be considered as its default legal meaning and this was not considered in the said ruling.

24. In *Re Alifereti Veimosoi* [2010] FJHC 33; HBP 62.2010 decided on 14th July, 2010 the wife who was living in de facto relationship in adultery for 3 years prior to the demise of her husband was excluded from the FNPF contributions, but in the case before me the de facto wife is claiming her rights to letters of administration where Section 7 of the Succession, Probate and Administration Act applies. In the said case there is no determination as to the Section 7 of the Succession Probate and Administration Act and the ratio of the said case cannot be applied to the present case where there is clear statutory provision and that is Section 7 of the Succession Probate and Administration Act. The husband or wife of the deceased cannot mean any other meaning than the legal wife or husband. Considering all, I distinguish the said ruling and would not follow the reasoning given in it, and it should be confined to the circumstances in that case only. The same reasoning with mutatis mutndis should apply to the ex parte order annexed to this application as APC5 and would only reiterate what Lord Reid stated in Norwich Pharmacal Company and Others V Commissioner of Customs and Excise [1973] 3 WLR 164 at paragraph 8 which I quoted earlier in this judgment at paragraph 11.

D. CONCLUSION

25. The law relating to administration of the estate of deceased is contained in Succession Probate and Administration Act. I cannot recognize the de facto partner in the order of priority for succession of the deceased. In my judgment the interpretation of the de facto partner for Law of Succession and Administration as surviving husband or wife is not possible. If such relationship is recognized in Family Law is not an issue for consideration as the Succession Probate and Administration Act would prevail over all other laws since it is an exception to the other laws in terms of Section 5 of Succession, Probate and Administration Act.

E. FINAL ORDERS

a. The ex-parte motion is struck off.

b. No costs.

Dated at **Suva** this **24th day** of **July, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva