

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Probate No. 52912**

**HPP Action No.: 23 of 2014**

**IN THE ESTATE of VINESH PRASAD late of Muaniweni, Nausori, Fiji, Farmer, Deceased, Intestate.**

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**BETWEEN** : **RANJANI REENA DEVI** of Muaniweni, Nausori in the Republic of Fiji, Domestic Duties.

**PLAINTIFF**

**AND** : **RAM NARAYAN** of Muaniweni, Nausori in the Republic of Fiji, Farmer

**DEFENDANT**

**Counsel** : **Mr. A. Nand for the Plaintiff**  
**Mr. K. Singh for the Defendant**

**Dates of Hearing** : **26<sup>th</sup> November, 2014**

**Date of Judgment** : **23<sup>rd</sup> January, 2015**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff seeks to remove the Defendant as the Administrator/trustee of her late husband's estate. The Plaintiff being the widow of late Vinesh Prasad and was the first person in the order of priority under the law to obtain the letters of administration, but she had renounced her rights in order to let her father-in-law, the Defendant, to obtain letters of administration for the estate. The Defendant became the administrator of the estate on 7<sup>th</sup> December, 2012. The estate comprised of a truck, an agricultural tractor and a farm land under a Crown Lease comprised of more than 10 acres which was cultivated with

cash crops. It was the main income for the Plaintiff's family, at the time of death of her husband. Admittedly the both movable properties were disposed for \$42,000 and a sum of \$6,000 was distributed to the widow and children.

## **ANALYSIS**

2. This is an originating summons filed in terms of Order 85 of the High Court Rules of 1988 for the removal of the administrator of the estate of late husband of the Plaintiff.
3. Both parties have filed their respective affidavits and annexed documents to it. There are some facts that are not disputed. There are facts that were submitted by the Defendant, which can be considered in the analysis of the judgment.
4. Neither side submitted written submissions and jurisdiction of the court to remove an administrator of an estate including the Defendant, is admitted. It should be noted that the Section 35 of the Succession, Probate and Administration Act (Cap 60) deals with removal of the executor appointed by will or administrator appointed by court with will annexed, which has no application to the present scenario.
5. Order 85 rule 4 of the High Court Rules of 1988 states that a Plaintiff can bring an action by way of Originating Summons for relief for any action referred in O.85 r.2. Any question arising in the administration of the estate of the deceased person or in the execution of a trust is one such question that is referred in O.85 r.2 of the High Court Rules of 1988.
6. In terms of the Section 73 of the Trustee Act (Cap 65) the court is entrusted with the removal of trustee 'whenever it is expedient' to do so. What constitutes 'expedient' may differ depending on the circumstances of the case.
7. The estate of the late husband of the Plaintiff comprised of following properties
  - a. Crown Lease No 14446, for 5.3 hectares of land (cultivated and earned income from cash crops for the Plaintiff's family)

- b. Motor Vehicle (Truck/3 Tonne Carrier) Reg EV058.
- c. Agricultural Tractor FG375.

8. The Defendant had sold both abovementioned movable properties bearing registration numbers EV 058 and FG 375 on 11/2/2013, and 21/10/2013 respectively. (According to the letter dated 27<sup>th</sup> August, 2014, from Land Transport Authority, annexed as 'A' to the affidavit in reply of the Plaintiff).
9. The Defendant is not a beneficiary of the estate and according to him all the money received from the sale of the said items, were utilized to settle the loan outstanding, from a financial institution for which he had provided details of the loan account.
10. According to the said details of the loan account of the deceased, provided by the Defendant the payment were made in following manner
  - i. 2/3/2012 5,200.
  - ii. 12/6/2012 6,200.
  - iii. 21/12/2012 6,200.
  - iv. 20/3/2013 6,200.
  - v. 18/6/2013 6,000.
  - vi. 27/9/2013 4,750.
11. From the above facts the payments of the loan were settled in quarterly (3months) installments, for last two years except for payment (iii). The majority of quarterly payments was a constant sum around \$6,200 except for the first and the last payments.
12. According to the Defendant total loan amount was settled from the sale of the two vehicles, but from his own undisputed evidence of the loan account the payments of the loan were made quarterly and the payments were around a constant sum of \$6,200.

13. The Defendant admits that Crown Lease of more than 10 acres was cultivated with cash crops and was earning income for late Vinesh Prasad. It is also admitted that said cultivation of the land continued and profits derived from that.
14. Though two years have passed no evidence of any steps being taken to transfer the said land to the beneficiaries of the estate namely the Plaintiff and her 3 children from the deceased. The Defendant was unable to state how much income derived by the main source of income from the estate. This can be considered as mismanagement of estate.
15. The Defendant was able to provide evidence in the affidavit in opposition for a payment of a sum of \$55, being school fees to two of the minor beneficiaries, but surprisingly, as regards to the income from the cash crops from a land of more than 10 acres, there is no amount of distribution mentioned. The Defendant in the paragraph 13 of the affidavit in opposition stated 'I just pay the Plaintiff half share from the profit' without indicating any amount. If such payments were actually made at least after the commencement of this litigation such amounts would have been revealed and some evidence of payment should be attached to the affidavit in opposition. According to the Defendant's affidavit the half of the profits from the farm was distributed weekly.
16. From the evidence provided by the Defendant, it is evident, that Defendant who is not a beneficiary of the estate, is delaying and or preventing the beneficiaries obtaining the profits from the farm. This has continued for last two years and further continuation is detriment to the welfare of the beneficiaries and can be considered as misconduct of the Defendant.
17. The Defendant had stated that he had repaired the agricultural tractor for \$656 and provided annexed evidence of three invoices that marked 'D' to the affidavit in opposition. The first invoice for \$412 was issued on 25.4.2013 and this tractor was transferred about 7 months later. Whether any income from that tractor was earned was not stated by the Defendant. It is also noteworthy that two other invoices annexed to substantiate payments for the parts to the tractor were issued in 2014, long after it was

sold and transfer of the ownership was effected in the records on 21<sup>st</sup> October, 2013! Defendant's conduct amounts to willful default as well as misconduct on the part of the administration of the estate.

18. The registration no EV058 was a 3 tonne carrier truck, and whether there was any income derived from that vehicle prior to the sale was not revealed.
19. The Plaintiff is a widow with 3 school-going-age children and she was unemployed and, her sole income derived from the income of cash crops when her late husband was alive. Her husband had obtained substantial amount of money as loan from the Fiji Development Bank (FDB) for the purchase of tractor and also for a truck. There was no evidence of default of such loans and this indicates substantial income from the farm. As a prudent financial institution, FDB would have assessed the income from the farm, before granting such a loan as the main income of the deceased.
20. It is now obvious that Defendant is continuing with the farming of the land and reaping profits from it, and if the same level of harvest is expected, there cannot be an issue of payment of the loan installments periodically, without utilizing sale proceeds of the sale of movable assets for the settlement of the loan.
21. This may be the reason for payment of the loan periodically, and full settlement of the loan prior to the sale of the agricultural tractor. If the sale of the cash crops were sufficient to meet all the living expenses of the Plaintiff's family, including the payment of the loan during the lifetime of late Vinesh, there should be a good reason for decline of income from farm. There is no such allegation of decline of income from the farm by the Defendant.
22. According to the Plaintiff, she is now cultivating a portion of the land for herself and her children. This indicates the helpless situation that she had encountered, due to her own renunciation of right to obtain the letters of administration for the estate. She may be regretting for her past decision.

23. The law gave her the priority to be the trustee of the estate of her late husband. She and her children are the only beneficiaries of the estate and already more than two years have passed, but the Defendant is unable to hand over the farm to the beneficiaries or to distribute the profits derived from it. The Plaintiff is now engaged in subsistence farming on a separate portion of the farm for her survival. This is due to the actions of the Defendant to fulfill his duties as the administrator of the estate.
24. This is an Originating Summons seeking removal of the Defendant as the trustee/administrator of the estate. The Plaintiff as the widow of the deceased was the person entitled by law to obtain letters of administration to the estate, but she had renounced her rights and since her children were minors, the Defendant who was the father in law of the Plaintiff obtained the right to obtain letters of administration. The relationship between the Plaintiff and the Defendant would have been favourable at that time, but it has now got strained. Admittedly the Plaintiff and the Defendant are now not even talking to each other. We were not told of any reason, but it seems that mistrust between the two have widened.
25. The Plaintiff accuses the Defendant for not distributing the sale proceeds of the two vehicles. The two vehicles were transferred in March, 2013 and October, 2013 and Plaintiff admits a total receipt of \$6,000. The total amounts received from the sale of the truck and tractor was \$42,000. The Defendant states that he settled the loans from the said sale of vehicles.
26. There was no loan outstanding when the second vehicle was transferred on 21<sup>st</sup> October, 2013 for \$12,000. This is deducible from the Defendant's affidavit in opposition which annexed details of loan, marked 'A' which indicate a surplus balance for loan from September, 2013. So, even if one believes everything in the Defendants affidavit in opposition the total sale proceeds of the FG 375 tractor should have been distributed to the beneficiaries, which was not done.

27. According to the details of the loan account of the deceased the full settlement of the final installment was made on 27.09.2013 and the affidavit in opposition filed by the Defendant was filed almost one year after full settlement of the loan, but no effort was made to transfer the Crown Lease and or its benefits to the widow or the children. This is an act that is detriment to the welfare of the beneficiaries and also can be considered as an act of mismanagement of the estate.
28. The Defendant who is not a beneficiary is delaying and or refusing the distribution of the rights to the beneficiaries. This include the income of the farm cultivated with cash crops which was able to finance a substantial loan granted by the premier development bank in Fiji, which would have assessed the repayment capacity from it.
29. The court can remove a trustee or personal representative of an estate where it is expedient to do so. Without prejudice to what was stated in above paragraphs the Plaintiff and her three children are the only beneficiaries to the estate. In the past 2 years two of the valuable properties were disposed and substantial income from the farm cultivated with cash crops derived to the estate, the beneficiaries received only about \$6,000. The settlement of the loan will not fully justify such income derived for the estate for more than two years. At the same time delay in the transfer of farm to the beneficiaries, without a valid reason, can be another reason to removal of the administrator of the estate. When considering what is 'expedient', there is a discretion granted to court. The discretion can be exercised depending on the facts and circumstances of each case.
30. Halsbury's Laws of England/WILLS AND INTESTACY (VOLUME 102 (2010), PARAS 1-564; VOLUME 103 (2010), PARAS 565-1304)/10 under the heading of Power of the High Court to substitute or remove personal representatives (para 1165) states as follows;

*'When exercising its discretion the court is governed by the same principles that govern the removal of trustees<sup>1</sup>. The overriding*

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<sup>1</sup> See Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch), [2008] Ch 395, [2007] 4 All ER 81

*considerations are whether the trusts are being properly executed and the welfare of the beneficiaries<sup>2</sup>.*

31. This is an Originating Summons but the court is not precluded from considering the admitted facts and also facts which are stated in the affidavit in opposition filed by the trustee to ascertain the conduct and due administration of the estate. Even if I am wrong on the analysis of such facts, it is an admitted fact that the relationship between the Plaintiff (beneficiary) and Defendant, who is not a beneficiary of the estate has strained. In *Letterstedt v Broers* [1881–5] All ER Rep 882 at 886-7 Lord Blackburn dealt the issue of conflicts between the trustee and beneficiary and said,

*'As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported.'*

32. The above passage is applicable for the present scenario. The Defendant was able to administer the estate for two years only because of the Plaintiff's renunciation of her right to be the administrator of the estate of her late husband. The Defendant had not given a valid reason for the refusal to relinquish his duties as the administrator. The position of the Plaintiff as a beneficiary of the estate and the Defendant who is not a beneficiary is a factor that can be considered in favour of the Plaintiff's application in a conflict situation.

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<sup>2</sup>Letterstedt v Broers (1884) 9 App Cas 371 (friction or hostility between trustees and beneficiaries is not of itself a reason for the removal of the trustees, but where the hostility is grounded on the mode in which the trust has been administered, it is not to be disregarded). See also Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch), [2008] Ch 395, [2007] 4 All ER 81; Re Loftus, Green v Gaul [2006] EWCA Civ 1124, [2006] 4 All ER 1110, [2007] 1 WLR 591; Heyman v Dobson [2007] EWHC 3503 (Ch), [2007] All ER (D) 275 (Dec). The power to remove and replace personal representatives is not limited to cases of misconduct: see Angus v Emmott [2010] EWHC 154 (Ch), [2010] All ER (D) 70 (Feb) (application to remove executors based on their hostile relationship).



33. Lord Blackburn in *Letterstedt v Broers* [1881–5] All ER Rep 882 at 888 further said,
- 'It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.'* (See (1884) 9 App Cas 371 at 389, [1881–5] All ER Rep 882 at 888).
34. The Plaintiff and the Defendant are now hostile to each other .The Plaintiff and her children are the only beneficiaries to the estate. In such a situation with hostility and strained relationship would act against the welfare of the beneficiaries of the estate hence the removal of the Defendant as the administrator should be ordered forthwith. The hostility between the parties was considered as a factor to be considered for the removal of the trustee in *Thomas and Agnes Carvel Foundation v Carvel and another* [2007] 4 All ER 81. The said case relied on Lord Blackburn’s above quotations in *Letterstedt v Broers* [1881–5] All ER Rep 882.
35. The hostility between the parties are such that Plaintiff is now farming for subsistence while the Defendant is reaping the profits from the farm. If these facts are considered this is against the welfare of the beneficiaries especially considering the welfare of the child beneficiaries. The main income of the Plaintiff and her children was the farming of the cash crops and they are deprived of the said income during critical time of their life as expenditure for food and education will determine their future success.
36. Though the Defendant had stated that he is expending money for the estate, this statement is without any exact amount of such spending and also any evidence of such expenditure. So, this has to be taken with a pinch of salt.

## CONCLUSION

37. Though the hostility and or strained relationship, cannot be a ground for removal of an administrator or trustee in all cases, but in this case that can be considered as a reason for removal of the Defendant as the administrator. The Defendant is neither a person

appointed by the deceased nor the first person who obtained priority to obtain the letters of administration in terms of the Section 6 of the Succession Probate and Administration Act (Cap 60). The Defendant was able to be the personal representative of the estate since the Plaintiff renounced her right to the priority under law. At the time of death of her husband all three children were minors. One cannot expect welfare of the beneficiaries in such a conflicting and hostile environment considering the circumstances of the case. Even if I am wrong on that, there are evidence of mismanagement of the estate that adversely affects the welfare of the beneficiaries. The main income of the Plaintiff's family was the farm and the Defendant had failed to distribute income or profits derived from that to the beneficiaries. If he utilized the profits of the farming to settle the loan periodically which may have been the practice of the deceased, then the entire sum of the sale of the vehicles should have been distributed to the beneficiaries. Defendant who is not a beneficiary of the estate and he is acting contrary to the welfare of the Plaintiff and her three children who are the only beneficiaries to the estate. The Plaintiff is only seeking removal of the Defendant as the administrator. In the circumstances the Defendant is forthwith removed as the administrator of the estate of late Vinesh Prasad and the Plaintiff who is the widow is appointed as the administrator of the estate. It should also be noted that court is mindful of expenditure for farming for last two years, but for that Defendant was adequately compensated with the income from the said farm during last two years. The Plaintiff is not seeking income derived from estate since the Defendant's appointment as an administrator. This also indicates the bona fide of the Plaintiff's application.

## **COSTS**

38. The usually the cost is ordered in favour of the successful party. 'When a trustee refuses to give up the trusteeship and is then removed by the court, he is usually ordered to pay the costs of his removal.'<sup>3</sup>(see **A-G v Murdoch** (1856) 2 K & J 571 at 573 per **Wood V-C**; **Palaiet v Carew** (1863) 32 Beav 564.). The cost of this application is summarily assessed at \$3,500.

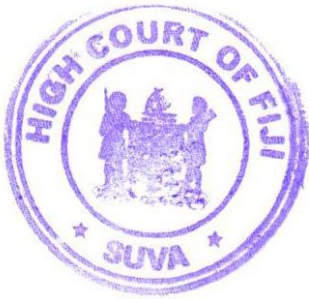
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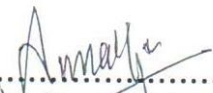
<sup>3</sup>Halsbury's Laws of England/TRUSTS AND POWERS (VOLUME 98 (2013))/2. TRUSTEES/(4) VACATION OF OFFICE/(ii) Removal/340. Removal by the court

## **FINAL ORDERS**

- a. The Defendant is forthwith removed as the administrator of the estate of late Vinesh Prasad.
- b. The Plaintiff is appointed as the administrator of the estate of late Vinesh Prasad.
- c. Defendant to pay a sum of \$3,500 as cost of this application to the Plaintiff.

Dated at **Suva** this **23<sup>rd</sup>** day of **January, 2015**.



  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**