

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 84 of 2017

BETWEEN : **RAIJIELI RACEVA TAWAKE** of 33 Macedon Street, Hoppers
Crossing 3029, Victoria Australia, Domestic Duties.

PLAINTIFF

AND : **THE CHIEF REGISTRAR**, High Court of Fiji, Government Buildings,
Suva.

DEFENDANT

Counsel : **Ms Raikaci N. for the Plaintiff**

Date of Hearing : **6th April, 2017**

Date of Decision : **27th April, 2017**

INTRODUCTION

1. The Originating Summons filed on 3rd April, 2017 filed by the surviving parent of three minors requesting for money held in High Court in terms of Section 57 of the FNPF Decree 2011, to be released to her. The Applicant is seeking to withdraw entire capital (money) held in favour of the minors who are living abroad, with her since they are living in Australia. The money is held by the Chief Registrar as the Chief Accounting Officer of High Court, on statutory trust under FNPF Decree 2011. This money held in High Court, was their entitlement from a deceased parent's FNPF account. Under the law the money is held, in trust for the benefit of the minors, until they reach the age of majority.

ANALYSIS

2. The Applicant had filed this Originating Summons for release of the entire amount held in trust in the High Court in terms of Section 57 of the FNPF Decree 2011.
3. Section 57 of the FNPF Decree 2011 states as follows

'7. - (1) In paying an FNPF member's preserved and general entitlements on his or her death, the Board must comply with any current nomination

by the member. However, the Board may only pay a nominee who was, at the time of the member's death -

(a) the spouse of the member;

(b) a parent or child of the member;

(c) an individual who was financially dependent on the member; or

(d) a person specified in rules made by the Board for this section.

(2) If a nominee of an FNPF member (not the surviving spouse of the member) is under 18 on the date of determination of the application for withdrawal, the Board must pay the amount for that nominee to the High Court.

(3) If -

(a) a nomination by an FNPF member does not cover all of the amount payable in respect of the member on his or her death; or

(b) because of subsection (1), the Board cannot pay some or all of the amount payable in respect of an FNPF member on his or her death;

(the amount not covered, or that cannot be paid, is the "unallocated amount"), the Board must pay the unallocated amount into the High Court for disposition according to law.

(4) The High Court may, on application, make such orders as are just for the disposition of an amount paid in under subsection (1) or (2).

(5) If -

(a) the High Court makes an order in favour of a person under subsection (4); and

(b) the person is under 18; then, the High Court shall hold the amount to be paid in trust for the benefit of the person.

(6) Subsection (5) does not apply if the person is the spouse of the deceased FNPF member.

(7) Where no application is made in respect of an amount paid into the High Court under subsection (1) or (2) within one year after it is so paid, the amount is to be repaid to the Board, and credited to the FNPF.

(8) If a person is found to be entitled to some or all of an amount credited to the FNPF under subsection (7), the Board must pay the person the amount to which he or she is entitled, together with an amount equal to the amount that would have been credited under section 48 if the amount credited to the FNPF under subsection (7) had been credited to an account in the FNPF for the person paid. (emphasis added)

4. There is no provision in the FNPF Decree 2011 which states the circumstances on which the said money held in trust for the benefit of the minor to be released to any person except to the minor upon the attainment of age of majority.
5. If the person is above the age of 18 then the money is not kept in the High Court in trust, accordingly the money held in court in trust for the minor is released upon the attainment of 18th birthday.
6. In the absence of provision regarding the release of money held in the High Court, in the FNPF Decree 2011, the general provision regarding trusts contained in Trustees Act 1966, will apply. In this instance the law relating to the trustee should be applied as the money is held in the High Court by the Chief Registrar in trust, in terms of the Section 57 of the FNPF Decree 2011.
7. In the Trustees Act 1966 the application of the said legislation is contained in the Section 3 [TRU3] and it states as follows

3.-(1) Except where otherwise expressly provided, this Act applies to every trust, whether constituted or created before or after the commencement of this Act.

(2) The powers conferred by or under this Act on a trustee are in addition to the powers given by the provisions of any other Act and by the instrument (if any) creating the trust; but the powers conferred on a trustee by the provisions of this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust and have effect subject to the terms of that instrument. (emphasis added)

8. The Trustee Act 1966 applies to the money held in trust by virtue of the Section 57 of the FNPF Decree 2011. So the relevant law, as to the dealing of the money held in the High Court are contained in the Trustees Act 1966 and FNPF Decree 2011.
9. The Plaintiff seeks withdrawal of entire capital (money) held in trust of the minors.
10. Section 55 of Trustee Act 1966 [TRU55] states as follows

'55. A trustee may at any time or times pay or apply any capital money or other capital asset subject to a trust for the maintenance, education (including past maintenance or education) or the advancement or benefit, in such manner as he may in his absolute discretion think fit, of any person entitled to the capital of the trust property or any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and any such payment or application may be made notwithstanding that the interest of that person is liable to be defeated by the exercise of a power of appointment or revocation or by the operation of the rule against perpetuities or to be diminished by the increase of the class to which he belongs; but-

(a) the money or asset so paid or applied for the maintenance, education, advancement or benefit of any person shall not exceed altogether two thousand dollars or half of the presumptive or vested share or interest of that person in the trust property, whichever is the greater;

(b) where that person or any other person is or becomes absolutely and indefeasibly entitled to the share of the trust property in which that person had a presumptive or vested interest when the money or asset was so paid or applied, that money or asset shall be brought into account as part of that share of the trust property; and

(c) that payment or application shall not be made so as to prejudice any person entitled to any prior life or other interest. Whether vested or contingent, in the money or asset paid or applied. Unless that person is in existence and of full age and consents in writing to the payment or application, or unless the Court, on the application of the trustee. So orders.
11. Accordingly, a capital sum can be paid for education and for maintenance, and this is to be exercised at absolute discretion of the trustee. The total or the maximum amount that

can be paid from such capital, under such disbursement is $\frac{1}{2}$ of the said capital or 2,000, whichever is higher.

12. So, by law $\frac{1}{2}$ of the capital sum cannot be released at all, and needs to be preserved by the trustee so the Plaintiff's application for the withdrawal of entire sum held in High Court cannot succeed in law. It would be illegal to release entire capital even to a parent under Section 56 of the Trustee Act, 1966.
13. It should also be noted when such capital is released for maintenance, education, advancement or for benefit conditions can be imposed on the person to whom such money is released. This is for the preservation of the capital and to prevent misuse or abuse of such money by others including parents. Section 56 of Trustee Act 1966 deals with such conditions. It states as follow;

Conditional advances for maintenance, etc.

56.-(1) Where a power to pay or apply any property for the maintenance, education, advancement or benefit of any person or for any one or more of those purposes is vested in a trustee, the trustee when exercising the power shall have, and be deemed always to have had, authority to impose on the person any condition, whether as to repayment, payment of interest, giving security or otherwise; and at any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

(2) In determining the amount or value of the property that a trustee, who has imposed a condition pursuant to the provisions of subsection (1), may pay or apply in exercise of his powers in that regard, any money repaid to the trustee or recovered by him shall be deemed not to have been so paid or applied by the trustee.

(3) Nothing in this section contained shall impose upon a trustee any obligation to impose any condition pursuant to the provisions of subsection (1); and a trustee, when imposing any condition as to giving security, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by the provisions of this Act or by any rule of law or by the trust instrument (if any).

(4) A trustee shall not be liable for any loss which may be incurred in respect of any money that is paid or applied under the provisions of this section, whether the loss arises through failure to take security, through the security being insufficient, through failure to take action for its protection, through the release or abandonment of the security without payment, or from any other cause.

14. The Applicant, who is the mother of the three minors has a parental obligation to maintain children. She had been in Australia for considerable time period even prior to the death of her late husband.
15. She had not indicated her present as well as past income or employment. She stated that she had obtained permanent visa to reside in Australia indefinitely since 2007. She also stated that since 2012 two of the older children had also obtained permanent visas to reside in Australia indefinitely. The youngest child was born in Australia and he had obtained visa to reside in Australia indefinitely.
16. According to the affidavit in support she had stated that she needs money to maintain minors. No evidence of her expenses regarding the minors presented.
17. Perusal of the file indicate that the Plaintiff obtained \$56,436.68 , in 2016, and only two minors entitlements are held in the High Court in terms of Section 57 of the FNPF Decree 2011.
18. In terms of the Section 55 of Trustees Act 1966 and the Section 57 of FNPF Decree, capital (money) held in trust can be released at the discretion of the High Court. The total or maximum amount that can be released from the capital for such purposes is half of the amount or \$2,000, whichever is maximum.
19. The Plaintiff had stated that the youngest child is suffering from Down Syndrome, which is incurable genetic disorder. (See paragraph 12 of the Affidavit in support of the Originating Summons) The annexed documents in proof of Downs Syndrome, indicate that

the child was progressing well and suffering from intellectual disability 'expected for a child with Trisomy 21 or Down Syndrome. (See Annexed I).

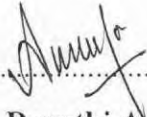
20. The Plaintiff had not in the affidavit in support included her income and the expenses for the education to assess the amount and or periodic intervals, that can be released from the capital held in trust in High Court. This may be so, as she did not request any partial withdrawal but only sought the entire sum. There is clearly statutory prohibition for release of entire capital, it should be noted that the maximum amount that can be released by the High Court is restricted to $\frac{1}{2}$ of the capital held in trust by the Chief Registrar (High Court) (or \$2000, which does not apply to this case. Though amounts can be periodically released for education of the minor children the total maximum amount that can be released under the law is $\frac{1}{2}$ of the capital that is held in trust in High Court.
21. The Originating Summons does not seek partial withdrawal, but if a proper application is made with sufficient information in order to exercise the discretion in favour of such application, periodic amounts can be released with appropriate conditions in terms of Section 56 of the Trustee Act 1966 [TRU56].

FINAL ORDERS

- a. The request to withdrawal of entire amount held in trust by the High Court is refused.
- b. The maximum or the total amount that can be released at the discretion of the High Court is $\frac{1}{2}$ of the Capital (money) or \$2,000 whichever is higher.
- c. The Originating Summons is struck off subject to above orders.
- d. No costs.

Dated at Suva this 27th day of April, 2017




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Justice Deepthi Amaratunga
High Court, Suva