IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT
LAUTOKA

Civil Action No. 254 of 2016

BETWEEN : **PRANIL ASHWIN NAIDU** of Varadoli, Ba, **YOGENDRAN NAIDU PRAKASH** of 7298 141A Street, Surrey, B.C. Canada, **KALPNA WATI NAIDU** of 22 Larchwood Ave, Westmere, Auckland, New Zealand, and **DEVIKA SITA NAIDU** of 7298 141A Street Surrey, B.C. Canada.

Plaintiffs

AND : **RAM DEVI** of Waimaro, Tailevu.

1st Defendant

AND : **THE MANAGER, FIJI NATIONAL PROVIDENT FUND** of Naviti Street, Lautoka.

2nd Defendant

Counsel : M/S Vijay Naidu & Associates for the Plaintiffs
Kohli & Singh for the Defendant
In House Counsel – Fiji National Provident Fund

RULING

INTRODUCTION

1. There is a tussle before me between the children of a deceased member of the Fiji National Provident Fund on the one hand, and their "estranged" mother on the other hand. The issue between them is whether the mother, Ram Devi, should have a share in the funds standing in the FNPF account of their deceased father/"husband".

2. The application before me is filed by Pranil Ashwin Naidu (**"Pranil"**). He is one of the four surviving issues of Paras Ram Naidu (**"Naidu"**) who was the deceased FNPF member in question and Ram Devi.

3. Pranil seeks the following Orders:

   (1) That the balance of the FNPF pension conversion amount standing to the credit of the deceased member namely Paras Ram Naidu, which has been paid to the High Court of Fiji due to an invalid nomination be released to the Plaintiffs.
   (2) That there be stay of any distribution of the deceased member's savings until the determination of this matter.

(3) Any other Orders this Honourable Court deems just.

BACKGROUND

4. Naidu died on 12 January 2015 without leaving a valid nominee. As I have said, he was a member of the Fiji National Provident Fund (**"FNPF"**) superannuation scheme. At the time of his death, the credit balance standing in Naidu's FNPF Account was $28,000-00.

5. Naidu was married to Ram Devi. They had four children together namely Yogendran Naidu (now aged 39 years), Kalpana Wati Naidu (now aged 37 years), the Applicant, Pranil Ashwin Naidu (aged 35 years) and Devika Sita Naidu (aged 34 years). The four children all survive Paras Ram.

6. It is not disputed that Ram Devi left Paras Ram more than twenty years ago to live in an adulterous *de facto* relationship with another man. I gather that she has cohabited with the other man continuously to this day, without interruption. That cohabitation started immediately after she left Naidu.

7. Both counsel accept that, by operation of Schedule 4 paragraph 5(1)(c) of the Fiji National Provident Fund Decree 2011, where a member of the Fiji National Provident Fund has died without any nomination or without a valid nomination, all monies standing in the account of the deceased member must be paid to the High Court for disposal in accordance with the law for the time being in force, which, at this time, is section 6 of the Succession Probate and Administration Act (see **In re Narendra Prasad** FNPF (57/1982); **In M. v. Attorney-General** (1985)).

8. The question has again arisen before me as to whether a "spouse" who had abandoned her husband and children to live in adultery or in a *de-facto* relationship with another man (even though she remained lawfully married to

the husband until the death of the latter) abrogates her right of inheritance in the husband's estate under our intestacy laws.

THE AFFIDAVITS

9. In paragraphs 7, 8, 9, 10, 11 and 12 of an affidavit sworn by Pranil Ashwin Naidu on 29 November 2016, he deposes as follows:

> 7. That Paras made numerous pleas to Devi to return home during the first few weeks she had left. Paras even took all four children and begged her to return home. She refused. As a result of this trauma Paras not long after went into depression. He stopped all communication with Devi and her family. In fact Devi's mother's house was just next door however, he never communicated with them. He did not want to have anything to do with Devi and her family.
> 8. That Devi also made no attempts whatsoever to have any communications in any form or kind after she left. She in fact abandoned me and my 3 siblings and took no responsibility in our welfare.
> 9. That after she left she made no communications with us to see if all our needs were met, whether we were safe or not and continuously failed and/or neglected her role as our mother. Her detachment from our family extended to such an extent that she did not even attend wedding ceremonies of the other plaintiffs.
> 10. That the marriage between Paras and Devi had broken down irretrievably. Paras was suffering from depression and therefore was unable to file dissolution of marriage proceedings. He did not want to even see her or have any communication with her. Although Paras and Devi never filed application for dissolution of marriage, I believe that she should not be entitled to any shares and interests in the FNPF benefits of the deceased as she had left Paras for another man and had been separated from Paras for about twenty one (21) years or so.
> 11. That I am the only person who remained with Paras and looked after him and cared for him till his last breath. All the other Plaintiffs were living in overseas thus, could not be there in person for him but they all provided financial assistance when they could and also visited him whenever it was possible for them. Three to four years prior to his demise Paras was rushed to hospital (Colonial War Memorial Hospital) for medical emergencies. I solely took care of Paras.
> 12. That the other Plaintiff have through their respective letters of authorities given me permission to represent them in this matter. Annexed hereto and marked as "E" is copies of all these letters. Further the Plaintiffs have also executed their respective Deed of Renunciation in my favour. Annexed hereto and marked as "F" is copies of all the Deed of Renunciation by the other Plaintiffs.

10. Ram Devi replies to the above allegations as follows in paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and 20.

15. That in reply to paragraph 10 of the said affidavit I say that the deceased did had sound mental capacity.
16. That I am advised and do verily believe that due to my marriage with the deceased I am entitled to my shares and interests in the FNPF.
17. That I with respect to Paragraph 11 of the said affidavit I say that the contents are not relevant for consideration for payment of FNPF benefits.
18. That I do not agree with Paragraph 12 of the said affidavit and say that the entitlements of the children to the FNPF proceeds can be paid to the 1st named Plaintiff.
19. That with respect to Paragraphs 13 of the said affidavits I say that I should be paid my share according to the laws of Fiji.
20. That despite our separation, the Deceased used to talk to me from time to time and I believe that he purposely did not file for Divorce. The Deceased knew that because of our relationship, I would be entitled to my share in the FNPF proceeds. He also used the FNPF money to educate the children. He also used to meet me from time to time when I visited my mother.

THE LAW

11. Schedule 4 Paragraph 5(1)(c) of the Fiji National Provident Fund Decree 2011 states:

> *What happens if the annuitant dies?*
> 5. - (1)If the annuitant dies within 5 years after the date of purchase of the annuity—
> (a) .....
> (b) .....
> (c) if there is no relevant nomination current at the annuitant's death - the Board must pay the amount of the payments for the rest of the 5 years, commuted in accordance with this Schedule, into the High Court **for disposition according to law.**

12. The above provision is similar in wording to section 35(1) of the old Fiji National Provident Fund Act which provides as follows:

> Procedure where there is no nominee or a minor nominee
> 35.—(1) If, at the time of the death of a member of the Fund, there is no person nominated under section 34 the Board, on being notified of the death of the member, shall pay into Court the amount standing to the credit of the member in the Fund for disposal in accordance with the law.

13. As I have said above, in Fiji, the phrase "disposal in accordance with the law" in section 35(1) has been interpreted to mean that distribution will have to be done in accordance with the laws of intestacy under the Succession Probate

And Administration Act (Cap 60). Given the similarity in the wording of the two provisions, there is no reason why the interpretation given to the old section 35(1) should not be applied to the new Schedule 4 Paragraph 5(1)(c).

14. Accordingly, I interpret the words "for disposition according to law" in Schedule 4 Paragraph 5(1)(c) to mean disposition in accordance with section 6 of the Succession, Probate and Administration (Amendment) Act.

15. Section 6(1)(c) and (d) of the Succession, Probate and Administration Act provides:

> 6.-(1) Subject to the provisions of Part II[3], the administrator on intestacy ..... shall hold the property as to which a person dies intestate ..... on trust to distribute the same as follows:
> (a) .....
> (b) .....
> (c) if the intestate leaves issue, the surviving wife or husband shall, take the prescribed amount and the personal chattels and one third only of the residuary estate absolutely, and the issue shall take per stripes and not per capita the remaining two-thirds of the residuary estate absolutely;
> (d) if the intestate leaves issue, but no wife or husband, the issue of the intestate shall take *per stirpes* and not *per capita* the whole estate of the intestate absolutely; (my emphasis)
> (e) .....
> (f) .....
> (g) .....
> (h) .....

16. If Pranil's argument prevails, then section 6(1)(c) will apply. If Ram Devi's argument prevails, then section 6(1)(d) will apply.

DISCUSSION

17. The starting point, in my view, is that a woman who is legally married to an intestate at the time of his death is, for all intents and purposes, the "surviving wife" and, therefore, is entitled to distribution of his estate in terms of section 6.

18. The onus is on anyone who claims that she is not entitled to distribution to prove so.

19. The adulterous conduct of a spouse, is not the issue and may, or may not, be relevant in any given case. This Court does not pontificate on matters of a moral dimension.

20. The issue is whether or not Ram Devi is a "surviving wife" in terms of section 6(1)(c).

21. Strouds Judicial Dictionary (Volume 5) defines "survive" as follows:

> "Survive" imports that the person who is to survive must be living at the death of the person whom, or at the happening of the event which, he is to survive (**Gee v Liddell** L.R. 2 Eq. 341).

22. The next question to ask is whether or not a deserting and adulterous wife is a "wife" within section 6(1)(c) of the Succession Probate and Administration Act.

23. Some jurisdictions have specifically legislated to disentitle a deserting and adulterous wife from any share in the intestate deceased husband's estate. Fiji's Act has no such provision, nor does it attempt to define the word "wife".

24. As a starting point, one can safely say that under the intestacy provisions of section 6, a legally divorced woman can claim no share in the estate of the deceased former spouse. In this regard, the thing that operates to disentitle her is the legal divorce which effectively severs their relationship and, with that, any entitlement she may have over his estate.

25. The question I ask is whether or not a woman who had deserted her husband and children to live continuously in adultery with another man, and who was in fact still living with that other man at the time of the death of her husband, and who, since deserting the husband, has had nothing whatsoever to do with the rearing or upbringing of her children, and who has refused to return to her

husband, had, for all intents and purposes, effectively severed her spousal relationship with her husband.

26. If the answer to the above question is "yes", is the woman then entitled still to be called a "surviving wife" in the sense contemplated by section 6 of the Succession Probate And Administration Act so as to entitle her to a share of her husband's estate under Fiji's intestacy laws?

27. To the ordinary person on the street, the thought that such a woman should be entitled to share in the late husband's estate may be morally repulsive. The thought would be even more repugnant when one considers that she would stand to inherit a sizeable share under the section 6(1)(c) scheme. Furthermore, the thought that she may, yet, then bequeath her inheritance to her *de facto* partner and/or children with the *de-facto* partner, would be totally abhorrent.

28. All of these are irrelevant considerations.

29. Rather, the first question I should address is whether or not the relationship of the woman with her husband is relevant in the scheme of things?

30. The law recognises the sanctity of marriage in many contexts. The Criminal Division of the High Court of Fiji, in many instances, has expressed sentiments recognising the sanctity of the marriage and how the husband may offend that by acts of domestic violence or marital rape.

31. Mr. Justice Aruna Aluthge in **State v Salayavi** [2017] FJHC 198; HAC203.2016 (17 March 2017) said:

> [12]. This sentence is passed not only to denounce your offending and punish you. But also to send a clear message to the society that marital rape, the worst form of domestic violence is no longer tolerated in Fiji. When sexual intimacy is egoistically used to despoil marital union in order to advance a felonious urge for coitus by force, violence or intimidation, the court will step into protect **sanctity of marriage**, vindicate justice and protect our laws and State policies.

32. In **State v Pe** [2005] FJHC 5; HAC0024D.1004S (11 January 2005), Madam Justice Shameem held that a woman in a *de facto* relationship was a competent and compellable witness against her *de facto* husband. In that case, Shameem J also reviewed some case authorities on the position that the non-compellability of a legally married spouse was based on the sanctity of marriage.

33. Michael C. Howard **Contemporary Cultural Anthropology (5th Edition)** defines marriage as "a socially sanctioned sexual and economic union between men and women".

34. If, as one might imagine, the so-called "economic union" in the institution of marriage entails the duty of one spouse to maintain the other, then in some old English cases, that economic union is said to be broken by an act of adultery of the woman, even where the parties remained legally married.

35. In **Wilson v Glossop** 20 QBD 354, the question arose in England as to whether or not a husband was legally bound to maintain a deserting and adulterous wife under section 4 of the Vagrancy Act 1824. Lord Esher MR said at 356:

> When a man marries he is bound to keep and maintain his wife, unless she has committed adultery, and further, he is bound in honour to protect her from infamy.

36. Lopes LJ said as follows:

> During cohabitation, there is a presumption , though a rebuttable one, arising from the circumstances of cohabitation, that the wife is, in certain cases, the agent of her husband and entitled to pledge his credit. But when the wife is living apart from her husband at the time of making the contract the presumption is the other way, and it lies on the creditor to shew that the wife is living apart from her husband under such circumstances as give her an implied authority to bind him.

37. From my reading of the judgement, there is nothing in it to suggest that the judges were relying on a provision in the Vagrancy Act of 1924 which precluded

the husband from liability in the case of a deserting and adulterous wife. Rather, they were simply following a line of reasoning which acknowledged that the conduct of a spouse which is of a nature repugnant to and defiant of the obligations which are inherent in the sanctity of marriage, may disentitle the offending spouse from any benefit that would normally accrue out of a spousal relationship.

38. In **Eastland v Burchell** 3 QBD 432, Lush J said:

> The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she bind him, she binds him only as his agent. ....If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere.

39. In Fiji, sections 155 and 157 of the Family Law Act are interesting in this regard. Section 155 provides that a spouse is liable to maintain the other party if and only if the other party is unable to support herself or himself[1].

40. Section 157 sets out the factors which a Court must consider in deciding whether or not to order a spouse to pay maintenance for the other.

41. Notably, included amongst the factors to be considered is whether or not the spouse to be maintained is cohabiting with another person and also the financial circumstances of that cohabitation (see section 157(l)).

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[1] Section 155 provides:

Right of spouse to maintenance

155. A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party if reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether-

(a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason,

having regard to any relevant matter referred to in section 157.

Matters to be taken into consideration in relation to spousal maintenance

157. In exercising jurisdiction under section 155, the court may take into account only the following matters-

(l) if either party is cohabitating with another person - the financial circumstances relating to the cohabitation;

42. Fiona Burns in her article "**The Changing Patterns of Total Intestacy Distribution between Spouses and Children in Australia and England**" [2013] UNSWLawJl 18; (2013) 36(2) University of New South Wales Law Journal 470 observed that intestacy laws in England had shifted over the years through reforms from one that was initially preoccupied with the financial well being of male descendants to one that focuses on the surviving spouse[2].

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[2] Professor Burns wrote:

By the end of the 19th century, the 'vertical tendency' of English intestacy law in which the major preoccupation was the financial wellbeing of the descendants of the intestate no longer served society and the reform of intestate succession became increasingly necessary. In addition to concerns about the status and rights of women, there were other reasons. First, the old pattern of intestate succession was no longer relevant to the upper and middle classes who implemented complex trust and marriage settlements.[41] Second, economic change meant that the rules did not address the economic circumstances of typical intestates. England had industrialised and there was a large urbanised population who did not own or work on land.[42] Third, in relation to the development of the middle classes, other forms of finance-based personalty emerged which could be passed on. In view of the changing nature of property, it has been demonstrated that the business classes preferred and utilised the principle of partible inheritance, so that the estate was distributed between the surviving spouse and the children of the deceased.[43] Indeed in some cases, the initial control of the whole estate was given to the wife exclusively.[44] Fourth, although spouses had obligations of care and support to one another prior to the 20th century,[45] this became a central function of companionate marriage.[46]

1 The Original* Administration of Estates Act 1925, *15 & 16 Geo 5, c 23

The *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23 was a significant overhaul of English succession law and remains (subject to amendment) the foundation of intestate succession in England. The legislation made four sweeping reforms:

(a) The Abolition of the Separate Rules for Realty and Personalty

In the main, the separate rules for realty and personalty were discarded in favour of a scheme influenced by the *Statute of Distribution 1670*, 22& 23 Car 2, c 10.[47] However, spouse-focused intestacy still retains some separate treatment of realty and personalty, but in ways different from that in the 19th century.

(b) Gender-Neutrality and Equality

Primogeniture no longer applied and the male and female lines had equal rights. Widows and widowers were treated equally.[48] The principles of hotchpot and *per stirpes* distribution were not abolished, but these principles did not prevent the application of the rules in a gender-neutral way.

(c) Spouse-Focused Intestate Succession

A new category of primary entitlement emerged. The major question was not whether the issue (particularly male children) survived the intestate. Instead, the principal determinant of the pattern of distribution became whether there was a surviving spouse. The central or 'gravitational' pull of intestate succession shifted from the preservation of family assets to the care and financial security of the surviving spouse. This was not unusual. Other European countries also prioritised the spouse. Indeed, Chrisoph Castelein has commented that '[t]he promotion of the surviving spouse as intestate (and in some countries as imperative) heir was one of the most remarkable changes of inheritance law during the 20th century'.[49]

(d) The Limitation of Those Relatives Entitled to Inherit from the Intestate

The traditional rules for determining the 'next of kin' were largely abolished and a limited statutory scheme was introduced, entitling (in order) parents, brothers and sisters, grandparents, uncles and aunts.[50]

43. Professor Burns then observed that the shift in focus arose from the recognition of the need to provide for the care of, and financial security of, the surviving spouse.

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44. Fiji's Succession Probate And Administration Act is one of the many laws inherited when Fiji became a colony of Great Britain. Clearly, in my view, section 6 is premised very much along the same policy lines as the one which Professor Burns identifies above.

45. Counsel for the FNPF urges this court to consider a definition of "surviving wife" in terms of dependency. The argument is that the wife was obviously no longer dependent on the husband at the time of his death because she had deserted him and the children to live in a *de-facto* relationship with another man for more than twenty years.

46. Counsel for Ram Devi insists that a "surviving wife" is the legally married wife, regardless of whether she was a deserting and adulterous wife.

47. Again, as Dr. Burns observes, the intestacy laws inherited from England is based on the need to provide for the care of, and financial security of, the surviving spouse.

48. The need to provide for the care of and financial security of the spouse is based ultimately on the duty of one spouse to provide for the other, which duty is recognised both in common law and in Fiji's Family Law Act, and which duty is based ultimately on the sanctity of marriage.

49. In my view, when a spouse engages in conduct which is repugnant to and defiant of the obligations which are inherent in the sanctity of marriage itself, he or she abrogates his or her entitlement to benefit from that marriage arrangement, which must include the right to inherit in terms of the intestacy provisions in our Succession Probate And Administration Act.

50. The issue of whether the conduct is of such a repugnant and defiant nature sufficient to disentitle the spouse from any inheritance under Fiji's intestacy laws, must be a question of fact in any given case.

51. In the matter before me, I take into account the following:

(i) fact that Ram Devi had abandoned Naidu and the children for some twenty years or so,

(ii) and throughout that time, had played no role in the children's upbringing,

(iii) or later, in fulfilling her role as mother during the marriage of her children,

(iv) that she never served Naidu as his wife, and

(v) that she had left Naidu for another man, and had uninterruptedly cohabited with that other man since the time she left Naidu.

(vi) clearly, she is being supported by her *de-facto* partner of more than twenty years.

52. In **Suva City Council v R B Patel Group Ltd** [2014] FJSC 7; CBV0006.2012 (17 April 2014) the Supreme Court of Fiji reiterated the two approaches to statutory interpretation as follows:

> 62. Generally speaking, there are two schools of thought in relation to the interpretation of statutes, the literal and the purposive. The **literal approach**, which was defined and explained by Higgins J. in ***Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*** [1920] HCA 54; (1920) 28 CLR 129, 161-2, seeks the intention of the legislature through an examination of the language in its "ordinary and natural sense ... even if we think the result to be inconvenient or impolitic or improbable". This method was also preferred by McHugh J. in ***Hepples v FCT*** [1992] HCA 3; (1991-1992) 173 CLR 492, 535-6, even if it produces "anomalies or inconveniences". Courts have stressed that they "cannot depart from the literal meaning of words merely because the result may ... seem unjust" (***CPH Property Pty Ltd & Ors v FC of T*** 98 ATC 4983, 4996 *per* Hill J.) or even "lead to a manifest absurdity" (***R v The Judge of the City of London Court*** [1892] 1 QB 273, 290 *per* Lord Esher).
>
> 63. An alternative method of interpretation applied by the courts is known as the **purposive approach**, which is an approach to statutory interpretation in which **the courts interpret legislation in the light of the purpose for which it was enacted and which promotes the purpose of the legislation**. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone"(*per* Lacobucci J in ***Re Rizzio & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27, at paragraph 21) and permits courts to utilize extraneous pre-enactment material such as cabinet memoranda, draft bills, Parliamentary debates, committee reports and white papers. The purposive approach was explained by Kirby J in ***FC of T v Ryan***, (2000) 42 ATR 694, 715-716, in the following manner:-
>
> > *"In this last decade, there have been numerous cases in which members of this court ... have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature ... even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose ...This court should not return to the dark days of literalism."*
>
> 64. Somewhere between the strictly literal method of interpretation and the purposive approach to interpretation lies the "**golden rule**", which was clarified by Viscount Simon LC in his judgment in ***Nokes v. Doncaster Amalgamated Collieries Ltd***. [1940] 3 All ER 549 at 553 as follows:-
>
> > *"The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation that which will reverse the previous law, for the purpose of a large number of our statute law is to make lawful that would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow.... At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the*

manifest purpose of legislation, we should avoid a construction that would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

53. I prefer a robust definition of "surviving wife" to mean a widow who was still legally married to the deceased intestate at the time of his death and who, during the marriage, had not engaged in any (proven) conduct of such nature repugnant to and defiant of the obligations which are inherent in the sanctity of marriage, sufficient to disentitle her from any expectation of any benefit in the intestate deceased husband's estate. To adopt a narrow view would be contrary to the policy of the intestacy provisions which Dr. Burns outlines.

54. As a side comment, a valid will that makes provision even for a deserting and adulterous spouse must be respected because, at the end of the day, it is the wishes of the testator which must prevail.

55. However, when it comes to whether a surviving, deserting and adulterous spouse should inherit from the deceased spouse's estate in terms of the intestacy laws under section 6 of the Succession, Probate and Administration Act, different considerations must apply.

CONCLUSION

56. Accordingly, I rule that the FNPF funds standing in the account of the late Naidu should only be distributed in terms of section 6(1)(d) of the Section 6(1)(c) and (d) of the Succession, Probate and Administration Act.

57. Parties to bear their own costs.

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Anare Tuilevuka
JUDGE
Lautoka
11 July 2017