

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Civil Action No.: HBP 20 of 2017

IN THE ESTATE OF AMIRKA NAND
aka AMBIKA NAND late of Lot 7, Sivi
Road, Caubati, Finance Officer, Testate.

BETWEEN : **RAJNISH LATA** of Lot 7, Sivi Road, Caubati Sub-Division, Nasinu,
Fiji, Domestic Duties as Executrix and Trustee of **AMIRKA NAND aka**
AMBIKA NAND late of Lot 7, Sivi Road, Caubati, Finance Officer,
Testate.

APPLICANT

AND : **BIMALA WATI** of Nasinu, Fiji, Occupation Unknown.

1ST RESPONDENT

AND : **ASVINA NAND** of Lot 7, Sivi Road, Caubati Sub-Division, Nasinu,
Finance Officer.

2ND RESPONDENT

AND : **FIJI NATIONAL PROVIDENT FUND (FNPF)** a body Corporate
established under the Fiji National Provident Fund Act.

3RD RESPONDENT

Counsel : Mr. M. Nand for the Applicant
1st Respondent In Person
Date of Hearing : 2nd July, 2018
Date of Judgment : 13th July, 2018

JUDGMENT

INTRODUCTION

1. This is an application invoking probate jurisdiction of this court seeking an order for distribution of '*monies paid to the High Court Probate Registry by FNPF in respect of Amirka Nand aka Ambika Nand be released and paid to the Applicant being the sole Executrix and Trustee of the ..*' estate of the deceased. At the hearing counsel made an

application to make an amendment, and admitted that money paid to the High Court, was not to the Probate Registry, and it was paid under FNPF Act, 2011. Initially the application was filed by an ex parte notice of motion and later, the widow of the deceased and the FNPF were made parties as there was no divorce from the marriage to her before death. The Applicant was de facto partner of the deceased, with whom he lived for a long time.

FACTS

2. The 1st Respondent is the widow of late Amirka Nand or Ambika Nand who passed away on 7.10.2016. But at the time of death he was not living with her.
3. The deceased was living with a de facto partner for a long time and the 1st Respondent admitted that fact.
4. According to her the deceased lived with her only for 2-3 years from the marriage and had left her and did not return. Deceased had not obtained a divorce, but lived with Applicant and also had a child from her. 2nd Respondent is that child.
5. The 1st Respondent lives in Vanua Levu away from the main city Labasa, and she had not retained a counsel, but had filed an application to release the money held in the registry of the High Court to her.
6. At the hearing 1st Respondent appeared in person. Her application already filed in the registry, in terms of Section 57(4) of FNPF Act, 2011 for the release of money was considered as an objection to the application. In that she had included all the necessary details such as death certificate of the deceased and also marriage certificate
7. The 3rd Respondent is the FNPF and they are opposing this application on the basis of Section 94 of the FNPF Act 2015. They had not filed any affidavit but had taken a legal objection

8. The Applicant is the executrix of the last will of the deceased and she was bequeathed the residue of the estate of the deceased in terms of the said last will. Accordingly she had obtained probate.
9. The initial application was made on the basis of the probate she had obtained for the release of money in the High Court Registry. The character of the application was changed as legal wife and FNPF were added and it was converted to an application made for the release of money in terms of Section 57(3) of the FNPF Act, 2011.

ANALYSIS

10. The basis of this application is not the last will of the deceased, or the grant of probate to the Applicant. The application is made in terms of Section 57(3) of the FNPF Act 2011.
11. Section 57 of FNPF Act states as follows

Payment on FNPF member's death

57. - (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.*

(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.

12. In terms of Section 57(3) of FNPF Act 2011, if there is no nomination, as to an amount of money they are holding for the deceased member of FNPF, that money is remitted to High Court for disposition in terms of the law.
13. A beneficiary of the said sum remitted to the High Court can make an application in terms of Section 57(3) of the FNPF Act, 2011 for distribution.
14. The 1st Respondent had made such an application. At the hearing she was unrepresented but she said she is claiming for full amount paid by FNPF to the High Court.
15. The Applicant had made this application and claiming full amount paid to High Court and her claim was in terms of the last will. 1st Respondent had also made an application, and that was considered as an application made under Section 57(3) of FNPF Act, 2011. The Applicant's application in alternate considered as an application in terms of Section 57(3) of FNPF Act, 2011.
16. As I stated earlier, the provision for distribution of the unallocated amount paid to the High Court in respect of deceased member is Section 57(3) or (4) of the FNPF Act 2011.

17. The issue is whether the Applicant can claim for the money paid to the High Court for disposition in accordance with law in term so Section 57(3) of the FNPF Act, 2011.
18. The Applicant is claiming as an executrix, and her claim is based on the contention that the last will had left her residue of the estate and the money paid to the High Court in the absence of nomination is part of the estate.
19. So the Applicant is claiming in terms of the last will as the beneficiary of the residue of the estate of the deceased. Whether a last will could assign the entitlement of a member before death needs to be ascertained. Section 94 of FNPF Act, 2011 prohibits any assignment of FNPF member's entitlement.
20. Section 94 of the FNPF Act states as follows

Amounts etc not subject to sequestration

94. - (1) Except as provided by this Decree, none of the following -

- (a) amounts paid under this Decree as mandated or additional contributions;*
- (b) amounts of an FNPF member's preserved or general entitlement;*
- (c) an FNPF member's entitlements under this Decree;*
- (d) amounts paid as an FNPF member's entitlements under this Decree, so long as they retain that character;*
- (e) amounts payable to a person as special death benefit under this Decree;*
- (f) amounts payable to a person under an approved retirement income product;*

and no right of a person in relation to those amounts and entitlements –

- (i) are capable of being assigned or otherwise disposed of; or*
- (ii) are capable of being pledged, charged or otherwise being made subject to a security interest (however described); or*
- (iii) are liable to be attached, sequestered or levied upon for or in respect of any debt or claim.*

(2) A person commits an offence if -

- (a) the person engages in conduct; and*
- (b) the conduct has the effect of recognizing or giving effect to an assignment, disposition, pledge, charge, attachment, sequestration or levy; and*
- (c) the assignment, disposition, pledge, charge, attachment, sequestration or levy was contrary to subsection (1).*

Penalty - 100 penalty units.

(3)Strict liability attaches to subsection (2)(c).(emphasis is mine)

21. In terms of that a person is not capable of 'assign or otherwise disposed' of the amounts or entitlements paid under section 94(1) of the FNPF Act. If a person commits a breach of that provision strict liability applies and it is an offence in terms of Section 94(2) of FNPF Act, 2011.
22. There is no dispute as to the amount paid to the High Court in the absence of any nominee, in terms of Section 57 (3) of the FNPF Act is a sum covered in Section 94(1) of the FNPF Act.
23. In the light of that, it is an illegal act that can be subject to a charge for a criminal offence if a person assigns or otherwise disposed money stated in Section 94(1) of FNPF Act, 2011.
24. So, the last will of the deceased cannot confer any right to the Applicant to seek for entitlement for the money paid to the High Court of the deceased member.
25. The contention of the counsel for the Applicant is that there is no express provision contained in the FNPF Act that monies shall not form part of the member's estate. It is futile or superfluous to say so when Section 94(1)(i) of the FNPF Act, 2011 covers all assignments or dispositions in relation to the money under Section 94(1) of the FNPF Act, 2011 paid to High Court in terms of Section 57(3) of the FNPF Act, 2011, and no claim can be made to money paid to High Court by a third party (i.e. other than a beneficiary).

26. So, in my judgment the omission of earlier provision which expressly excluded the money from the estate of the deceased in FNPF Act 2011 cannot be taken, as inclusion of the money paid to High Court as part of an estate. As to that money paid to High Court by FNPF no creditor can claim and no such money can be subject to sequestrated or levied upon or in respect of and claim for a debt. This is a salient feature of retirement benefit scheme such as members' entitlements under FNPF, and if that character is diminished, it will lose its utility.
27. There is no dispute that the 1st Respondent is entitled to make an application for the distribution of money paid as a beneficiary being the widow of the deceased, though she was not living with the deceased for a considerable time, since there was no divorce in law.
28. If the divorce is obtained the 1st Respondent was entitled for the distribution of property, too. This did not happen and deceased left a last will that bequeathed residue of his estate to Applicant. The last will annexed was dated 22nd May, 1996. In that the Applicant was named as only executor and she was referred as 'my de facto wife' by deceased.
29. Having rejected Applicant's claim for release of money paid in terms of the last will, next issue is whether she can be considered as a beneficiary in the 'disposition in terms of law'.
30. Money is paid to the High Court by FNPF for 'disposition in terms of law' and the law that the court is considering it Succession, Probate and Administration Act, 1970 and more specifically Section 6 of the said Act.
31. Act No 6 of 2018 amended the Succession, Probate and Administration Act, 1970 and de facto partnership is recognized as a beneficiary in the distribution of the estate of the deceased.
32. So the Applicant and 1st Defendant both are entitled to equal share of the money paid to the High Court in terms of Section 6(1)(a) and it states;

(ii) both a wife or husband and a de facto partner, the surviving wife or husband and the de facto partner shall take the prescribed amount and the personal chattels and one-third only of the residuary estate in accordance with subsection (1A) absolutely, and the issue shall take per stirpes and not per capita the remaining two-thirds of the residuary estate absolutely;"

CONCLUSION

33. The Applicant cannot claim for the money paid by FNPF as an executrix of the estate of the deceased in terms of Section 94 of FNPF Act, 2011. She can claim as de facto partner recognized for disposition of money paid according to law (in terms of Section 6 of the Succession Probate and Administration Act). The alternate claim as de facto partner and the widow's claim both can be granted, but in law they have to share the amount paid to High Court.

FINAL ORDERS

- a. The Applicant and 1st Defendant are entitled for equal shares of the money paid to the High Court by FNPF.
- b. No costs.

Dated at Suva this 13th day of July, 2018



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Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva