IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Re Application In Terms of Section 57(3) of FNPF Act 2011 (Deceased Arun Dutt)

HBP Action No. 698 of 2019

BETWEEN : **GITENDRA DUTT MAHARAJ** of Naitalasese, Bau Road, Nausori, Sales Executive.

FIRST PLAINTIFF/APPLICANT

: **ARCHANA ARTIKA MAHARAJ** of Nanuku Street, Vatuwaqa, Unemployed.

SECOND PLAINTIFF/APPLICANT

R. Devi

Added Applicant/Claimant

Counsel: Applicant: **Ms N.Mishra**
Claimant (De Facto partner): **Mr.B.Makanjee**

Date of Hearing: **29th May, 2020 (9.30am)**

Date of Judgment: **29th May, 2020 (3.30pm)**

JUDGMENT

INTRODUCTION

1. This is an application made by two children of late Arun Dutt in terms of Section 57(3) of FNPF Act 2011 for distribution of money of deceased member of FNPF, remitted to this court, as there was no nomination for distribution of the money held by FNPF upon member's death. Both children were born out of *de facto* relationship. It was informed at the hearing that mother of the Applicants who had left the deceased in 1996, more than a

decade before his demise. It was also informed that she wanted to make a claim for funds on the basis of her *de facto* relationship. So her application by way of an affidavit was filed and a counsel appeared on behalf of her. The material facts of this case is not in dispute. Claimant admits that she had left deceased more than ten years before death of late Arun Dutt. So the issue is whether she is entitled for distribution of money in terms of Section 57(3) of FNPF Act 2011. The distribution needs to be 'in accordance to law' and the relevant law is Section 6 of Succession Probate and Administration Act 1970. In terms of Section 6 (1)(c)[1] only surviving wife or *de facto* partner at the time of death is entitled for distribution. No ex-wife or ex –*de facto* partner(s) are entitled for the funds of the deceased. Since claimant *de facto* partner had left the deceased and also her children more than a decade before demise of late Arun Dutt she is not entitled for the distribution of money in terms of Section 57(3) of FNPF Act 2011.

FACTS AND ANALYSIS

2. If a deceased member of FNPF had not nominated a beneficiary upon his or her death such funds are remitted to this court in terms of Section 57(3) of FNPF Act 2011 for distribution in terms of law.

3. Applicants are two children of deceased, through a *de facto* relationship with additional claimant. But the *de facto* relationship had ended irrevocably more than ten years before death of deceased.

4. Applicants do not have contacts with their mother and had not seen for a long time. They are both adults now.

5. Upon a death of a member of FNPF if there is no nomination funds are remitted to High Court for disposition. Funds are remitted when the nominees are minors, and or where nomination was not for the entire fund, but that has no application to this case as there was no nominee by deceased. The children of the deceased, who are applicants, are adults. Their mother is claiming as previous de facto relationship that had ended before death.

6. Predecessor to FNPF Act, 2011 was FNPF Act 1966 as amended from time to time in Section 35 contained a provision that dealt with deceased members funds when there was no nomination. In term of the said provision money needs to be distributed in terms of law.

7. In the Matter of *Mohammed Hassan* [1989] 35 FLR 107, where Fatiaki J (as he then was) held that a sum standing to the credit of a deceased member of the FNPF does not form

[1] As amended by Act No 6 of 2018

part of his estate but it is to be distributed as provided by the Succession, Probate and Administration Act1970. Distribution in terms of law means in terms of Section 6 of Succession, Probate, and Administration Act 1970.

8. Section 57 of FNPF Act, 2011 states as follows:

"(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 favor 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) shall not apply to a person if, at the time of the death of the deceased FNPF member, the person was the spouse of the deceased FNPF member. [subs (6) subst Decree 77 of 2012 s 15, effective 1 March 2012.

(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)

9. Act No 6 of 2018 amended Succession Probate and Administration Act, 1970 and it, came in to operation on 16.3.2018 with the assent of the President of Republic of Fiji.

10. Amended Sections 2 and 6 of the Succession probate and administration Act, 1970, *inter alia* introduced 'a person in a *de facto* relationship' as a party entitled to the line of succession of a deceased.

11. In this case deceased passed away in 2008 and at that time Act No 6 of 2018 had not come in to operation.

12. This application for distribution was made on 4.6.2020. In my judgment since funds of FNPF does not form part of estate , use of Section 6 for distribution of funds in the absence of any provision of law in FNPF Act 2011, is different to application of same provision for distribution of property which are part of deceased estate. So what court needs to apply is the existing law at the time of distribution of funds not the repealed law. The substantive law was changed in 2018 and no application for distribution was made prior to recognition of de facto relationship for distribution of property. Hence current law relating to intestacy should be applied irrespective of the legal position at the time of death of member of FNPF.

13. Text Maxwell on The Interpretation of Statutes(12th Edi) at pages 216- 217 stated

> *'.... Other statutes, though they may relate to acts or events which are past, are not retrospective in the sense in which the word is used for the* ***purpose of the rule under consideration****. The following cases illustrate this point.*
>
> *By section 2 of the Poor Removal Act 1846; "No woman residing in any parish with her husband at the time of his death shall be removed.... From such parish, for twelve calendar months next after his death, if she long continue a widow". In R v Inhabitants of St. Mary, Whitechapel[2], it was sought to remove within the twelve period a woman whose husband had died before the Act was passed, on the ground that to make the section apply in such a case was to construe it retrospectively, the right to remove being a vested right which had accrued on the man's death. But the court held otherwise, Lord Denman CJ(at p.127) saying " that the statue is in its direct operation prospective, as it relates to future removals only , and that it is not properly called a retrospective statute because a*

[2] (1848) 12 Q.B. 120

part of the requisites for its action is drawn from time antecedent to its passing."(emphasis added)

14. Similar to above decision money could have distributed prior to 2018 if such an application was made. As the application of the distribution of funds was made only 2020, the applicable law contained in Section 6 of Succession Probate and Administration Act 1970 was amended and application of that is prospective and not retrospective.

15. In Maxwell on The Interpretation of Statutes (12th Edi) at page 217 stated;

> *'Finally, on this point there is the case of Re A Solicitor's Clerk [3]. The clerk was convicted in 1953 on four charges of larceny but the charges did not relate to money or property of his employer or employer's client, and so an order prohibiting solicitor from employing him could not be made under provisions of Section 16 of the Solicitors Act 1941. The Solicitors (Amendment) Act 1956, s.11 amended section 16 so as to include convictions of larceny irrespective of ownership. The Divisional Court held that the amendment was not a true retrospective provision. "It enables an order to be made," said Lord Goddard CJ(at pp1222,1223),"disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. ..."*

16. The rule of retrospective construction is not a rigid rule and must vary *secundum materium.* (see Barber v Pigden (1937) 1 All ER 126, Carson v Carson (1964) 1 All ER 681 at 687).

17. There is no dispute that legislature can make laws that can operate retrospectively. (see Sabally v. A.G (1964) 3 All ER 377(CA) , Western Transport Pvt.Ltd v Krapp (1964) 3 All ER 722 (PC)).

18. In L'Office Cherifien des Posphates v Yamashita-Shinnihon Steamship Co Ltd (1994) 1 All ER 20 at p 29 (House of Lords), it was held that basis of application of a statute for an event happened past is no more than simple fairness which ought to be basis or every legal rule. This was applied in House of Lords decision (Per Hoffmann LJ) in Government of The United States of America v. Montgomery and Another [2001] UKHL 3; [2001] 1 All ER 815; [2001] 1 WLR 196 (23rd January, 2001).

19. In L'Office Cherifien des Posphates v Yamashita-Shinnihon Steamship Co Ltd (1994) 1 All ER 20 it was held that question of fairness in application of legislation retrospectively

[33] 1957 1 WLR 1219

required consideration of value of the right that was recognized by law and whether application of it retrospectively will diminish its value and also any unfairness in application retrospectively. In this contest it is important to consider purpose of the legislation. The purpose of amendment Act No 6 of 2018 to accept *de facto* relationships and consider *de facto* partners *on par* with legally married partners, but not to grant any special rights that favour *de facto* partners as opposed to married spouse. If such additional rights were created such position should be clearly stated in the statute and this is not so.

20. In *Secretary of State for Social Security v Tunicliffe* [1991] 2 All ER 712. Lord Staughton LJ held,

> "In my judgment the true principle is that Parliament is, presumably, not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

21. It is unfair not to recognize the Claimant's request to the funds of the deceased in 2020 when a de *facto* relationship is recognized by Succession, Probate and Administration (Amendment) Act, 2018 and it is part of law in Fiji regarding distribution of estate of a deceased.

22. Respondent's children, who were the original Applicants to this matter, born from *de facto* partnership with deceased. They were recognized as beneficiaries of a deceased under Succession Probate and Administration Act 1970, but the recognition as regard to the person in *de facto* relationship of the deceased, was introduced in 2018. So existing law at the time of distribution of funds in terms of Section 57(3) of FNPF Act 2011 is Section 6 of Succession Probate and Administration Act 1970 as amended by Act No 6 of 2018. Application of said amended provision, will not *ipso facto* entitle the Claimant to funds as she had ceased *de facto* partnership before death.

23. It is not disputed that deceased had lived with the Claimant, who is the mother of Applicants for some time before their *de facto* relationship ended more than decade before death of deceased. She had abandoned her children and had no contacts with them.

24. Can a party who had ceased *de facto* relationship claim for properties in terms of Succession Probate and Administration Act 1970? There is no clear indication of this contained in Succession Probate and Administration Act 1970. So, it needs to be

interpreted in conformity intention of the legislature contained in amendment to main Act by Act No 6 of 2018.

25. Ex-spouse cannot seek any inheritance rights under Succession Probate and Administration Act 1970 after death of former spouse .(subject to property distribution under Family Law Act 2003).

26. Accordingly ex-husband of ex-wife is not allowed to claim for distribution of money in terms of Section 57(3) of FNPF Act 2011. It is only widow or widower and children who survived deceased can make an application and former married partner is excluded.

27. Similarly, former *de facto* partner must be excluded as beneficiary in terms of Section 6 of Succession Probate and Administration Act 1970. If not *de facto* partners will be in much more advantageous position than legal partners and that was not the intention of legislature in the introduction of Amendment Act No 6 of 2018 that recognized *de facto* partners *on par* with legal partner(wife or husband) for distribution of property of a deceased.

28. If a person had a de *facto* partner and a legal partner, at the same time they are both recognized as surviving heirs of a deceased in terms of Section 6 of Succession Probate and Administration Act, 1970, there is no recognition of previous *de facto* partners as heirs of deceased. (see *Bosworthick v Clegg* (1929 Times Law Report 938, and *Ghaidan v Mendoza* [2004] 3 All ER 411 of 446 para 101.

29. Only a 'surviving *de facto*' partner is recognized as an heir in Section 6 of Succession Probate and Administration Act, 1970. So in order to obtain rights under said provision *de facto* partnership, must have existed at the time of death of deceased. If not there can be plethora of applications, when a person dies, and it would be difficult to distribute property effectively in terms of Section 57(3) of FNPF Act 2011.

30. Section 6 of Succession Probate and Administration Act, 1970 reads as follow

> "(1) Subject to the provisions of Part 2, the administrator on intestacy or, in the case of partial intestacy, the executor or administrator with the will annexed, shall hold the property as to which a person dies intestate on or after the date of commencement of this Act on trust to distribute the same as follows—
>
> (a) if the intestate leaves a wife or husband or de facto partner but not both a wife or husband and a de facto partner, without issue, the surviving wife or husband or de facto partner shall take the whole of the estate absolutely;

(b) if the intestate leaves both a wife or husband and a de facto partner,without issue, the surviving wife or husband and the de facto partner shall take the whole of the estate in accordance with subsection (1A) absolutely;

(c) if the intestate leaves issue and—

(i) a wife or husband or de facto partner but not both a wife or husband and a de facto partner, the surviving wife or husband or de facto partner shall take the prescribed amount and the personal chattels and one-third only of the residuary estate absolutely; or

(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 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 or defacto partner, the issue of the intestate shall take per stirpes and not per capita the whole estate of the intestate absolutely;

(e) if the intestate leaves no issue but both parents, then, subject to the interests of a surviving wife or husband or de facto partner, the father and mother of the intestate shall take the residuary estate of the intestate absolutely in equal shares;

(f) if the intestate leaves no issue, but one parent only then, subject to the interests of a surviving wife or husband or de facto partner, the surviving father or mother shall take the residuary estate of the intestate absolutely;

(g) [Repealed]

(h) if the intestate leaves no wife or husband or de facto partner and no issue or parents, then the brothers and sisters of the whole blood, and the children of deceased brothers and sisters of the whole blood, of the intestate shall take the whole estate of the intestate absolutely in equal shares, such children taking per stripes and not per capita;

(i) if the intestate leaves no wife or husband or de facto partner and no issue or parents or brothers or sisters of the whole blood or children of deceased brothers or sisters of the whole blood, then the brothers and sisters of the half blood and children of deceased brothers and sisters of the half-blood shall take the whole estate of the intestate absolutely in equal shares, such children taking per stripes and not per capita;

(j) if the intestate leaves no wife or husband or de facto partner and no issue or parents or brothers or sisters of the whole blood or of the half blood, or children of deceased brothers or sisters of the whole blood or of the half blood, then the grandparents of the intestate shall take the whole estate of the intestate absolutely, and if more than one survives the intestate they shall take absolutely in equal shares, but if there is no grandparent, then the uncles and aunts of the whole blood, and children of deceased uncles and aunts of the whole blood, of the intestate, being brothers and sisters of the whole blood of children of deceased brothers and sisters of the whole blood, of a parent of the intestate, shall take the whole estate of the intestate absolutely in equal shares, such children taking per stirpes and not per capita;

(k) if the intestate leaves no wife or husband or de facto partner and no issue or parents or brothers or sisters of the whole blood or of the half blood or children of deceased brothers or sisters of the whole blood or of the half blood and no grandparents or uncles or aunts of the whole blood or children of deceased uncles or aunts of the whole blood of the intestate being brothers and sisters of the whole blood of children of deceased brothers and sisters of the whole blood, of a parent of the intestate, then the uncles and aunts of the half blood and children of deceased uncles and aunts of the half blood of the intestate shall take the whole estate of the intestate absolutely in equal shares, such children taking per stirpes and not per capita;

(l) in default of any person taking an absolute interest under any of the foregoing provisions of this section the residuary estate of the intestate shall belong to the State as bona vacantia, and in lieu of any right to escheat, and the State may, out of the whole or any part of the property devolving on it, provide for dependents, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

[subs (1) am Act 12 of 1985 s 4, effective 1 February 1987; Act 11 of 2004 s 3, effective 1 September 2004; Act 6 of 2018 s 3, effective 21 March 2018]

(1A) Where an intestate leaves both a wife or husband and a de facto partner—

(a) if the intestate leaves no issue, the whole of the estate; or

(b) if the intestate leaves issue, the prescribed amount and the personal chattels and one-third only of the residuary estate,

shall be distributed—

(i) in accordance with an order of the court;

(ii) in accordance with a written agreement between the surviving wife or husband and the de facto partner; or

(iii) in equal shares between the surviving wife or husband and the de facto partner, provided—

(A) the administrator serves the surviving wife or husband and the de facto partner a notice in writing stating that the administrator shall distribute the property equally between them unless, within 3 months of the notice, at least one of them seeks an order of the court under subparagraph (i) or they enter into an agreement under subparagraph (ii); and

(B) within 3 months of the notice, the surviving wife or husband or de facto partner does not take an action stated in the notice under subparagraph (iii)(A).

[subs (1A) insrt Act 6 of 2018 s 3, effective 21 March 2018]

(2) For the purposes of subsection (1), any income derived from the property of a deceased person shall be distributed among the persons entitled in distribution to that property in the same respective proportions to which they are entitled to share in the distribution of that property.

[subs (2) subst Act 12 of 1985 s 4, effective 1 February 1987]

(3) In this section—child

(a) in relation to an intestate, means any child, whether legitimate or illegitimate, of the intestate;

(b) in relation to any person entitled under the provisions of this Act to share in the property of an intestate, means any child legitimate or illegitimate of that person; issue includes a child or any other issue whether legitimate or illegitimate, in any generation, of an intestate; and prescribed amount means $20,000 or any other prescribed amount.

[subs (3) insrt Act 11 of 2004 s 3, effective 1 September 2004]

(4) For the purposes of this section, an illegitimate relationship between a father and his child shall not be recognized unless there is proof that the paternity of the father has been admitted by or established against the father while both the father and the child were living."

In terms of Interpretation Section 2 of the Succession Probate and Administration Act, 1970 de facto partner means a person in de facto relationship. Since word

'means' is used it is an exclusive interpretation. De facto relationship is also defined in the same Section as follow;

"de facto relationship" means a relationship between a man and woman who are at least 18 years of age and , although not legally married to each other have lived with each other as spouses on a genuine domestic basis for

(a) Period of more than 3 years; or

(b) A period of less than 3 years, provided-

(i) The relationship has resulted in the birth of adoption of child, or

(ii) The court, having regard to the circumstances listed in section 154A of the Family Law Act 2003, considers it just to treat the relationship as a de facto relationship"(emphasis added)

In terms of Interpretation Section 2 of the Succession Probate and Administration Act, 1970 de facto partner means a person who in de facto relationship. De facto relationship is also defined in the same Section as follow;

"de facto relationship" means a relationship between a man and woman who are at least 18 years of age and , although not legally married to each other have lived with each other as spouses on a genuine domestic basis for

(c) Period of more than 3 years; or

(d) A period of less than 3 years , provided-

(iii) The relationship has resulted in the birth of adoption of child, or

(iv) The court, having regard to the circumstances listed in section 154A of the Family Law Act 2003, considers it just to treat the relationship as a de facto relationship"

31. In order to consider de facto relationship consideration of Section 154Section of Family Law Act 2003 is needed. Section 154 A of Family Law Act, 2003, states:

"154A In determining whether 2 persons are in a *de facto* relationship, all the circumstances of the relationship are to be taken into account, including but not limited to the following as may be relevant in a particular case—

(a) the duration of the relationship;

(b) the nature and extent of common residence;

(c) whether or not a sexual relationship exists;

(d) the degree of financial dependence or interdependence and arrangements for financial support between the parties;

(e) the ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children, if any;

(h) the performance of household duties; and

(i) the reputation and public aspects of the relationship."

32. The Claimant had a *de facto* relationship with deceased and it had ended with her leaving the deceased and two children, more than ten years ago, around 1996. At the time of death Respondent was not 'living in de facto' relationship with deceased and not living with the deceased or had any contact with children. So she cannot be considered as 'surviving *de facto*" partner of deceased. So her claim for money distributed in terms of law under Section 57(3) of FNPF Act 2011 is rejected. Money held in court amounting $7,481.77 is distributed equally among two children of deceased who are Applicants.

FINAL ORDERS

a. Funds remitted to court $7,481.77 is distributed equally among the following Applicants
   a. Gitendra Dutt Maharaj.....$3,740.88
   b. Archana Artika Maharaj.....$3,740.89

   Total $7,481.77

c. No order as to costs.

Dated at Suva this 29th day of May, 2020.

HIGH COURT CIVIL SUVA

.....

Justice Deepthi Amaratunga
High Court, Suva