IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBP 172 of 2021

IN THE MATTER of an Application under section 41 of the Succession, Probate and Administration Act and Section 53 of the FNPF Act 2011 under the inherent jurisdiction of the Court.

IN THE MATTER of an Application by **NINA MAY WHIPPY** of Kavuli, Tavua, Fiji, Domestic Duties.

BETWEEN : **NINA MAY WHIPPY** of Kavuli, Tavua, Fiji, Domestic Duties

PLAINTIFF

AND : **MILIAKERE RAVOUVOU** of Naganivatu Village, Naitasiri, Fiji, Domestic Duties.

DEFENDANT

Counsel: **Plaintiff: Mr Degei. M**
Defendant: In Person
Date of Hearing: 29.3.2023
Date of Judgment: 02.06.2023

Catch words
Certificate of Marriage-wife-Divorce- Section 6 of Succession Probate and Administration Act 1970- living separately-Section 57 of FNPF Act 2011- disposition according to law- Ratio-

JUDGMENT

INTRODUCTION

1. Plaintiff is seeking distribution of money remitted by FNPF to the High Court for distribution, as there was no nomination made by late Venieli Tama. Plaintiff was the wife of deceased at the time of his death. Defendant is the mother of the deceased. Plaintiff and deceased got married in 23.11.2015 and it is admitted fact that she had lived with deceased

for only three years from 2015 to 2018. There after deceased lived with Defendant until his death on 5.2.2021.

ANALYSIS

2. 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, but that has no application to this case as there was no nominee by deceased. In terms of Section 57 (4) of FNPF Act 2011.

3. In term of the Section 57(3) of FNPF Act 2011, money is remitted to High Court to be distributed in terms of law.

4. *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 part of his estate but it is to be distributed as provided by the Succession, Probate and Administration Act,1970.

5. So, money remitted to High Court for disposition does not form part of estate, but it is distributed in terms of Section 6 and 6 A of Succession Probate and Administration Act 1970.

6. 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.
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> (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
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> (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)

7. There is no dispute that Plaintiff and deceased were married and their certificate of marriage is annexed to the application ar d it shows that they were married on 23.12.2015.

8. It is an admitted fact that Plaintiff and deceased did not live together since from 2018.

9. Plaintiff in the application stated that she and deceased had a child, but at the hearing no such evidence was provided with birth certificate.

10. Accordingly it is a fact that is not proved, and even death certificate of deceased contained only Plaintiff's name as the wife at the time of death, and no child's name included.

11. It is an admitted fact that Plaintiff and deceased were never divorced, or marriage was – declared void.

12. Deceased members funds were received by this court to be distributed according to law and the relevant law is found in Section 6 of Succession Probate and Administration Act 1970.

13. According to Section 6 of Succession Probate and Administration Act 1970, Plaintiff as the 'wife' at the time of death is entitled for disposition of money.

14. Defendant is the mother of deceased and she cannot claim priority under Section 6 of Succession Probate and Administration Act 1970, as there was a 'wife' at the time of death of the deceased.

15. In terms of Section 6 of Succession Probate and Administration Act 1970, if there is 'wife' and or 'de facto partner' at the time of death both of them become equally entitled for inheritance. There is no qualification for the wife to live with deceased in such a scenario and intention of legislation was clear not to exclude 'wife' even when deceased was living in 'de facto' relationship and not living with the wife at the time of death. This is not an uncommon situation when an already married person is having a permanent de facto relationship, and legislation would have thought about this situation before making amendments to Section 6 of Succession Probate and Administration Act 1970 in 2018. So 'wife' in terms of Section 6 of the said Act, is meant a person having a valid marriage at the time of death, and not whether how long they lived together.

16. There was no requirement for 'wife' to live with deceased in order to be considered as 'wife' in terms of Section 6 of Succession Probate and Administration Act 1970.

17. According to Defendant Plaintiff had left the deceased in 2018 and living with a de facto partner. It is not disputed that Plaintiff did not come to the funeral of deceased or prior to that when admitted to the hospital and informed about the condition of deceased. Defendant relied on these facts to state that Plaintiff cannot be considered as 'wife' of deceased, in terms of law.

18. Section 6 of Succession Probate and Administration Act 1970 states

> "(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
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(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;

(d) if the intestate leaves issue, but no wife or husband or de facto 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 stirpes 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 stirpes 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 dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision".(emphasis added)

[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]

19. Legislation had recognized 'de facto' partnership on par with legal wife and both are recognized and given equal status irrespective of 'adultery' or 'matrimonial fault', at the time of death. So the paramount consideration for entitlement under Section 6 of Succession Probate and Administration Act 1970 for a 'wife' is that there should be valid marriage and absence of divorce from that marriage according to law.

20. It is clear that when there is a legal marriage, till one party dies the remaining spouse is considered as 'wife' or 'husband' of the deceased at the time of death, irrespective whether they were living together or not. The result of construction which is obvious and clear cannot be a reason not to apply and unambiguous word such as 'wife' in Section 6 of Succession Probate and Administration Act 1970.

21. In *London Brick Co Ltd v Robinson* (1943) 1 All ER 23 (House of Lords) p 26 held,

> "S 8 provides that this additional sum is to be added to the lump sum:
>
> '... if the workman leaves a widow or other member of his family (not being a child under the age of 15) wholly or partially dependent upon his earnings and in addition leaves one or more children under the age of 15 so dependent ...'
>
> **Reading these words literally, the condition they prescribe is satisfied**. The workman did leave a widow and in addition left a child under 15 and they were both dependent wholly on his earnings. The appellants contend that the reference to a widow in the conditional phrase which I have quoted is to a widow who is making a claim under the Act. The Court of Appeal felt constrained to reject this argument, notwithstanding Lord Atkin's observation in *Avery v London & North Eastern Ry Co*, which was, of course, not the

concluded view or even an incidental *dictum* of my noble and learned friend, but was merely a speculation thrown out in the course of unravelling a most perplexing matter." (emphasis added)

22. This position is further substantiated by expressly recognizing 'de facto' partner within a valid marriage, and recognition of legally married person on par with 'de facto' partner for the purposes of Section 6 of Succession Probate and Administration Act 1970. The time a deceased lived with his 'wife' is irrelevant as long as there is a valid marriage at the time of death.

23. In UKHouse of Lords decision *Inland Revenue Commissioners v Hinchy*, [1960] 1 All ER 505 at 512 held,

> "Difficulties and extravagant results of this kind caused Diplock J and the Court of Appeal to search for an interpretation which would yield a more just result. **What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences** which flow from the Crown's contention. But we can only take the intention of Parliament from the words which they have used in the Act and, **therefore, the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences** and however strongly we may suspect that this was not the real intention of Parliament. The Court of Appeal found it possible to adopt a secondary meaning for the crucial words"(emphasis added)

24. As I have pointed out before 'wife' in terms of Section 6 of Succession Probate and Administration Act 1970, should have uniform meaning throughout the legislation. It would create an anomaly if 'wife' is given more restrictive meaning to mean a person other than a legally married person. Legislation had clearly identified both de facto partner and 'wife' at the time of death are beneficiaries on par for a deceased, as a beneficiary to estate of deceased.

25. So, in my mind when the legislation stated 'wife' what is required was a valid marriage at the time of death of the deceased and similarly, if a person is claiming as 'de facto' partnership that 'de facto' relationship also should exist at the time of death, as there will not be a divorce for 'de facto relationship'. As much as divorced wife of deceased is not a beneficiary a 'de facto' relationship that had ended prior to the death needs to be treated similar to an ex- wife.

26. There is no additional requirement for wife or husband to prove other than a valid marriage at the time of demise of the deceased. For a legally married person the entitlement as

beneficiary in terms of Section 6 of Succession Probate and Administration Act 1970 arises not from the strength of relationship after marriage with deceased, but from the validity of certificate of marriage at the time of death. This is the reason that legislation without any qualification included 'wife' as equal benefactor to the estate of deceased, even when 'de facto partnership' was recognized in law in 2018. This shows how weak the relationship with a legally married spouse was not a consideration for court in determination of 'wife' or 'husband' in terms of section 6 of the said Act.

27. So in my mind if there is a valid marriage at the time of death there is no requirement to satisfy that they are living together at the time of death. Recognition of de facto partner and a wife or husband as equal beneficiaries, will militate such additional requirement. Plaintiff had got married to deceased in 2015 and lived with him though they had lived separately from 2018 till his death.

28. If 'wife' in terms of Section 6 of Succession, Probate and Administration Act 1970 had any restrictive meaning other than legally married person that could have included when the provision was amended in 2018, to include de facto partner as beneficiary on par with 'wife' or 'husband'. This is clear indication 'wife' or 'husband' cannot be given any strained meaning other than legally married spouse as there should be uniformity in application of word 'wife' in the said legislation.

29. I am mindful of Court of Appeal decision of *Devi v Manager, Fiji National Provident Fund* [2020] FJCA 19; ABU120.2017 (28 February 2020), though neither side submitted this decision at hearing or in written submission of Plaintiff. In this case no argument was based on interpretation of 'wife' in terms of Section 6(1)(b) of Succession Probate and Administration Act 1970 and requirement to be uniform application to interpretation of 'wife' in said legislation.

30. *Kadhim v Housing Benefit Board, Brent* [2000] EWCA Civ 344 (20 December 2000) considering the binding authority of 'ratio' of a decision held,

> "....we have to remember that it is the reasons that bind, and not the decision. Any formulation of a rule of precedent must be flexible enough to respect that basic truth. That is what led Lord Diplock to say in Baker, as cited in paragraph 36 above, that whilst an assumed proposition may be part of the ratio, it does not have precedential value. To hold otherwise would be to come close to permitting the outcome of the case, rather than its reasoning, to dictate its status."

31. So what is binding is the reasoning given not the result, and without the contention in this decision being raised there was no determination binding and can be distinguished with respect.

CONCLUSION

32. Plaintiff as the legally married 'wife' of the deceased at the time of death of late Venieli Tama is the beneficiary to the money paid to the court for distribution. Whether she was living with deceased or not cannot be considered under section 6 of Succession, Probate and Administration Act 1970. Defendant as the mother is not entitled to be considered as beneficiary.

FINAL ORDER

a. Plaintiff is entitled for distribution of $21457.97 as 'wife' of late Tama Venieli pursuant to Certificate of Marriage.
b. No costs.

DATED this 2nd day of June 2023.

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
Judge High Court, Suva