

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Probate Action No. 18 of 2023**

IN THE ESTATE OF NASIR MAHMOOD ALI  
late of Dreketi Feeder Road, Saweni, Lautoka in  
the Republic of Fiji, Taxi Proprietor, Deceased,  
Intestate.

**BETWEEN:**            **MAHMOOD ALI** of Dreketi Feeder Road, Saweni, Lautoka,  
Businessman.

**APPLICANT**

**AND:**                 **NAZREEN SHERIN NISHA** of Dreketi Feeder Road, Saweni,  
Lautoka, School Teacher.

**RESPONDENT**

**Before:**             Mr. Justice Deepthi Amaratunga

**Counsel:**           Ms.M. Mcgoun for the Plaintiff  
Mr. A. Chand for the Defendants

**Date of Hearing:** 29.5.2024

**Date of Judgment:** 13.6.2024

**JUDGMENT**

## **INTRODUCTION**

- [1] Applicant filed amended notice of motion seeking limited letters of administration on behalf of two minors who are the sole beneficiaries of the estate of late Nasir Mahmood Ali (the Deceased).
- [2] Applicant is the next of kin of the Deceased who is above age of majority as required in terms of Section 7 of Succession, Probate and Administration Act 1970. He is entitled to obtain limited letters of administration.
- [3] Respondent is the mother of the said two minors and also ex-wife of the Deceased. They were separated since 2020 and also in *de factor* relationship and also divorced prior to death of the Deceased. There was no application for distribution of property.
- [4] Deceased was a taxi driver and had had entered in to sale and purchase agreement with his brother to sell his taxi and its permit to him for a consideration. Approval for said permit granted by Land Transport Authority (LTA) after three months of the application and by that time Deceased died.
- [5] The estate of the deceased legally obliged to finalize the transfer of the taxi and the permit in terms of the contract. The immediate reason for this application was the requirement for appointment of administrator to fulfill the contractual obligations of the estate of the Deceased. Failure to do so may be liable for damage to the estate of the Deceased.
- [6] Respondent had filed an application in the Family Court jurisdiction for a claim on said property of the Deceased and the vehicle was seized and kept pursuant to an order of Magistrate's Court made on 19.9.2023, and this property is not gaining any value and deteriorating as it was kept in the vicinity of the court and being wasted.
- [7] Respondent had made a personal claim from a property of the deceased, and also allowed the same estate property to deteriorate and wasted by ex parte orders obtained by the Magistrate's Court. She was aware of the application to transfer the taxi permit was made three months prior to death of the Deceased.
- [8] Respondent's action also could result in a claim against the estate by the prospective buyer of the taxi and permit, who was granted conditional transfer of the taxi permit after death of Deceased by LTA but the taxi is yet to be

transferred in terms of the agreement between the Deceased and purchaser, who is the brother of the Deceased.

- [9] Apart from said Taxi the estate of the Deceased comprised an agreement to lease of a residential property .Deceased and Respondents were the lessees of the agreement to lease where all the parties to this action and minors live. Respondent and children live in a separate structure and Applicant also lives on a structure close to this. It is in the best interest of the children that the Applicant lives close to them for their protection emotionally considering past conduct of Respondent and her partner who visits. It will be in the best interest the children that their rights to the said property be administered by Applicant who lives on the property than the Respondent.
- [10] Applicant is granted a limited administration of the estate of the Deceased, till at least one minors attain the age of majority (18 years).

### **FACTS**

- [11] The Deceased and Respondent got married on 22 .2. 2007 and lived together and had two children namely Zayn Nasir Ali a male born on 1 .12. 2008 aged 16 and Zunairah Naaila Ali a female born 26.7. 2012 aged 12. (The Children)
- [12] The Deceased and Respondent were separated in 2020 and final orders for divorce entered on 8.10. 2022.
- [13] Prior to final orders being made in 2020 Respondent had made an application for residence of two children, and there were no orders made under that.
- [14] The Children lived with Respondent and her *de facto* partner visits Respondent. The Deceased lived in a house located in the same land, with his father who is the Applicant. So there are two separate but close houses on the land where both parties and minors live.
- [15] The Deceased also filed an application for full custody of two children along with orders for safety and protection for child welfare and also protection of child abuse and recovery. These orders were sought 31.5.2021 after alleged incident where Respondent and her *de facto* partner were involved in an

incident, and children were taken to Police. This incident happened in the house where she lives on 30.5,2021.

- [16] The Deceased was concerned about the safety of the two children. It was alleged that Respondent and her *de facto* partner, along with children taken to Police. There were allegations of child abuse in the said application filed by way of an affidavit relating to exposure of the Children to undesirable environment by Respondent when her de facto partner visit her.
- [17] On 17.12.2021 Respondent was ordered to continue with 'residence' of the Children and the Deceased to have 'open contact' with the Children.
- [18] The Deceased died on 26 .11. 2022 having diagnosed with cancer. The Deceased was diagnosed with cancer since 2020 and was also treated for that.
- [19] Allegedly, the Deceased was looked after by Applicant and his brother to whom the Deceased had requested his taxi permit to be transferred about three months prior to his death.
- [20] On or around 30.8.2022 brother of the Deceased had made an application to LTA, for the transfer of the taxi permit of the Deceased and also an agreement dated 4.8.2022 the Deceased had agreed to sell his taxi along with his permit upon approval of the said transfer by LTA.
- [21] Approval for the transfer of the taxi permit was granted provisionally by LTA on 16.12.2022.

## **ANALYSIS**

- [22] This is an application seeking limited administration of the estate of the Deceased by his father as the sole beneficiaries are minors. The immediate reason for this application was the execution of transfer of taxi along with its permit which the Deceased had consented to transfer to his brother, but could not complete before his death. Accordingly the estate is obliged to fulfill said agreement of the Deceased without inordinate delay.
- [23] Applicant is seeking limited grant for administration of the estate of the Deceased. The two main properties of the Estate that are the agreement to

lease for land parties and the Children live and the taxi which the Deceased drove, and agreed to transfer to his brother.

[24] Respondent allege that the Deceased had a bank account but was unable to state to which Bank such an account belonged and or details such as bank account number, or approximate amount money held in the Bank when she lived with the Deceased. Respondent is now employed in a school and lived with the Deceased for ten years.

[25] According to the Section 7(b) of the Succession, Probate and Administration Act 1970 which states;

7. The court may grant administration of the estate of a person dying intestate to the following persons (separately or conjointly) being not less than 18 years of age-

(a) the husband or wife or *de facto* partner of the deceased; or

(b) if there is no husband or wife or *de facto* partner , to one or more of the next of kin in order of priority of entitlement under this Act in the distribution of the estate of the deceased; or

(c) any other person.....”

[26] Prerequisite for grant of an order for administration of an estate of a deceased is that administrator is an adult person for obvious reasons. In terms of Section 6(1) (d) of Succession, Probate and Administration Act 1970 sole beneficiaries of the estate of the Deceased are the Children who are minors. So, there is a need for a limited grant to fulfill the obligations of the Deceased including and not limited to said transfer of taxi along with its permit and also holding the interest of the Deceased for the benefit of two children.

[27] According to Section 6 (1) (d) of the Succession, Probate and Administration Act 1970 which states that

“6.-(1) Subject to the provisions of Part II, 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).....

(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;.....”(emphasis added)

[28] The Children are the sole beneficiaries, of the estate of the Deceased. Accordingly, the administrator is obliged to ‘hold the property’ of the estate ‘on trust to distribute the same ‘in terms of Section 6(1) of the Succession, Probate and Administration Act 1970.

[29] Applicant who is grandfather of the Children who are sole beneficiaries of the estate of the Deceased, had made this application for limited grant as administrator or trustee of the said estate till at least one child attains the age of 18 years.

[30] So the scope of this application for limited grant is whether the Applicant is suitable for the limited grant, considering objections of the Respondent.

[31] Halsbury’s Laws of England on ‘Duties of trustees in general’ states, (Vol 91)  
“It is the duty of the trustees of a settlement to make themselves acquainted with the terms of the trust, to obtain possession of all trust property which should be under their control, to comply strictly with the provisions of the settlement, to keep proper accounts, to exercise in good faith any discretion conferred on them either by the settlement or by statute, to act impartially between the beneficiaries and, in the case of a settlement by deed, to inform the beneficiaries of their interest under the settlement<sup>1</sup>. .....

[32] Respondent in the written submission contend that under the law ‘children are entitled to take out the Grant as they are the next of kin of the Deceased’. This is not correct legal provision as Section 7 of Succession, Probate and Administration Act 1970 requires such next of kin to be above 18 years in order to apply for a Grant for administration of estate, in terms of law. There is a difference between beneficiary under the estate and being able to apply for a grant. The Children cannot seek a grant as they are below the age of majority.

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<sup>1</sup> See *Hawkesley v May* [1956] 1 QB 304, [1955] 3 All ER 353. As to the duties of trustees generally see trusts and powers vol 98 (2019) para 386 et seq. As to delegation by trustees see the Trustee Act 1925 s 25; the Trusts of Land and Appointment of Trustees Act 1996 s 9; the Trustee Delegation Act 1999 s 1; and trusts and powers vol 98 (2019) para 424 et seq. As to a trustee’s statutory duties in exercising powers of investment see para 467

- [33] The duties and obligations of a trustee cannot be fulfilled by a minor hence a need to appoint an adult. This application for limited grant is due to the fact that sole beneficiaries are minors and there was a contractual obligation of Deceased to be completed.
- [34] In terms of Section 6(1) (d) of Succession, Probate and Administration Act 1970, the sole beneficiaries of the estate of the Deceased were the Children, but they will be entitled to a grant of the estate only when they reach the age of majority upon proper application to the probate registry. Till then they are not entitled to obtain a grant. So there is a need for limited grant till one child attains age of majority. If such an application is not made the property of the estate may remain without administration. This can result in loss to the estate whose ultimate beneficiaries are the children.
- [35] Already Respondent had made an application under Family Law for alteration of the property of the Deceased. This action required an appointment of administrator. At the same time contractual obligation of the Deceased can be fulfilled through appointment an administrator. Apart from that, the Deceased was a lessee of the agreement to lease where Respondent had equal interest. The interest of the Deceased needs to be administered for the best interest of the Children. Limited grant for the estate of the Deceased is needed in order to prevent the estate being exposed to waste and or deteriorate in value.
- [36] The Applicant is a person entitle under section 7 of Succession, Probate and Administration Act 1970 as next of kin in the order of priority under said Act, but there is a general discretion granted to court for the appointment of limited administrator, considering the best interest of the Children.
- [37] According to Section 32 of the Non-Contentious Probate Rules (NCPR) deals with Grants on behalf of minors and it states,
- “32.—(1) Where a person to whom a grant would otherwise be made is a minor, administration for his use and benefit, limited until he attains the age of eighteen years, shall, **unless otherwise directed**, and subject to paragraph (2) of this rule, be granted to the parents of the minor jointly, or to the statutory or testamentary guardian, or to any guardian appointed by a court of competent jurisdiction; provided that where the minor is sole executor and has no interest in the residuary estate of the deceased, administration for the use and benefit of the minor limited as aforesaid, shall,

unless a registrar otherwise directs, be tainted to the person entitled to the residuary estate.

(2) A registrar may by order assign any person as guardian of the minor, and such assigned guardian may obtain administration for the use and benefit of the minor, limited as aforesaid, in default of or jointly with, or to the exclusion of, any person mentioned in paragraph (1) of this rule; and the intended guardian shall file an affidavit in support of his application to be assigned..” (Emphasis added)

[38] It is not mandatory to grant letters of administration in terms of NCPR to such party stated in the above rule namely to Respondent as the parent and or guardian of the Children, on facts and circumstances of this application.

[39] The court can name a party as a limited administrator in the exercise of its discretion considering all the circumstances, as above quoted Rule is applied under NCPR when there is no order by the court for ‘otherwise directed’ . This is after considering the circumstances a person other than a parent or guardian can be appointed.

[40] Respondent had filed objections to this application without making an application for limited grant, her objections can be considered in terms of Rule 32 of NCPR for an order to grant or refuse Applicant’s application.

[41] By the same token Section 7(1) (b) of Succession, Probate and Administration Act 1970 allows Applicant to obtain limited grant for administration of the estate of the Deceased as the next of kin who is above the age of 18. Rule 32 of NCPR allows Respondent for a limited grant, by default of a court order. Both provisions allows discretion of the court to be exercised.

[42] Halsbury’s Laws of England<sup>2</sup> . (Wills and Intestacy)(Vol 102) states,  
“No broad rule of law can be laid down as to what are special circumstances enabling the court to pass over a person otherwise entitled to a grant; each case must be decided upon its own merits. One object which the court keeps in view is the expeditious and economical administration of estates of

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<sup>2</sup> 762. Special circumstances enabling court to pass over person otherwise entitled to letters of administration Halsbury's Laws of England - Wills and Intestacy (Volume 102 (2021), paras 1–566; Volume 103 (2021), paras 567–1304) > 9. The Grant of Probate or Administration (4) General Grants of Administration



deceased persons. Special circumstances are not necessarily limited to circumstances in connection with the estate itself or its administration, but can be any other circumstances which make it necessary or expedient to pass over the executor.”(foot notes deleted)

[43] Applicant is making this application in terms of Section 7(1) (b) of Succession, Probate and Administration Act 1970 as the next of kin of Deceased above the age of 18 years. Respondent is objecting to this application in terms of Rule 32 of NCPR as the person who is having residence of the Children. Both provisions allows discretion of the court to appoint a suitable person with limited grant of administration of the estate of the Deceased on the facts before the court by way of originating summons. This appointment was pending for more than a year and there is urgency in the matter.

[44] While the Deceased was alive, he had ‘open contact’ to the children in terms of the the orders made on 18.1.2022. There were evidence that when the *de facto* partner visiting Respondent, an incident had happened between Respondent and de factor partner and neighbors had complained the incident to Police and to the Deceased.

[45] In the Defendant’s application for recovery of the children he alleged that children were exposed to undesirable conditions. It was stated that in the affidavit in support of the said application that the Deceased had also sought redress from ‘social welfare’ that resulted his application for cross examination for recovery and custody and child abuse. These were untested evidence as said application had not proceeded to hearing, but considering welfare of the children is paramount consideration of the court, when a limited grant is made.

[46] There was an affidavit of the Deceased filed in his application Form 9 application contained in the supplementary affidavit of the Respondent. It is commendable that Respondent had filed full record of the proceedings relevant to this application in the supplementary affidavit in opposition. These documents shed light on the condition of the Children and what they are exposed at the moment.

[47] Applicant was granted time to file reply to supplementary affidavit, which comprised documents already submitted to under Family Law, but no reply was filed. Supplementary affidavit in opposition filed on 6.12.2023 and Applicant had sufficient time to file a reply if needed, before hearing.

[48] Though both parties wanted to vacate the hearing it was not allowed considering urgency of the determination as the sole beneficiaries were the

Children and also to reduce waste of the property of the estate of the Deceased.

- [49] It is safe to assume that children were visiting the Applicant's house while the Deceased was alive. Though he is dead there may be relationship with the Applicant as grandfather. This is essential considering the alleged incident where even children were taken to Police due to behavior of Respondent and her partner while the Children were at home.
- [50] Respondent and the Deceased were joint lessees for the land where Applicant and Respondent and children live. Applicant's presence is in the best interest of the minors in the circumstances. If Respondent is granted letters of administration for the estate which comprised half share interest in the said lease, she can administer entire land, which can be used against occupation of Applicant and this will not be in the best interest of the Children.
- [51] The Deceased had made an application for child recovery with evidence of alleged incidence it is desirable to have the Applicant's occupation in the said land. The Deceased was granted 'open contact' with the Children and his demise leaves the Children without such access to a person other than Respondent.
- [52] The Children are living with Respondent and it is alleged she is having a child from *de facto* partner who visit her. Respondent had already filed a 'claim' from the estate of the Deceased. It will be decided by said court under Family Law, and the fact that Respondent have a claim against the property of the Deceased is relevant for this application.
- [55] Respondent had not made an application for the grant of letters of administration of the Deceased since his demise on 26.11.2022, but objecting to the application of Applicant.
- [56] She contend that the reason for this application by the Applicant is to transfer the taxi and permit. The immediate reason for this application was to allow the transfer of the taxi and permit to brother of the Deceased. This is an obligation of the estate to perform.

- [57] Applicant had advertised the said application in local papers on 9.12.2022. Amended notice of motion was filed on 3.8.2023 with an affidavit in support. There was no evidence of caveat against the grant of the estate of the Deceased.
- [58] Respondent had obtained orders from family court on 19.9.2023 to seize 'Taxi Registration No LK0282 and kept under vicinity of the Magistrate Court'. It was kept near vicinity of the court premises of the Magistrate's court. Since then it was allowed it to be deteriorated considering the nature or the asset and other circumstances such as weather.
- [59] Supplementary affidavit in opposition contained an application made by Applicant and intended purchaser of the said Taxi permit for setting aside the *ex parte* order granted on 19.9.2023. This is yet to be determine and it is essential to make the limited grant without inordinate delay. This was an additional reason for conducting the hearing without delay.
- [60] It is clear that Respondent had lived separately since 2020 and the Deceased was diagnosed with a cancer also from 2020 and he had obtained treatment for about three years. The Deceased had entered in to sale and purchase of the taxi to his brother and said transfer was pending before LTA since 30.8.2022 and the provisional transfer of the taxi granted 21.12.2022, but this transfer could not take place due to demise of the Deceased on 26.11.2022. Appointment of limited administrator is required to execute the transfer of the taxi along with the permit by the estate of the Deceased.
- [61] From the facts submitted, Respondent had filed an application, claiming her share in the transfer of the said taxi along with the permit. This had led to deterioration of a property of the Deceased by an order made *ex parte* by said court. This action of Respondent had also made the estate of the deceased liable for damages for the prospective buyer.
- [62] Respondent lives in the same land with, her partner and she is also lessee for half share of the land and remaining half belonged to the estate of the Deceased. The sole beneficiaries of the said estate are the Children. Considering the circumstances of this case which is special it will not be in the best interest to grant letters of administration to allow Respondent to administer the whole land.

- [63] The Taxi was driven by the Deceased as his source of income, but there were evidence that application for transfer to taxi permit was made in August, 2022 and there was an agreement to transfer it subject to approval of LTA, before the death of the Deceased. It is shown that the delay was due to application of the taxi permit and LTA took time for process for approval of such transfer of a permit. LTA's letter of 16.12.2022 acknowledged the receipt of the application for the transfer on 30.8.2022. The Deceased had entered in to an agreement to transfer the vehicle once the transfer of the taxi permit is approved.
- [64] So that had delayed the transfer of the vehicle as the prospective purchaser did not want the vehicle without taxi permit being transferred.
- [65] Taxi permit transfer was provisionally approved by LTA on 16.12.2022 and the conditions of the said approval was accepted by Zahid Mohamed Ali who is the bother of the Deceased, on 21.12.2022.
- [66] The transfer of the vehicle could not be executed due to the death of the Deceased who was the owner of the vehicle and also failure to appoint an administrator for the estate of the Deceased.
- [67] Respondent had not filed any action for distribution of property since 2020 when they separated. Respondent's claim under alteration of property of the Deceased under Family Law was made after death of deceased, and it will be decided by the said court as to merits and legality.
- [68] The estate is legally obliged to fulfill transfers and if not may even be liable for damages for breach of contract. Such action can even diminish the value of the estate of the Deceased, whose sole beneficiaries are the Children. Respondent has no beneficial interest for the estate and her application under Family Law is in conflict with her objection to Applicant's request for limited grant, and that she should be appointed as administrator and Applicant's request
- [69] Both Section 7(b) of Succession, Probate and Administration Act 1970 and also NCPR allows the court to exercise its discretion for appointment of limited

administrator to hold the property of the two minor children until they attain age of majority.

[70] Considering these facts is not in the best interest of the Children to appoint Respondent to hold the property in trust till they attain the age of 18, considering the circumstances of this case

[71] In the case of Devi v Lal [2023] FJHC 351; HPP36.2020 (24 May 2023) is a case where the court granted mother of the child limited grant of the estate with the will annexed, over *de facto* partner of the deceased who obtained priority in terms of the law. This was also an exercise of discretion considering the circumstances of the said case. In that case there was no evidence of grantee mishandling the estate property and or allowing a valuable property to deteriorate and or adverse claim by the mother of the child despite having equitable interest for the said property. In contrast the grantee in the said case was paying the mortgage rentals for the property thus adding value to the property. So it can be clearly distinguished on the law and also on the facts.

[72] In this case counsel for the Applicant in the written submission contend that Respondent cannot in one had act as administrator as personal representative of the estate of the Deceased and also claim as personally from the same estate in family jurisdiction for 'alteration of her share'. This is a factor in the exercise of the discretion of the court. As stated earlier the conduct of the Respondent that made the estate liable for breach of contract for failure to transfer the Taxi and permit which was agreed by the Deceased and accepted by LTA for the grant of provisional approval.

[73] A person appointed as administrator must 'hold the estate on trust 'for the distribution of the same to the Children, but the conduct of the Respondent regarding the estate is not in the best interest of the Children. Respondent is making a claim in her personal capacity in the Family Law which is clearly conflict with the interest of her children.

[74] As the administrator of the limited grant Applicant is also restrained from transferring any property of the estate without supervision of the court, except for the transfer of the taxi, which was the prime reason for this application.

## **CONCLUSION**

[75] Applicant being the grandfather of the beneficiaries and also an elderly person is best suited to be appointed as limited administrator of the Deceased considering the circumstances of the case. Applicant must not dispose any property of the estate without sanction of a court (except the tax). It is paramount consideration that estate property must be economically administered without undue deterioration in value. Respondent had adverse claim against a property of the Deceased namely the taxi this is dealt by Family Court. Objections of the Respondent is considered and discretion of the court is exercised in favor of Applicant for the grant of limited administration of the estate of the Deceased. Considering the facts and circumstances no order as to the costs.

## **FINAL ORDER:**

- a. Applicant is granted limited letters of administration for the estate of late Nasir Mahmood Ali.
- b. No order as to costs.



  
.....  
Deepthi Amaratunga  
Judge

At Suva this 13<sup>th</sup> day of June, 2024.

## **Solicitors**

Gordon & Company

Saneem Lawyers