VERONICA ABE'E EDWARDS **Applicant**
-V-
CAROL EDWARDS **Respondent**

HIGH COURT OF SOLOMON ISLANDS
(PALMER J)
Civil Case No. 312 of 1995
Hearing: 22 November 1995
Judgment: 12 January 1996

PALMER J: This is an application by notice of motion filed on 12 October, 1995, by the Applicant, Veronica Abe'e, that she be appointed as an additional personal representative to the Respondent, Carol Edwards, to whom the Court had granted on 15th December 1994, letters of administration of the estate of Victor Edwards, deceased. The Respondent and another, Simon Edwards were children of the deceased's first marriage. This fact is not in dispute. It is also not in dispute it appears that there had been a legal divorce between the Respondent's mother and the deceased.

The ground on which the claim of the Applicant is based is contained in paragraph 2 of the affidavit of Veronica Abe'e Edwards filed also on 12th October, 1995, in which she stated that she was the lawful widow of the deceased. Her claim therefore can be summarized as follows:

(i) that she was the lawful wife of the deceased, at the time of his death, and that by virtue of that status, she was entitled to appointment as a matter of priority as an additional personal representative of the deceased's estate;

(ii) even if the Court should find that she was not the lawful wife of the deceased, the Court should exercise its discretion in favour of appointing her as an additional personal representative by reason of the peculiar circumstances surrounding their relationship.

The Respondent on the other hand strongly disputes the claim of the Applicant that she was the lawful widow of the deceased.

The Evidence.

There is no evidence of a formal ceremony of marriage having been conducted before a minister of religion or before a District Registrar, as required under the Islanders Marriage Act (CAP.47). This is not disputed. The Applicant rather states that they were married in accordance with the customary practice of the Kiribati Community in Solomon Islands. According to that custom, if a man and a woman love each other, then the man can approach the parents of the woman, ask for their consent, and once that has been obtained, a food party is then held, with friends and relations in attendance. After that, the couples are deemed married in custom and can cohabit together as husband and wife. The Applicant states that this was what was done in their case. A party was held at the house of Kabwere and Philamina at White River on 20 February, 1985. Thereafter, she cohabited with the deceased and bore him four children; Tiera Edwards born on 12 December, 1985; Margaret Edwards born on 12 April, 1987; Frank Edwards born on 24 April, 1989; and Hector Edward born on 11 February, 1991. She stayed with him she says as his lawful wife at his house situated at Mbokonavera 1, fixed-term estate Parcel No. 191-024-132, (the only property of the deceased to be administered under the grant of letters of administration), until his decease on 16 May, 1992.

In support of her claim of a custom marriage, she called Wali Murdock, a cousin of the deceased, who stated that she had first-hand knowledge of the party, consisting of food and drinks at the house of Philamina at White River. This witness is from the Local Kiribati community, and asserts that she is familiar with the customs of the Kiribati people or Community. She confirmed in evidence that such a practice is recognised among the Kiribati people as a valid marriage in custom, and that the couple are then free to cohabit together and have as many children as they want. She did point out though that usually after such a food party, the couple attend at a church or at the Magistrate's Court for a formal ceremony of marriage. For those who do not attend however, would still be regarded as having gotten married in custom, nevertheless.

No evidence in rebuttal has been called by the Respondent, preferring rather to argue a point in law that even if there was such a customary practice in existence, that it would not have mattered anyway, because the Court is bound to take cognisance only of the customary law of the indigenous people of Solomon Islands, and not of those, as has been the case with the deceased it seems, and the Kiribati community at large, who have settled in the country by migration or resettlement schemes during the Colonial period from Kiribati, formerly known as The Gilbert and Ellice Islands.

The Issue.

The issue before this Court can be summed up as follows:

(i) **Is there a valid marriage in law between the Applicant and the deceased. If the answer is yes, then the Applicant is entitled as of right to be appointed as an additional personal representative to**

the estate of Victor Edwards, deceased. If not, then the Court will have to consider whether in the exercise of its discretion it should or not appoint the Applicant as an additional personal representative in the circumstances of this case.

The Law.

The law on marriage in Solomon Islands is contained in the Islanders Marriage Act (CAP.47). Bearing in mind that it is not contested, that the Applicant is not claiming that her marriage was celebrated before a minister of religion or before the District Registrar, the relevant provision covering her situation would be section 4 of the Islanders Marriage Act. That section reads:

> **"No marriage between Islanders celebrated after the coming into operation of this Act, save and except a marriage celebrated in accordance with the custom of Islanders or in accordance with the provisions of the Pacific Islands Civil Marriages Order in Council 1907, shall be valid unless celebrated -**
>
> **(a) before a minister of religion; or**
> **(b) before a District Registrar."**

That section is quite important insofar as it relates to marriages ***"celebrated in accordance with the custom of Islanders".*** The effect of that section is to save marriages celebrated in accordance with custom from being declared invalid by virtue of the fact that they have not been celebrated in accordance with the provisions of the Islanders Marriage Act. In other words such marriages are deemed valid in law.

The above interpretation is recognised consistently throughout the provisions of the Islanders Marriage Act, ***[see sections 14, 18, and 19(2), also section 4 of the Islanders Divorce Act (CAP.48), and sections 17 and 18 of the Births, Marriages and Deaths Act (CAP.43)]***

Also, the same question, had been fully addressed by this Court in the judgment of Daly C.J. in the case ***Balou -v- Kokosi (1982) SILR 94.*** In that judgment his Lordship held that the marriage celebrated in custom between the parties was not only valid, but that it was also valid in accordance with the law of Solomon Islands.

In the facts of this case however, there is a slightly different issue in law that surfaces. The alleged custom marriage between the Applicant and the deceased was celebrated in accordance with the customary practices of the Kiribati Community in Solomon Islands . Mr Radclyffe submits that even if there was a valid marriage in accordance with the customary practices of the Kiribati people, he

argues that paragraph 3(1) of Schedule 3 to the Constitution, would not permit this Court to give recognition to it. Paragraph 3(1) reads as follows:

> **"Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands."**

Mr Radclyffe submits that the references to ***"customary law"*** should be read as applying only to the customary law of the indigenous people of Solomon Islands . In the case of the Applicant and the deceased, they were not members of the indigenous people of Solomon Islands , and that therefore the Constitution does not recognise such customary marriages. The question of law therefore for this Court to address now is whether a marriage celebrated in accordance with the customary practice of the Kiribati Community in Solomon Islands is valid in law as well.

The starting point must obviously be paragraph 3(1) and (2) of Schedule 3 to the Constitution and the definition of the term ***"customary law".*** Paragraph 3(2) reads as follows:

> **"The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament".**

Subparagraph (2) above simply addresses the issue in the event of conflict.

The term ***"customary law"*** is defined in the Interpretation section, section 144(1) of the Constitution as follows:

> **"means the rules of customary law prevailing in an area of Solomon Islands."**

There are two possible ways of interpreting the above definition. It could be interpreted to apply to the rules of customary law prevailing in an area of Solomon Islands from time immemorial, or, simply referring to any rules of customary law prevailing in an area of Solomon Islands , whether through migration or re-settlement schemes, and whether the persons residing in those areas are members of the indigenous population of Solomon Islands , or not. Now, it may be argued, that the first possibility, is the correct interpretation that this Court should adopt, for the reason that, inter alia, the Constitution belongs to the people of Solomon Islands and that it was for them that it was enacted. The intention of the Legislators then, must surely be to relate the existence of those rules of customary law to the indigenous population. That may well have been the intention of the Legislators. However, the definition of ***"customary Law"*** does not contain such limitations or qualifications. If it was intended to be so read, then it could easily have been defined to read ***"means the rules of customary law prevailing in an area of Solomon Islands, and where***

members of a group, clan, line or tribe of the indigenous people of Solomon Islands reside". The definition however did not stretch to that extent. The two qualifying matters contained in that definition are*: (i) "prevailing in"* and *(ii) "an area of Solomon Islands ".* The correct approach to be taken therefore is to establish if those two requirements have been met. Once that has been done, then the next consideration is to see if there is any conflict with the Constitution or an Act of Parliament. If none, then that particular rule of customary law can be recognized in law. It must be borne in mind that when the Legislators drafted the provisions of the Constitution, they must be deemed to be aware or have cognisance of the overall population of Solomon Islands, their composition, and locations throughout the country. They must be deemed to know therefore of the existence and the plight of the Kiribati Community in Solomon Islands at the time of the drafting of the Constitution. A clear example of this awareness is reflected in the way the Citizenship provisions of the Constitution were drafted in Chapter III of the Constitution; which sought to recognise and take into account the existence of the Kiribati people.

Now, it is an established fact, and judicial notice can be taken of this, that sometime in the late 1950's or early 1960's, the Colonial Government instituted a migration or a re-settlement scheme, for a certain number of Kiribati people; uprooting them from Kiribati and re-settling them in certain identified parts in the country, especially in the Choiseul and Western Provinces. The more well known areas are at Vaghena (also spelled Waghena) in the south-eastern tip of Choiseul Island, Titiana at Gizo, Western Province, and some parts in the Shortlands Group of Islands. The Legislators therefore must be deemed to know that at the time the country was heading towards Independence in 1978, there were already in existence in certain parts of the country an identifiable group of non-indigenous people, with their own distinctive customs, inter alia. These inhabitants, example, in Waghena Island, over the years have continued to maintain whatever customary practices that they may have considered useful and applicable; and no doubt that would have included customary practices relating to marriage. Could it be, that the drafters and legislators of the Constitution were aware of this distinctive group of people and so deliberately worded the definition of "customary law" in the manner enacted. Whatever it is, I am unable to read that definition, in the manner suggested by learned Counsel for the Respondent, and to exclude the rules of customary law ***(whatever they may be, subject of course to the two limitations contained in the Constitution already mentioned in this judgment),*** of the Kiribati people living in those areas of the country; who have been here prior to and after Independence, have become citizens of this country, and have helped and participated in the development of this country. Many regard this country as their home. It is my respectful view that the definition of *"customary law"* should not be read restrictively, but rather should be seen as remedial in its application and be given a fair, wide and liberal interpretation.

It is pertinent to point out that the term ***"an area of Solomon Islands ,"*** is not defined, and therefore it is capable in my respectful view of applying even to such settlement areas as Waghena and Titiana. For the purposes of the meaning of *"customary law"* as contained in the Constitution, I am

satisfied that the rules of customary law of the Kiribati Community in those settlement areas are covered by that definition.

Having so ruled, it next follows whether there is any difference in the fact that the Applicant and the deceased were resident in Honiara at the time of marriage. I do not think there is any difference or legal impediment. In the definition of the term ***"customary law"***, there is no mention that its application is to be confined to specific parts of the country only. Rather, it is my respectful view that once the test or the requirements in that definition have been complied with, then those rules of customary law can be recognized in law, irrespective of where they occur within the country. It would not be any different to a situation where say two members of an indigenous tribe get married in custom in Honiara, or Gizo or Auki, away from their area where those rules of customary law prevail. I do not think it would ever be contemplated by the members of their families, that their rules of customary law may not apply simply because they do not reside in their home areas or villages. The question whether to celebrate a marriage in custom or not, is a matter of choice between the parties. If the parties voluntarily enter into such a ceremony, and provided there is no conflict with the Constitution or an act of Parliament, then it is no less valid in law.

This brings me next to consider the question whether there is any conflict with the provisions of the Islanders Marriage Act, and whether it applies to the case of the Applicant. At the outset, it is important to bear in mind that the Islanders Marriage Act was formerly known as the Native Marriage Act. In 1974, by the Statute Law Revision Ordinance 1974 - No.8 of 1974, the Native Marriage Act was amended and called the Islanders Marriage Act. Also, all references to the use of the word ***"native"*** were changed and replaced with the word ***"Islanders"***, and reference to ***"native custom"*** were replaced with the words ***"the custom of Islanders".*** The Native Divorce Act (Cap. 48) was also amended with references to ***"native custom marriage"***, replaced with the words ***"marriage by the custom of Islanders".***

The reason for the changes and amendments is not known, but the effect of such amendments in my respectful view, is quite significant. The term ***"native"*** is a more specific word of description, and therefore more restrictive in its application. The Oxford Advanced Learner's Dictionary defines the word ***"native"*** as follows:

> **"person born in a place, country, etc, and associated with it by birth; Local inhabitant; Local inhabitant as distinguished from immigrants, visitors, etc."**

The Australian Little Oxford Dictionary defines it as follows:

"inborn; by reason of (place of) one's birth; born in place, indigenous; of natives;
occurring naturally."

By contrast, the word ***"Islander"*** would appear to be a generic term of description, and so wider or broader in its application. The Australian Little Oxford Dictionary defines the word ***"Islander"*** as follows:

"inhabitant of island".

The Oxford Advanced Learner's Dictionary defines it as follows:

"person living on an island, especially a small or isolated one."

The term "Islander" is not defined under the Islanders Marriage Act. A question for this Court to consider is whether the term **"Islander"** should also be extended to include members of the Kiribati Community in Solomon Islands, who by virtue of their origins are also Islanders, but non-indigenous people residing in this country. Should it be confined to native Islanders only, as was or would appear to be the case prior to the amendment? However, if that was the case, then why the amendment in the first place? It would all seem to be an unnecessary exercise. Could it be that the Legislators deliberately made the amendments to take into account such cases as found here? Whatever the reasons, I am satisfied that the term ***"Islander"*** is capable of being interpreted as including the Applicant and the deceased who were at the time of the celebration of the marriage in custom, were citizens of this country and ordinarily resident in the country before and after the celebration of the marriage as well. They are persons who formerly originated from a group of Islands formerly known as The Gilbert and Ellice Islands. They are therefore Islanders as well. In re-settling them, they have also been settled in Islands in the country. So again, they can also be referred to as Islanders. A restrictive interpretation would deprive a sizeable group of the citizens of this country of the protection and benefits of the law. On the other hand, a liberal interpretation will not offend against any provisions of the Constitution, in particular, paragraph 3(1) of Schedule 3 to the Constitution. I am satisfied accordingly that the celebration of a marriage in accordance with the custom of the Kiribati Community in Solomon Islands is a valid marriage in law under the Islanders Marriage Act and is not inconsistent to any other Act of Parliament or the Constitution.

A Custom Marriage.

Has there been a custom marriage celebrated in accordance with the customary practice of the Kiribati Community in Solomon Islands? The evidence adduced before this Court has gone virtually unchallenged. It has not been disputed that the deceased had been legally divorced with his first wife *(the Respondent's mother),* prior to the marriage in custom with the Applicant. After the custom

ceremony had been completed, the parties cohabited together, it seems at the residence of the deceased at Mbokonavera 1. They had four children and were still living together as husband and wife when the deceased died in 1992. They had cohabited together for a total period of seven years. There has been no evidence adduced to the contrary, to show that in that period the couple were not known as husband and wife, or were living apart, and only came together occasionally. On the balance of probability, I am satisfied that a valid customary marriage had been celebrated between the parties, and that in law it was also valid.

The Wills, Probate and Administration Act 1987 - Section 29.

Section 29 of The Wills, Probate and Administration Act 1987, deals with the question of order of priority in cases of intestacy:

> **"29.(1) Where the deceased died wholly intestate, the persons having a beneficial interest in the estate shall be entitled to a grant of administration in the order of priority that may be prescribed for the purpose by the rules."**

No rules appear to have been enacted as yet, and so recourse must be had to the former rules as contained in **The Non-Contentious Probate Rules, 1954**, which rules were made under section 2(5) of the **Colonial Probates Act 1892.**

Rule 21(1) provides:

> **"Where the deceased died on or after the 1st January, 1926, wholly intestate, the persons having a beneficial interest in the estate shall be entitled to a grant of administration in the following order of priority, namely:-**
>
> *(i) The surviving spouse;*
>
> *(ii) The children of the deceased... or the issue of any such child who has died during the life time of the deceased;*
>
> *(iii) The father or mother of the deceased brother or sister of the whole blood who has died..."*

According to that order of priority, the surviving spouse, in this case, the lawful widow of the deceased, is entitled to be appointed the personal representative of the deceased's estate. In the circumstances of this case, that had not been done. The reasons given were that at the time of the grant of letters of administration to Carol Edwards, in December of 1994, the widow was overseas, visiting relatives at Kiribati. Secondly, it appears that the Respondent was under the mistaken belief

that the widow was not a person entitled in law to the appointment of such a grant as well, and that accordingly, no mention was even made as to her existence, or possible claim on the estate of the deceased, despite the fact that her children from the deceased were mentioned in the affidavit in support, of Carol Edwards filed on 29 September, 1994. I am satisfied however, that she is a person entitled to a grant of letters of administration in the order of priority and that accordingly, she should be included as an additional personal representative.

I note that the Applicant appears not to object to the fact that Carol Edwards had been appointed as a personal representative in the estate of the deceased. Her application merely seeks an order for the appointment of an additional personal representative. I am satisfied accordingly that she should be appointed as an additional personal representative to the estate of the deceased, and **I so order**. I also **direct** that a note shall be made on the original grant, of the addition of a further personal representative. Costs of this application to be paid out of the estate of Victor Edwards, deceased.

ALBERT R. PALMER

A. R. PALMER
JUDGE