Faletau v 'Akau'ola

Supreme Court, Nuku'alofa
Lewis J
C.1167/96

14 & 30 May 1997

Deceased estate - donatio mortis causa - proof of promise
Constitution - customary rights - survival of - legislation
Adoption - customary - claim to deceased estate

The plaintiffs, relatives of the deceased, and customarily adopted by him, claimed part of his estate from the defendant, who inherited the deceased's intestate estate.

Held:

1. There was no proof of a promise made by the deceased directly to the plaintiffs in consequence of an imminent expectation of death on the part of the deceased, sothere was no basis for a claim of donatio mortis causa. That claim was struck out.
2. As to the alternative claim, based on customary adoption the Probate and Administration Act is silent as to customary adoption, whereas the Constitution (cl.111) is not. But it is clear that clause (111) works in a way which re-establishes the blood line in title cases.
3. Unlike other commonwealth countries where native title was removed by reason of a foreign dominant country taking a subservient one by force and by squatting, the notion of custom in Tonga has an uninterrupted existence and is quintessentially Tongan.
4. Inroads into custom in Tonga has been through the passage of laws (in accord with the principles in the Constitution) by legislation passed by Tongans. The law of Tonga has evolved by statutes made by Tongans in a Tongan Parliament embracing and discarding custom as the Tongan Parliament deemed appropriate.
5. The plaintiffs were all legitimate and cannot be legally adopted.
6. There is no gap in the law of Tonga to be filled by resorting to the common law of England, the rules of equity or statutes of general application (such as the Inheritance (Provision for Family and Dependants) Act 1975, UK) as the Probate and Administration Act provides for the division of the property of an intestate deceased and the manner of the property's distribution.
7. The claims of the plaintiffs be struck out as customary adoption will not provide the basis of a claim in relation to intestacies.

Cases considered : Fulivai v Kaiananu (1961) 2 Tongan LR 178
Tu'ipulotu v Niukapu [1995] Tonga LR
Te Weehi v Regional Fisheries [1986] 1 NZLR 680

Statutes considered : Constitution cl 111
Probate and Administration Act
Civil Law Act
Maintenance of Illegitimate Children Act
The Inheriture (Provision for Family and Dependents) Act 1975/UK

Counsel for plaintiffs : Mr W Edwards
Counsel for defendant : Mr Niu

Judgment

This is an application by the defendant to strike the claims of the plaintiffs in these proceedings on the basis that their claim, and its alternate, show no cause of action.

The plaintiffs claim an interest in the estate of the late Hon.'Akau'ola (the deceased) who died intestate on 30 December 1995. The defendant (formerly by name 'Inoke Faletau but now having inherited the title of 'Akau'ola) is the brother of the deceased.

The deceased remained unmarried at the time of his passing with no children of his own. The defendant inherited the estate of the deceased having claimed an hereditary right..

It is not disputed that the second third and fourth plaintiffs were related to the deceased. They were adopted by what the plaintiffs say is, and was, customary adoption.

The plaintiffs claim some funds in Bank accounts of the deceased. They argue that were promised by the deceased that he would build a house for them and apply the funds in his bank accounts for the plaintiffs and himself. He died before the plan came to fruition. The defendant after some initial denials now admits the existence of the promise and the nature of the plaintiffs' claim.

The first claim of the plaintiffs must fail. The only basis under which the plaintiffs may establish any right to the intestacy of the deceased is by proof on their part of a donatio mortis causa, that is a promise made by the testator directly to the plaintiffs in consequence of an imminent expectation of death on the part of the donor. There is no such proof. There is no basis for a claim of donatio mortis causa either under the provisions of the Probate and Administration Act (Cap 16) or the Civil Law Act (Cap 25) sections 3 and 4.

The Plaintiffs' first ground of claim in my opinion is unsupportable at law. I order that it be struck from the statement of claim.

THE ALTERNATIVE CLAIM

As to the second claim, it is said to arise from custom. The plaintiffs claim that they were adopted by the deceased by customary adoption, a common and recognised practice in Tonga without any formal documentation. As to the existence of the practice there is no evidence led at this point. The claim is before the court at the moment to determine whether a cause of action exists or whether the plaintiffs claim ought be struck by reason of the non existence of any cause of action.

I begin with an examination of the Probate and Administration Act (Cap.16) to see whether the Parliament at the time of the passage of the law contemplated customary claims. In large measure the Act makes provision for events related to testamentary disposition. The first clue as to the intention of the legislature is found in section 16 and Schedule 1 of the Act.

Section 16 provides:-

> "The widow shall inherit the dwelling house on the town allotment (and if more than one the court shall decide which one shall go to the widow), the growing crops pigs and poultry and ngatu whether the deceased left a will or not but the rest of the property of an intestate shall be divisible according to schedule 1 hereto."

The schedule provides for the division of property on intestacy. Where the deceased dies leaving a brother (or brothers as here) the division is prescribed as "amongst brothers ..... in equal shares ....." In the Probate and Administration Act, Parliament is silent as to adoption and silent as to customary adoption.

In the Constitution (Cap. 2) clause 111 it is not. Parliament provides:

> "111. Whereas by Tongan custom provision has always been made that an adopted child may succeed to the estates and titles ofhis adopted father now therefore it is decreed that upon the death of the holder of an estate or title who has inherited such estate or title by virtue of his bloodidescent from such adopted child the estate and title shall revert to the descendant by blood of the original holder of the estate and title in accordance with the provisions of this clause and should there be alive no such descendant by blood the provisions of the one hundred and twelfth clause shall apply."

The plaintiff's submit that the practice is a recognised one which is not repugnant to the laws of Tonga. They submit that the Constitution, clause 111, supports the contention.

The defendant submits that the plaintiffs have misconstrued the intended meaning of the Constitution, clause 111. The defendant submits that clause 111 was specifically enacted in 1953 for the purpose of removing a title from a person who inherited the title from an ancestor who was adopted before the passage of the Constitution in 1875.

The defendant submits that clause 111 of the Constitution has been construed in a Privy Council decision as a clear statement that customary adoptions no longer have force and effect in determining hereditary titles (whereas before the passage of the Constitution they did). Fulivai (Noble) v Kaiananu (1961) 2 Tongan LR 178 followed in Tu'ipulotu v Niukapu [1995] Tonga LR 1994.

In my opinion, whatever the circumstances in which the enactment came about, the intention of Parliament is clear from Kaiananu, that the Constitution works in a way which would reestablish the bloodline in title cases. This is not such a case in any relevant sense. The only principle which may be usefully gleaned from clause 111 for present purposes is that there has been at least a statutory recognition of the former existence of customary adoptions.

It is submitted by the plaintiff that this court should follow the path of decisions in Canada, New Zealand and Australia in approaching the present claim. To follow the decisions of other Courts of the Commonwealth in the matters of interpretation is a

legitimate course to take. There is no doubt that this court is entitled to afford those decision persuasive status. Evidence Act, (Cap.15) section 166.

I am referred by counsel for the Plaintiffs to Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 at 691, where the Court said inter alia:-

> "The Canadian cases follow the general approach that rights of native or aboriginal people may not be extinguished except by way of specific legislation which clearly and plainly takes away that right."

It must be said, the removal of native title occurred in Canada (and New Zealand and
160 Australia until the Australia Mabo decisions and their legislative sequel) by reason of a foreign and dominant country taking a subservient one by force and by squatting, whereas the notion of custom in Tonga has an uninterrupted exitence and is quintessentially Tongan.

The phenomenon which has brought about inroads into custom in Tonga has been the passage of laws in accord with the principles set out in the Constitution Act of 1875 and other legislation by the Tongans themselves. That is, the law in Tonga has evolved by statutes made by the Tongans in a Tongan Parliament embracing and discarding custom as the Tongan Parliament representing all Tongans, deemed appropriate.

In the present context the effect here of foreign judgments and utterances must
170 necessarily be weakened by that fact alone coupled with, for example, in Australia, the existence of the Colonial Laws Validity Act and like Statutes of the English Parliament.

I have kept steadfastly in mind that these arguments spring from a motion to strike the plaintiffs' claims. The admitted position is that there was, on any account of it, a customary adoption of the plaintiffs by the deceased. The plaintiffs are all of them the legitimate children of their natural parents and accordingly may not be made the subject of adoption (at law) as illegitimate children may be. (See Maintenance of Illegitimate Children Act (Cap.25) section 16).

The defendant makes the point that if customary adoption is given force of law in
180 Tonga then any legitimate child customarily adopted would lose succession rights which he otherwise would have enjoyed as a legitimate child of natural parent. That may be a consequence and perhaps an unhappy one but it does not have relevance for the immediate purpose of this Application which is to determine if the Plaintiffs are possessed of a valid cause of action.

The plaintiffs argue that this court should exercise 'equitable discretion' in determining this matter and not strike the claim. The basis of the submission is that had the deceased been testate they would have taken under the will and its terms and although the Probate and Administration Act is silent the Court may resort to the Civil Law Act and thereby
190 invoke the statutes of general application, the rules of equity and the common law of England.

The defendant responds that the Civl Law Act section 4 provides:-

> "4. The common law of England, the rules of equity and the statutes of general application referred to in section 3 shall be applied by the Court -
>
> (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom".

and the Probate and Administration Act section 16 makes provision for the division of the
200 property of an intestate deceased person and the manner of its distribution. There is no

gap in the law of Tonga to be filled by resorting to the common law of England the rules of equity and the statutes of general application.

The plaintiffs lastly submit that the Court may, using the Civil Law Act provisions resort to an Act of the UK Parliament - The Inheritance (Provision for Family and Dependants) Act 1975 - which should be considered when considering whether the plaintiffs are possessed of a cause of action.

Apart from suffering from the same infirmity as the argument of the presence or absence of a law in Tonga which governs the issues and whether the plaintiffs may have
210 resort to the Civil Law Act provisions, the UK Act specifically makes reference to claimants against the estate of persons who die intestate in England and Wales after the commencement of the Act. In my opinion the statute cannot have applicability as a statute of general application within the meaning of the Civil Law Act, s4.

I cannot leave this judgment without saying that I am not insensitive to the feelings the death of the adoptive father of the plaintiffs will have brought about but I am bound by my oath as a Judge of this court to do that which the law requires of me.

This Court must ask whether there is any cause of action which is disclosed by the pleadings as they presently stand concerning a claim made by the plaintiffs that customary adoption will provide the basis of a claim in relation to intestacies. I have come to the
220 conclusion that there is no such cause of action available to the Plaintiffs under the present law.

IT IS ORDERED THAT:-

1. The claim of the plaintiffs be struck out there being no cause of action.
2. The parties bear their own costs.