IN THE SUPREME COURT OF TONGA
Divorce Jurisdiction
Nuku'alofa Registry

Case No 22/85

BETWEEN Taniela Kinikini Petitioner

and

Losaline Lupe Pohahau Respondent

N. P. Tonga for the Petitioner.

Mrs T. Palelei for the Respondent.

JUDGMENT

This is an application by the Respondent wife who claims a half share in the former matrimonial home at Kahoua. These two parties have litigated almost every possible dispute that can arise when a marriage breaks up and I trust that this will be the last such application.

The Facts.

The parties were married in New Zealand on 5th January 1976. They returned to Tonga in the same month. The Husband took a job at Liahona, then earning some $17 every two weeks. The wife also worked there. Before the marriage the wife had some savings which were in a savings account at the Bank of Tonga. They pooled their money and used whatever they earned for their joint needs regardless of who earned what. Some of the money earned by both parties was paid into the savings account held in the name of the wife.

In August 1977 they went to Samoa, where again they were

both employed. In March 1979 they returned to Tonga and to Liahona. Before they left Samoa the Tongans there made them a gift of $350. That money was intended for them both. For convenience, it was paid into the savings account.

They continued to work at Liahona. They were now financially better off and decided to have a car. The husband asked a friend in the U.S.A., one Sinapeli, for help and he sent a cheque for US $500. This converted to T$478.48 which was paid into the wife's savings account on 13th August 1979. The husband says that this money was intended as a deposit on the house. This cannot be correct because, as he agrees, the $500 withdrawn shortly afterwards on 4th October 1979 was spent on a car.

Some time after this they decided to build a house. In February 1980 the husband went to the Bank of Tonga to ask for a loan. On 19th February 1980 he was granted a loan of $4,000. They had to find a 10% deposit of $400. There was slightly more than this in the savings account. At the end of February 1980 a total of $390 was withdrawn to cover the majority of the down payment.

The loan was not sufficient to complete the tiling and painting of the house and a further $1,100 was borrowed to cover this. The total cost was therefore $5,100, of which $400 was paid out of the joint savings and the balance of $4,700 was loaned by the Bank.

At this time the husband was earning $55 every two weeks. Repayments on the loan were $40 every two weeks. This sum was deducted from the husband's salary, but the wife was working and

used her earnings to support the family. Without her contribution they could not have afforded the repayments.

Construction started in about March 1980 and was completed in June. During this period the wife helped to prepare meals for the building workers.

They had no children of their own but in February 1980 the wife's sister had a child whom they adopted in the Tongan fashion. So keen were they to make this child their own that they registered her incorrectly as their legitimate child. (That has now been corrected). In February 1981 the wife left work to devote her time to looking after the child. By then the husband's salary had been increased. From that time the wife made no direct contribution towards the family finances.

The parties separated in January 1983. Ever since then relations between them have been very strained. In March 1983 the husband lost his job, he says because of his domestic problems. He tried to earn money by operating a van but he failed to meet the repayments on a bank loan and had to sell it. The Bank threatened to repossess the house for non-payment but he managed to gain further time. Eventually he repaid the entire loan, the last payment being on 20th March 1987.

In earlier maintenance proceedings on 2nd November 1987 the amount due to the wife was agreed at $2,150 and a consent order was made that he pay this sum to her. It is now argued for the wife that that sum represented the agreed value of her share in the house. That is not how it was put to the court at the time. The order describes it as an agreed figure for arrears of main-

tenance, and that is how I must regard it. The value of her share has never been agreed.

A series of court hearings before me made it very clear that the husband was determined not to pay and would go to any lengths to deprive the wife of the money which he owed her. He paid only $445.57 under the order. It was eventually revoked by consent on 16th December 1988 and all arrears remitted.

The wife then issued this application. Her application seeks an order that the house is owned by herself and the husband in equal shares, but she made it clear that she would be content if she recovered the unpaid balance of the sum previously agreed - $1,704.43.

<u>The Law.</u>

Section 15B of the Divorce Act (Cap 18) as amended by the Divorce (Amendment) Act 1988 empowers the court to order one party to make a lump sum payment to the other regardless of rights of ownership. But first I must determine what share, if any, the wife holds in the house.

If money is paid from both incomes into a one account, whoever may be the account holder, that money is presumed to be owned by them jointly. Evidence may be called to rebut that presumption, to show that it was not intended, but no such evidence was given in this case. I therefore find that the money in the savings account was held equally and the deposit must be taken to have been paid in equal shares.

While they were both working both parties were contributing to the repayment of the loan. The fact that it was the husband who actually made the payments is irrelevant. He would not have been able to do so if the wife's earnings had not relieved him of the responsibility of maintaining the family and meeting its obligations. The position is the same as if he had paid his money into the joint pool (which they own in equal shares) and then made the payments from this source. The payments during this period must be taken as having been made in equal shares.

In this case therefore the wife contributed one half of the deposit ($200) and one half of the repayments up to the time when she ceased employment. The total payments up to the time when she ceased work were $960 and she must be credited with one half - $480. So she has made a direct contribution of $680 out of a total cost of $5,100. That is the minimum sum which the wife is entitled to recover.

But the matter does not end there. When a wife works over a period of years she contributes to the family assets, either directly by actually providing money for their purchase, or indirectly by relieving the husband of the need to meet routine expenses so that he can use his money to buy things. In this way over a period the wife builds up a share in those assets. Even if she does not go out to work and earn money she still makes a contribution. She does what every wife does and cares for the home, the husband and any children. She may work to produce mats and ngatu, which in themselves are family assets. If the marriage breaks up, it is unjust that she should receive no return for what in many cases is a very substantial contribution. In most cases this cannot be quantified precisely. So the court

has to resort to assessing her interest as a proportion of the value of the family's assets. The longer the marriage, the greater the wife's contribution and her share of the assets is correspondingly greater.

Following English law, the conventional starting point for assessing the wife's share of the matrimonial assets is to give her one third, leaving the husband with two thirds. This takes account of the fact that the husband's direct contribution is normally greater, and so are his commitments. It is not a rule of law but a practice which has been followed over a long period. Despite occasional criticism it is a useful practice which provides general guidance and helps to achieve consistency. One cannot operate in a void and there has to be a starting point. Nobody has yet suggested a more convincing way in which to approach the problem and I think it right to apply the same practice in Tonga when determining claims under section 15B. I stress that "one third" is only a starting point and the proportion awarded to the wife may be decreased, for example if the time together was very short; or it may be increased in the case of a very long marriage or if the wife has made a particularly substantial contribution.

In this case the parties lived together for 7 years. During that time the wife worked and made a direct financial contribution for 5 years. She continued to make an indirect contribution for a further 2 years. In that situation there are no particular factors to increase or decrease her entitlement and I therefore assess her share of assets at one third.

One third of what ? There were two vehicles but these

appear to have been financed by the husband's family or solely by himself after the separation, so the wife has no claim to those assets. The only remaining asset is the house and there is no evidence of its present day value. In the circumstances I take its cost ($5,100) and award the wife one third of that which is $1,700. No deduction is appropriate for the sums already paid by the husband because they were paid by way of maintenance for the wife or the child, and not in part satisfaction of her capital claim. As it happens, that is approximately the sum which the wife says she wants, but I have reached that conclusion by another route.

I order that the husband pay to the wife the sum of $1,700 within three months. That will give him time to raise the money by way of loan or otherwise. In default I order that the house be sold and the money due to the wife be taken out of the proceeds.

The husband has consistently displayed a determination to avoid paying anything to the wife and he must pay the costs of this application which I assess at $200.

Dated the 15th day of March 1989

Chief Justice.