

IN THE ESTATE OF: RAUPEPE FIDELIA

BETWEEN: RAUPEPE DIDIER
Appellant

AND: FREDY WASS
Respondent

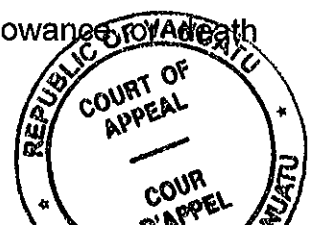
Coram: *Chief Justice Lunabek*
Justice John von Doussa
Justice Ronald Young
Justice Daniel Fatiaki
Justice Robert Spear
Justice Dudley Aru
Justice Mary Sey

Date of Hearing: 16th April 2013
Date of Decision: 26th April 2013

Counsel: *Eric Molbaleh for the Appellant*
James Tari for the Respondent

JUDGMENT

1. This appeal is against the dismissal of the appellants' application for administration of the intestate Estate of the late Raupepe Fidelia (the deceased) who died in Vanuatu on 5th December 2011. The appellant applied for administration as the husband of the deceased. His application identified the persons entitled to the deceased's property as himself and Raupepe Alienza, the adopted daughter of the deceased and the appellant.
2. The application for administration was made on the Forms 3 and 4 prescribed by the Probate and Administration Rules, Order 28 of 2003, although the schedule to Form 4 which requires details of the property of the deceased was not completed. Evidence before the trial Judge disclosed that the assets of the deceased comprise a house, a payment of severance allowance and a



benefits (both descriptions are used in the papers) of Vatu 917,280 and savings with the Vanuatu Teachers Union of approximately 2 Million Vatu. It seems that the deceased was also entitled to a benefit under the Provident Fund which will be distributed by the Trustees of the Fund in the manner nominated by the deceased and that benefit will not form part of the property subject to administration.

3. The application for administration was duly advertised as required by the Probate and Administration Rules. A response in opposition to the grant of administration to the appellant was filed by the respondent Freddy Wass who claimed to be related by blood to the deceased. The deceased's mother was his sister.
4. The competing claims for administration were tried in opposition proceedings before the Supreme Court. The trial Judge dismissed the appellants' application and ordered that the respondent be granted administration. By implication the trial Judge also ruled that the estate of the deceased was to be applied for the benefit of more distant relatives of the deceased than Raupepe Alienza, and to the exclusion of both her and the appellant.
5. The respondent in support of his opposition to the appellant's claim for administration posed two questions for the decision of the Supreme Court:
 - 1) Whether the appellant is capable of administering the estate of the deceased; and
 - 2) Whether the appellant was legally married to the deceased.
6. The trial Judge for the reasons discussed below answered both questions in the negative, and for those reasons the appellant's application for administration was dismissed.
7. Regrettably, counsel at trial did not refer the trial Judge to the relevant law of Vanuatu by which an application for administration is to be determined, nor did the trial Judge refer to it. That law is set down in the Succession, Probate and Administration Regulations 1972, the Queen's Regulation, which prescribe who



in order of priority is entitled to administration, and how an intestate estate is to be distributed.

8. Regulation 7 which deals with grant of letters of administration provides:-

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 twenty- one years of age:-

(a) The husband or wife of the deceased; or

(b) if there is no husband or wife to one or not more than four of the next of kin in order of priority of entitlement under this Regulation in the distribution of the estate of the deceased; or

(c) any other person, whether a creditor or not, if there is no person entitled to grant under the preceding paragraphs of this section resident within the jurisdiction and fit to be so entrusted, or if the person entitled as aforesaid fails, when duly cited, to appear and apply for administration.

9. Subject to the appellant establishing that he was the husband of the deceased he was as a matter of law entitled to the grant of administration.

10. Regulations 5 and 6 of the Queen's Regulation relevantly provide:-

5. Notwithstanding anything to the contrary contained in any laws in force in New Hebrides at the date of commencement of this Regulation, the property of an intestate dying on or after the date of commencement of this Regulation shall be distributed in accordance with the provisions of this Regulation, and no person shall have any right, title, share, estate or interest in such property except as provided in this Regulation.

6. (1) Subject to the provisions of the last preceding Part hereof, 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 Regulation on trust to pay the debts, funeral and testamentary expenses of the deceased and to distribute the residue as follows:-

(a) if the intestate leaves a wife, or husband, with or without issue, the surviving wife or husband shall take the personal chattels absolutely, and:-

(i) if the net value of the residuary estate of the intestate, other than the personal chattels, does not exceed ten thousand dollars the residuary estate absolutely; or

(ii) if the net value of the residuary estate exceeds ten thousand dollars, the sum of ten thousand dollars absolutely;

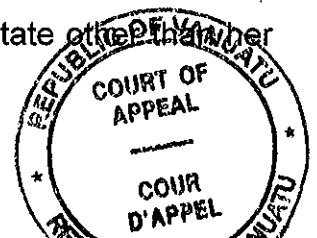
(b) if the intestate leaves no issue, the surviving wife or husband shall in addition to the interests taken under paragraph (a) of this subsection, take one-half of the residuary estate absolutely;

(c) if the intestate leaves issue, the surviving wife or husband shall, in addition to the interests taken under paragraph (a) of this subsection, take one-third only of the residuary estate absolutely, and the issue shall take per stirpes and not per capita the remaining two-thirds of the residuary estate absolutely.....

[balance of Regulation 6 (1) is not relevant].

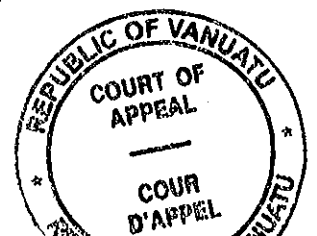
11. The reference to "dollar" is a reference to Australian dollars and by Regulation 6 (3) "issue" includes a child, and a "child" includes a legally adopted child of the deceased.

12. Under Regulation 6, if the appellant was the husband of the deceased and Raupepe Alienza was her adopted child, the deceased's estate of the appellant



personal chattels which will go absolutely to the appellant, is to be applied as to the first AUD \$ 10,000 (approximately 1 million Vatu) for the benefit of the appellant, and the residue as to two-third for the benefit of Raupepe Alienza and one-third for the benefit of the Appellant.

13. The issues of fact raised by the respondent in relation to the first question posed by the respondent for the consideration for the trial Judge were :-
- The failure of the appellant to detail the property of the deceased in his application for administration;
 - The receipt by the appellant of the death benefit of Vatu 917,280 before administration had been granted. (Incidentally the evidence shows that the appellant has invested a substantial proportion of this money with a bank for the benefit of Raupepe Alienza);
 - The fact that the appellant was overseas in New Zealand apple picking when the deceased became ill and died;
 - The appellant never paid bride a price in respect of the deceased in accordance with custom practices in their community; and
 - The community chiefs and elders have decided against the grant of administration to the appellant and have decided that the benefits of the deceased property be allocated for the benefit of the Family Wass and Family Naova.
14. The trial Judge relied on these matters to reach the conclusion that the appellant was not capable of administering the deceased estate. Where the entitlement of a particular person to a grant of administration is governed by Regulation 7 of the Queen's Regulation, factual matters of the kind considered by the trial Judge are not relevant, and for this reason should not be admitted into evidence. The last of the factual matters taken into account also reflects a serious misapprehension about the legal rights and responsibilities of a party to whom administration is granted.
15. The grant of administration to a person does not give that person any rights to the benefits of the property of the deceased which the person would not

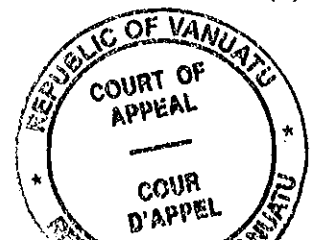


otherwise have under the law. It seems necessary that this Court emphasises again what it said in In re Estate of Molivono [2007] VUCA 22:

“.....the granting of probate or administration does nothing to determine ultimate ownership of the personal property of the person who died. Not only in this case but in others as well we have seen suggestions that the grant of the right to administer an estate meant there was a determination of what property was owned by the estate and also governed its future ownership. Obtaining probate or administration is placing on an individual an extraordinarily solemn duty. It is the duty first to call in and collect all the properties of the deceased person apart from any interest in custom land. Then, they must pay all the debts of the estate. Their solemn obligation is to ensure that what is left is distributed either in accordance with the terms of the will or in accordance with the rules laid down in Queen’s Regulation 7. It provides for the executor or administrator no rights of ownership or personal benefit.

A person who is granted probate or administration is answerable to the Court for the proper exercise of the obligation which he or she has chosen to take up.”

16. The people entitled to receive the benefit of the personal estate of the deceased are determined by law: where the deceased leaves a will dealing with their personal property that property is distributed according to the terms of the will; in the absence of a will the personal property of the intestate deceased will be distributed according to the Queen’s Regulation.
17. The second question posed for the consideration of the trial Judge by the respondent, whether the appellant was legally married to the deceased, is the question of critical importance in this case. The trial Judge in answering the question in the negative gave two reasons. First, no evidence was led by the appellant to establish that the purported marriage had been registered. Secondly, there was no evidence by the appellant to establish that section 4 (c)



and section 6 of the Marriage Act (sic, the Control of Marriage Act [CAP 45]) had been complied with.

18. Sections 4 (c) and 6 of the Control of Marriage Act provide:

4. *The principal celebrant of any marriage shall satisfy himself prior to the celebration of the said marriage:*

(a)

(b)

(c) *that the parties thereto have freely expressed their consent before at least two witnesses or before the District Commissioner of the District in which they reside.*

6. *No marriage shall be valid unless the parties thereto have expressed their consent in the matter described in paragraph (c) of Section 4.*

19. In a sworn statement received at trial on behalf of the respondent, the deponent suggested that the deceased entered into the purported marriage with the appellant under duress. This bold assertion was not supported by any admissible evidence. Before this Court the respondent argued that the absence of consent was established by the failure to pay a bride price and to perform a marriage ceremony in accordance with custom.

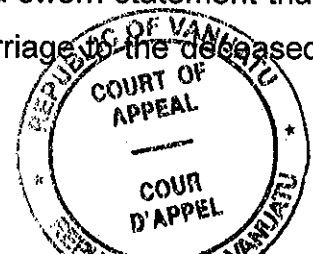
20. The evidence before the trial Judge did not establish the payment of a bride price nor the participation of the deceased and the appellant in a custom ceremony of marriage. However there was evidence before the trial Judge that the marriage relied on by the appellant was one celebrated in accordance with the rights of the Catholic Church at Port Olry, Santo on 28th November 2010 in the presence of two witnesses who signed a certificate acknowledging that fact. This evidence is not referred to in the Judgment.

21. The Marriage Act [Cap 60] provides for the validity of marriages. By section 1 every marriage after the Act came into operation shall be valid if celebrated before either a District Registrar, a minister for celebrating marriages, or in



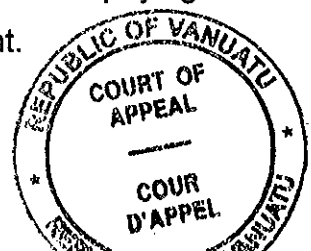
accordance with custom and in accordance with the provisions of the Marriage Act. In the present case the ceremony relied upon by the appellant was conducted by a minister for celebrating marriages. The evidence included a formal record of the marriage ceremony signed by the celebrant, by the deceased and the appellant and by two witnesses Danny Naliupis and Anika Tamsel. The certificate provides evidence that the marriage was celebrated in accordance with the provisions of the Marriage Act, and that there were present two witnesses. The requirement that there are two witnesses is to provide assurance that the parties voluntarily entered into their marriage as consenting parties. Where the ceremony takes place in presence of the witnesses and before a marriage celebrant, the law will presume that the parties to the marriage have freely expressed their consent unless and until the contrary is clearly established by those that seek to challenge the validity of the marriage.

22. In this case there was no admissible evidence that cast a shadow of doubt on the validity of the marriage. As the marriage was celebrated before a minister for celebrating marriages, it was a lawful marriage even though it may not have been accompanied by a custom ceremony.
23. There was no evidence before the trial Judge that the marriage was duly registered. Section 15(1) of the Marriage Act requires that immediately upon the celebration of any civil, religious or custom marriage, it shall be registered in conformity with the provisions of the Civil Status Act, Cap 61. However neither section 15 nor any other provision of the Marriage Act provides that a ceremony of marriage is rendered invalid if it is not immediately registered. On the contrary, the Civil Status Act in section 23 provides that any marriage that is not registered in a timely manner shall be subject to a late declaration, and in that way registered.
24. The purpose of registration is to provide a formal record of the event, and to facilitate easy proof of marriage. The failure to register a marriage does not make it invalid.
25. In this case, in support of the appeal the appellant filed a sworn statement that exhibited a copy of a certificate of registration of his marriage to the deceased



at Port Olry on 20th November 2010. The certificate shows that the marriage was registered as the result of a late declaration on 10th May 2012, some 10 weeks before the trial. No objection was taken to the filing of this statement which constituted fresh evidence before the Court of Appeal. The affidavit established that the formalities of registration had in fact taken place. However, for the reasons already given, the marriage of the appellant and the deceased and its validity had already been established by the evidence at trial.

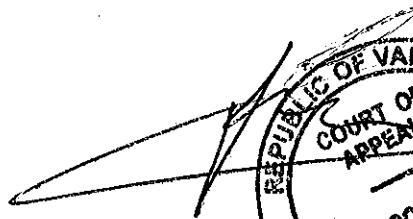
26. As the appellant was the husband of the deceased he is the party entitled to the grant of administration.
27. The validity of the adoption of Raupepe Alienza is not in dispute. The evidence before the trial Judge shows that the adoption took place in accordance with custom.
28. For these reasons the appeal must be allowed and a grant of administration made in favour of the appellant. Further, the personal estate of the deceased is to be administered in accordance with the provisions of Regulation 6 of the Queen's Regulation, and not in any other way.
29. The Notice of Appeal in this matter was filed 18 days out of time. A formal application for leave to appeal out of time was made to this Court when the appeal was called for hearing. The delay was explained by the appellant as being due to his difficulty in raising the filing fees. The appeal raises issues about the entitlement of an infant to share in her mother's estate. This fact alone is sufficient to warrant a grant of leave. Further, the merits of the appeal are in favour of the appellant. In the circumstances, the Court of Appeal granted leave at the commencement of the hearing.
30. Finally, we were informed that the respondent has received Vt 200,000 from the deceased's savings with the Vanuatu Teachers Union, apparently to cover the funeral expenses. To the extent that the money was used for this purpose it was a proper use as the estate must pay the funeral expenses (Regulation 6 of the Queen's Regulation). If there is any balance left after paying these expenses it must be paid by the respondent to the appellant.

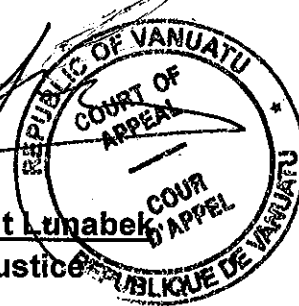


31. The formal order of the Court is:-

- 1) Appeal allowed.
- 2) The order for administration in favour of the respondent dated 28th August 2012 is set aside.
- 3) Administration of the estate of Raupepe Fidelia is granted to the appellant.
- 4) The respondent must pay the appellant's costs of the appeal at the standard rate, to be agreed or taxed.

**DATED at Port Vila this 26th day of April 2013
FOR THE COURT**


Hon. Vincent Lunabe
Chief Justice



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "COURT OF APPEAL" in the center. Below the seal, the text "HON. VINCENT LUNABE" and "CHIEF JUSTICE" is printed. To the right of the seal, the text "REPUBLIQUE DE VANUATU" and "COUR D'APPEL" is visible.