ESTATE CARRUTHERS (RICHARD HETHERINGTON)
re: CARRUTHERS (BERNADETTE TAPUITEA)

Supreme Court Apia
Ryan CJ
30 April, 9 May 1991

WILL ESTATE - S47 Administration Act 1975 - exclusion of widow from will - moral duty to provide - no conduct by widow disentitling her to provision under the estate - value of the estate.

HELD: Plaintiff entitled to sum to enable her to live in reasonable comfort if not quite to the standard that she was accustomed to. No evidence to show the Plaintiff guilty of conduct which disentitled her to provision under the estate.

Little v Angus [1981] 1NZLR 126
Re Mercer [1977] 1NZLR 469

OTHER CASE CITED:

- Re Wilson [1973] 2NZLR 359

LEGISLATION:

- Administration Act 1975; S 47

R Drake for first Plaintiff
L S Kamu for second Plaintiff
E F Puni for Trustees
A V Va'ai for the four Beneficiaries

Cur adv vult

This is an application for relief out of the estate of Richard Hetherington Carruthers who died on 14 May 1987 leaving a will dated 13th October 1983. The probate of the will was granted to the Defendants on 20th November 1987. No precise figure as to the value of the estate was available at the hearing but it seems to range anywhere between $600,000 and $1.2m.

The claims against the estate are brought by testator's widow and her daughter. They are the only claimants. The claims are brought under section 47 of the Administration Act 1975 which reads:

> "The Court may grant to any widow, widower, parent, child or grandchild of the deceased person who has died leaving an estate in Western Samoa such relief thereof as to which seems just if the Court is satisfied (having regard to all the circumstances of the case) that such widow, widower, parent, child, or grandchild is insufficiently provided for."

The situation here is that the Plaintiff was totally excluded from the will and there was no explanation in the will for that exclusion as is so often the case. I am told by counsel that claims of this nature are infrequent in the court in Western Samoa and in fact counsel were unable to direct me to any other recorded decision. It is necessary therefore to have resort to some New Zealand case law to ascertain the principles upon which the Court should act.

The deceased, Mr Carruthers, was a prominent businessman in Western Samoa and had a rather chequered life. He was married in fact four times. The first marriage in December 1937 was dissolved in November 1942 and there were two issue of that marriage; the second marriage was in February 1945 and was dissolved in September 1961 and there was one child of that marriage; the third marriage was in November 1961 and that was dissolved in March 1966 there being four issue of that marriage; and the final marriage to the Plaintiff was in May 1966. The parties although they separated in December 1980 were not divorced as at the date of death. There are two children of that marriage who are now both adult. Apart from a legacy to a niece of some $10,000 the totality of the estate has been left to the six children who were the issue of the last two marriages of the deceased.

There was no great dispute at the hearing but that the testator should have made some provision for his widow. Really the question before the Court is, how much provision? The beneficiaries themselves, the six children have been dealt with in two different ways. The two male offspring of the two marriages, one from each, have been left a home and land together with other provisions under the will and the four daughters have been left blocks of land in the family estate at Vailima and have also had provision made for them in other ways under the will. None of those children with the exception of Margaret who was an infant at the date of death seek further provision from the estate.

The Plaintiff's assets comprises a section at Afiamalu which was purchased in 1978 for some $6,000 and is clearly worth considerably more now given the valuation evidence which was before me in relation to other properties in Apia. She also owns a Toyota corolla car of minimal value and has US$10,000 in a bank account in American Samoa which she says is in trust for the children but to which it seems to me she has liberal access.

After the parties separated in 1980 it was necessary for the Plaintiff to go to the Magistrates Court to obtain maintenance against the deceased; Orders were duly made and that maintenance appears to have been paid by a company I.H. Carruthers Ltd, which from every indication in the course of the evidence was a company totally dominated by the deceased and controlled by him and was used in addition by him as his private bank giving him access whenever he wanted it, to the assets of the company and in particular the cash assets of the company. There seems to have been very little differentiation made by the deceased between the assets of the company and his own personal assets and the ultimate conclusion which I have been driven to is that the company was basically a legal fiction which operated as the personal fiefdom of the deceased.

The affidavits filed by the Plaintiff and the Defendants make it quite clear that there was little love lost between the issue of the third marriage of the deceased and the Plaintiff. Since the date of death of the deceased the Plaintiff has resided in a house on the Vailima estate which was willed to her son Irving. She makes a basic claim at this point for a block of land from the estate at Vailima and for sufficient monies to enable her to build a comfortable residence and to provide some income for her needs. It is true that the daughter Margaret is also a joint Plaintiff in the proceedings but it seems to me that her claim fell by the way side at an early stage and in any event she is now an adult with a child and it is clear that there has been sufficient provision made for her under the will. She was the subject of a maintenance order and clearly there are arrears owing under that Order which will have to be met by the estate. That is a relatively simple calculation which the trustees should make without any further delay but given the approach by her at the hearing, I am no longer concerned in any way with a claim by Margaret for relief under the Act.

As I have said the affidavits filed show a state of disharmony at the very least between the Plaintiff and the four children of the third marriage, many of whom will in the ultimate it seems to me, reside on the family estate and for that reason it does seem to me to be quite inappropriate for the Plaintiff to continue to reside at Vailima. Her continued residence will be nothing less than a source of friction, disharmony and possibly even worse and for that reason I intend to make my orders subject to a rider which will ensure that she lives elsewhere. It is really

impossible for me to say from the affidavits and from the evidence in Court just where the truth lies as to various allegations that are made against the various parties to the action but I have reached the conclusion that there is probably a good deal of truth in most of the accusations made by each deponent against the various parties. Having said that, there is certainly nothing in the affidavits which persuade me that the Plaintiff's claim should be diminished in any shape or form by reason of misconduct if it can be described as misconduct.

I have mentioned earlier that the estate did not have a precise valuation, although seemingly one of the trustees was of the view that the net value was of the order of $600,000 he having estimated that death duties would amount to $170,000 (it now seems that in fact death duties were abolished in Western Samoa prior to the death of the deceased). The reason for the lack of precision is that the bulk of the estate comprises either shares in I.H. Carruthers Ltd, or the estate at Vailima. A valuer was called by the Plaintiff to put a value on the block at Vailima and his estimate was a total figure of some $700.000. That was not seriously challenged by anybody. The shares themselves were valued by a Mr Betham, an experienced accountant in Western Samoa and he, in his report indicated that there were three possible methods of calculation of the value of shares in private companies such as the existing one. The first one was a capitalization of profits method, the second was the dividend yield method and the third was the net asset method. He considered that the two most suitable valuation methods were the capitalization of profit method and the dividend yield method. I must say that with all due respect to Mr Betham I disagree and I do so because we have here a company I.H. Carruthers which is totally dominated as to shareholding by the offspring of the deceased. The company has a number of freehold properties in the central business district in Apia and these properties form part of the assets of the company which as at the last balance sheet totalled almost $1.8m. The company itself declared a 10% dividend in the last financial year having previously declared dividends of 5% for the preceding three years. Those dividends do not take into account unappropriated profits of some $218,979 which could quite easily of course have been declared as dividends. The only problem there is that the cash position of the company was not strong. However it would be a simple matter for the company to obtain cash by the sale for example of its Vaisigano property which should return according to the valuation, some $300,000 at the very least. That property seems to perform no useful purposes as far as the day-to-day operations of the company are concerned given that it is a residential property and the company itself is basically a merchant trading operation.

The availability of assets of the company for liquidation in my view plays a significant and vital part in the approach which the Court should take in deciding on the amount of provision which should be made for the widow and also of course in the assessment of the real value rather than the notional value of the shares in I.H. Carruthers Ltd. Mr Betham in his assessment using the dividend yield method gave a value of $2 for each of the 57,600 shares in the company. That of course would mean a net asset backing of some $115,200 which is totally out of reality with the net assets shown on the balance sheets. Similarly the capitalization of profits method places an estimated net value on the business of $130,000 and a share value of $2.26. Once again in my view that is a figure which it would be quite inappropriate for the Court to accept as the real value of the shares of the deceased in the company. As I have said the family of the deceased dominate the shareholding of the company. Indeed of the total of shareholding of 57,600 only 1,720 shares are held outside the family and the directors of the company are the four children of the 3rd marriage of the deceased; the secretary is Mr Gary Carruthers, one of those four children. In those circumstances therefore there would be no problem whatsoever for the company to liquidate assets to provide for the payment of appropriate dividends to the various shareholders and incidentally for the transfer to the estate of sufficient cash resources to meet an adequate provision for the widow in these proceedings.

In New Zealand under very similar legislation the principles and practice which the Courts follow are well settled and were stated yet again in the decision of the New Zealand Court of Appeal in Little v Angus [1981] 1NZLR 126 at pg 127 ls. 40-49:

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

A case which has a great deal of similarity to the present one is the decision in Re Mercer [1977] 1NZLR 469 which was also a case where a widow was totally excluded from a will. An explanation was given in the will for exclusion which was basically that the wife had deserted the deceased. The deceased also stated that the widow had the alienated affection of his children. The

parties had been separated for many years and the widow had taken proceedings in the Courts for maintenance against the deceased. The court held that the deceased had failed in his moral duty to the widow and awarded her 2/5 of the value of the estate (a small one) 1/5 to each of the children of the deceased and the remaining 1/5 to the original sole beneficiary. The Court held that the onus lay on the beneficiaries to show that the Plaintiff had been guilty of conduct which disentitled her to provision under the estate. The Court held that that was not proved. The position in this particular case is similar in that there was no substantial evidence before me which shows that the Plaintiff should not have been properly provided for. The Court referred to a decision in Re Wilson [1973] 2NZLR 359 in dealing with the question of capital sums. It is clear that under earlier decisions in New Zealand the Courts had somewhat altered that principle, if indeed it was ever a principle, or indeed had any particular merit. In Wilson at page 362 the Court held and I quote from the judgement of McCarthy P:

> "For myself, I think that the occasions when capital grants can rightly be considered necessary "in order to enable a widow to live with comfort and without pecuniary anxiety in such sate of life as she was accustomed to in her husband's lifetime" as probably more frequent today than in the past."

There is no doubt in my mind that capital is required in this particular case to enable the Plaintiff to live in reasonable comfort if not quite to the standard that she was accustomed to when she was residing with the deceased then at least beyond subsistence level. I have already indicated just what the Plaintiff's assets are and I can only presume that she purchased the section at Afiamalu in 1978 with an intention at some stage of putting a home on it. For the reasons already given I do not believe it is appropriate for the Plaintiff to reside or continue to reside at the Vailima estate. She is a relatively young woman of 51 and I am sure she could obtain some employment of some description for her day-to-day needs. She has relied on her son Irving who is in the United States Army for day-to-day living expenses up to the present time and she of course has resort also to the monies in American Samoa. It does seem to me that all that is required is a payment of a lump sum to her to enable her to erect a home on the Afiamalu property. There is nothing of course that the Court can do to confine Mrs Carruthers to this course of action and accordingly it is appropriate only to award a lump sum to her to do with what she will whether to erect a home at Afiamalu or to sell that section and with the proceeds plus the capital sum from the estate to build somewhere else. It seems appropriate to me given the size of the estate and the building costs presently in this country that the sum to be provided will have to be reasonably substantial and the appropriate figure in my view is $100,000.00.

There will accordingly be an Order that the provision to be made for the Plaintiff will be in that sum and that is to be paid to the Plaintiff as soon as she vacates the house presently occupied by her at Vailima on a permanent basis with an appropriate written undertaking from her that she will not return to live in that property once she vacates it.

I indicated at the conclusion of the hearing that counsel should reach an agreement as to the position of costs however on further consideration it does seem appropriate to me that I should deal with this issue.

Each of the Plaintiffs will be entitled to an order of $2,000 costs from the proceeds of the estate. There will be no need to make any Order for the trustees costs as they have access to the estate funds. As far as the beneficiaries who were represented by Mr Va'ai, they are similarly entitled to payment of $2.000 costs. Any disbursements and court costs certified by the Registrar shall also be payable by the estate.