

IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0090 OF2005S
(High Court Civil Action No. HPP 11D of 2001S)

BETWEEN:

1. **VERNON EMERSON AMOS**
2. **ANTHONY ROBERT**

Appellants

AND:

1. **THE PUBLIC TRUSTEE OF FIJI**
2. **PRAKASH WATI AMOS**
3. **JIM EMERSON AMOS**
4. **THOMAS WATSON AMOS**
5. **ANTHONY AVEENASH SAHAI**

Respondents

Coram: Ward, President
Gallen, JA
Ellis, JA

Hearing: Tuesday, 25 July 2006, Suva

Counsel: R Prakash and P Kenilorea for the Appellants
F Haniff for the Respondents

Date of Judgment: Friday, 28 July 2006, Suva

JUDGMENT OF THE COURT

Introduction

[1] Prakash Wati Amos (the wife) murdered her husband Robert Emerson Amos (the deceased). He died on 5 June 1985 and she was convicted of murder on 4 June 1986 and sentenced to life imprisonment. She has now been released from prison. It is not disputed that she cannot benefit from the estate of the deceased because of

her crime. It is not necessary to refer to any other cases than the leading case of In the Estate of Crippen [1911] All ER 207.

[2] The deceased left a will dated 26 February 1979 made in San Francisco where he was then residing. The significant portions are in the following words:

"FIRST: *I hereby declare that I am married and that the name of my wife is PRAKASH WATI AMOS. I have two adult children now living, by a former marriage, whose names and birth dates are:*

*EMERSON AMOS, born September 24, 1946; and
THOMAS WATSON AMOS, born on October 4, 1949.*

I have two minor children by my beloved wife PRAKASH WATI AMOS who are:

*VERNON EMERSON AMOS, born October 23, 1973;
and ANTHONY ROBERT AMOS, born August 29,
1976.*

I have no deceased children."

"SECOND: *It is my intention to dispose of the entire community and quasi-community property of my wife and myself, and of all my separate property, real and personal which I have a right to dispose of by will, including any and all property as to which I may have a power of appointment by will."*

"THIRD: *I do not leave anything or any property whatsoever to either of my adult children JIM EMERSON AMOS AND THOMAS WATSON AMOS and my minor children VERNON EMERSON AMOS and ANTHONY ROBERT AMOS, except on the contingency set forth in paragraph 'FIFTH', hereinafter set forth."*

"FOURTH: *I direct my Executor or Executrix to pay my just debts and expenses of my last illness, funeral and burial."*

"FIFTH: *I give all of my property, both real and personal, wherever situated to my beloved wife, PRAKASH WATI AMOS, provided that she survives me by at least one hundred and eighty (180) days, then I give all of my estate to my two minor*

children, VERNON EMERSON AMOS and ANTHONY ROBERT AMOS, then living, share and share alike, however, if any of them have predeceased me, but leave issue surviving, the share of my estate that would otherwise go to such deceased child shall instead go to the issue of the deceased child on the principle of representation."

"SIXTH: Except as provided in paragraph "FIFTH", I have purposely made no provision herein for any other person, including my two adult children by my former wife who have been provided for otherwise, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this will, or not mentioned in this will, shall contest this will or object to any of the provisions hereof, or in any manner seek to impair or invalidate any provision thereof, or directly or indirectly aid in the contest thereof, I give to such persons contesting or objecting the sum of one dollar (\$1.00) and no more, in lieu of the provision which I have made or which I might have made herein for such person so contesting or objecting."

"SEVENTH: I hereby nominate and appoint PRAKASH WATI AMOS as Executrix of this my last will and testament. In the event PRAKASH WATI AMOS is unable to serve or does not desire to serve as Executrix for any reasons, then I nominate and appoint K. LAMBERT KIRK as the Executor of this my last will and testament. K. LAMBERT KIRK shall be allowed his fees as Executor together with the fees which may be allowed to him as Attorney for the Executor."

"EIGHTH: No bond shall be required of any Executrix or Executor named or nominated in this will."

"NINTH: I authorize my Executrix or Executor to sell, convey, partition, divide, subdivide, exchange, mortgage, and/or hypothecate with or without notice, at either public or private sale, and to lease or rent any property belonging to my estate, for any period of time within or extending beyond the period of service as Executrix or Executor of the estate subject only to such confirmation of court as may be required by law."

"TENTH: I have not entered into either a contract to make wills or a contract not to revoke wills."

“ELEVENTH: If any part of this will is held to be void, invalid, or inoperative, I direct that such voidness, invalidity, or inoperativeness shall not affect any other part of this will and that the remainder of this will shall be carried into effect as though such part had not been contained herein.”

[3] Letters of Administration were granted to the Public Trustee of Fiji on 17 January 1986 limited to the duration of the imprisonment of the wife. Letters of Administration with the will annexed were also granted to Francis G Seran, the personal representative of the deceased, in San Francisco on 22 January 1988 in respect of the same will.

[4] The deceased was survived by his wife, his 4 sons mentioned in the will and an adopted son Anthony Aveenash Amos who was born on 14 March 1981 and adopted on 29 April 1983. He was adopted by his natural mother on 2 September 1987. The two sons by the deceased’s first wife are the 3rd and 4th respondent. The two sons by his marriage to the wife are the appellants, and Anthony is the 5th respondent.

[5] The Public Trustee applied to the High Court for the following directions:

“(a) WHETHER the grant of the Letters of Administration Number 21327 (with the Will annexed) of the Estate of Robert Emerson Amos of the 17th day of January 1986 made to the Public Trustee of Fiji “limited during the imprisonment of Prakash Wati Amos” be continued without a limiting condition and the Probate Registrar issue a new copy of the grant as such to the Public Trustee of Fiji.

(b) WHETHER by operation of law the whole gift to the widow Prakash Wati Amos is a failed gift and whether the children of a first marriage of Robert Emerson Amos (deceased) through un-mentioned in the Will become entitled to part of the estate under the rules of intestacy.

- (c) ***WHETHER Anthony Aveenash Amos, a person adopted by the deceased on 29th day of April 1983 under provisions of the Adoption of Infants Act, Cap.58 is entitled to share in the estate.***

[6] The application was heard by Jitoko J in November 2003 and judgment was delivered nearly 2 years later on 6 September 2005. The orders made were:

- “1. Prakash Wati Amos is prevented under Section 35 of the Succession, Probate and Succession Act (Cap 60) and the rule of Public policy from acting as Executrix of the Estate of Robert Emerson Amos.***
- 2. Prakash Wati Amos having been convicted of murder of Robert Emerson Amos is disqualified from taking any benefit either under the will of Robert Emerson Amos or on his intestacy.***
- 3. Robert Emerson Amos (deceased) has died intestate.***
- 4. Anthony Aveenash Amos now know as Anthony Aveenash Sahai is, by virtue of Section 11(2) of the Adoption of Infants Act, entitled to the Estate of Robert Emerson Amos.***
- 5. By operation of law, all the children of Robert Emerson Amos (Deceased) namely, Jim Emerson Amos, Thomas Watson Amos, Vernon Emerson Amos, Anthony Robert Amos, and Anthony Aveenash Sahai, are entitled under section 6(1)(d) of the Succession, Probate and Administration Act (Cap 60) to an equal share of the Estate of Robert Emerson Amos.***
- 6. That K Lambert Kirk is hereby appointed as Administrator of the Estate of Robert Emerson Amos, and it is hereby ordered that a grant of the Letters of Administration in favour of K Lambert Kirk be made in substitution to the Letters of Administration No. 21327 of 17 January 1986 made to the Public Trustee of Fiji.***
- 7. That the Public Trustee of Fiji within 3 months of the new grant ensure that real and personal property of the Estate of Robert Emerson Amos is vested in the new Administrator, K Lambert Kirk.***

8. In the event that K Lambert Kirk is unable to serve or does not desire to be appointed as Administrator of the Estate of Robert Emerson Amos, the Public Trustee of Fiji shall under an amended grant continue with the administration of the Estate of Robert Emerson Amos, including its distribution to the beneficiaries of the Estate of Robert Emerson Amos, now ascertained.

9. The Public Trustee of Fiji as the Applicant and the Third and Fourth Defendants are awarded costs of \$1,000.00 and the costs are to be paid out as disbursements from the Estate of Robert Emerson Amos."

[7] The appellants submit that there was no intestacy and that they are entitled to the whole estate. The 2nd, 3rd, 4th and 5th respondents did not appear to oppose the appellants' claim and the Public Trustee adopts a neutral stance. There was no formal application for probate by Mr Kirk before the High Court but we were told he is willing and suitable to be granted probate of the will.

[8] From a copy of Mr Seran's formal report filed in the Superior Court of California the wife and 5 children were cited as beneficiaries under the will, and that the wife was precluded by law from inheriting. Further 3rd and 4th respondent were specifically disinherited by the will. Anthony Sahai had claimed against the estate by a guardian ad litem and the end result was that the appellants and Anthony Sahai shared the estate equally.

[9] In the High Court the Judge did not refer to the eleventh clause in the will and held that as the wife had survived the deceased for more than 180 days the appellants did not take under the will.

[10] There are two approaches to the interpretation of the will that we have considered. This first is the "plain meaning" of the words used making the devise and bequest and the second is to ascertain the deceased's intention which includes a consideration of the eleventh clause.

[11] We repeat the fifth clause:

“I will give all of my property, both real and personal, wherever situated to my beloved wife, PRAKASH WATI AMOS, provided that she survives me by at least one hundred and eighty (180) days, then I give all of my estate to my two minor children, VERNON EMERSON AMOS and ANTHONY ROBERT AMOS, then living, share and share alike however, if any of them have predeceased me, but leave issue surviving, the share of my Estate that would otherwise go to such deceased child shall instead go to the issue of the deceased child on the principle of representation.”

[12] The gift to the wife is conditional upon her surviving for more than 180 days. If one simply strikes over the words “to my beloved wife” then the “she” still plainly refers to her and the will reads that if she survives the deceased for more than 180 days “then to” the appellants. If one strikes out the words “I give all my property both real and personal wherever situated to my beloved wife, Prakash Wati Amos, provided that she survives me by at least one hundred and eighty (180) days, then” the same result is achieved.

[13] We have no doubt that the intention of the deceased was to leave his estate to his wife but, failing that gift, the two named sons would inherit. The provision of a survival period is usually inserted to avoid the situation such as an accident when both husband and wife die and avoid the possibility of two estates and perhaps double death duties and costs. The use of a 180 days period is longer than that customarily used, at least in our experience.

[14] The eleventh clause too is unusual in our experience, but it covers the present situation where the gift to the wife is “held to be void, invalid, or in operative.” The clause then directs that that shall not affect any other part of the will which in this case is the gift to the appellants. We think it artificial and indeed destructive of the will to retain the demise of the wife before the expiry of 180 days as a precondition of the gift to the appellants. This is also in accord with the authorities in the case of a beneficiary who cannot take by

reasons of criminality. In the case of *In the Estate of Hall, Hall v. Knight and Baxter* [1914] P 1 the beneficiary had been convicted of manslaughter of the deceased. The Court of Appeal followed the earlier case of *Cleaver v. Mutual Reserve Fund Life Assoc.* [1892] 1 Q.B. 147 Swinfen Eady said (at p.8) "I am of the opinion that the estate of the testator must go in the same way as if these were no benefit given to (the convicted person)."

[15] For these reasons we consider the gift to the appellants of the estate stands. Accordingly we allow the appeal. While orders 1 and 2 made in the High Court are in agreement with our own view we think it better to quash all orders and make orders in terms of the directions sought by the Public Trustee.

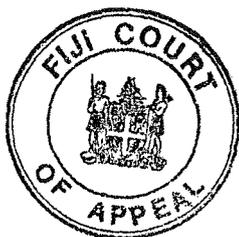
[16] We make the following orders on the understanding that Mr Kirk will now apply for probate of the will.

- (1) The grant of letters of Administration number 21237 with the will of the deceased annexed to the Public Trustee shall be continued until the grant of Probate or Administration is made to K Lambert Kirk.
- (2) The whole gift to the widow Prakash Wati Amos fails.
- (3) Jim Emerson Amos and Thomas Watson Amos do not inherit any part of the estate under the will.
- (4) The estate passes to the appellants under clause five of the will.
- (5) The adopted child Anthony Aveenash Sahai does not inherit any of the estate pursuant to the will of the deceased.

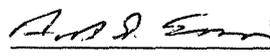
[17] In a case such as this and where all parties (except of course the wife) have acted properly, solicitor and client costs should be paid out of the estate. The Public Trustee and the appellants no doubt do not need an order. There will therefore be an order that any solicitor and client costs of the 3rd and 4th and 5th respondents be paid out of the estate. If they cannot be agreed they are to be taxed.



Ward, President



Gallen, JA



Ellis, JA

Solicitors:

Mishra Prakash and Associates, Suva for the Appellants
Munro Leys, Suva for the Respondents