

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBM 54 OF 2019

BETWEEN : **JAI NARAYAN** of Wailailai, Ba, Farmer

APPLICANT

A N D : **DIPIKA DIPASHNI PILLAY** formerly of Malolo, Nadi

RESPONDENT

Appearances : **Mr Aman Chandra Datt for the applicant**
The respondent is absent and unrepresented

Hearing : **Monday, 24th February, 2020**

Decision : **Tuesday, 28th April, 2020**

DECISION

[A] INTRODUCTION

(01) Before me is an ‘Originating Summons’ filed by the applicant seeking the grant of the following orders;

- (1) *That the amount standing to the credit of the late **ANISH ABHIKASH NARAYAN** with the Fiji National Provident Fund (“FNPF”), which has been paid to the High Court of Fiji due to the absence of a legal nomination, be released to the Applicant on trust for the biological child of the late **ANISH ABHIKASH NARAYAN** namely **ARIHANT ABHIKASH NARAYAN**.*
- (2) *That there be abridgment of time in calling this matter.*
- (3) *Any other Orders that this Honourable Court deems just and equitable in the circumstances.*

- (02) The application is made pursuant to Order 85 of the High Court Rules, Section 57(4) of the Fiji National Provident Fund Act 2011 and the inherent jurisdiction of the Court.
- (03) The Originating Summons is supported by an affidavit sworn by the applicant on 05-12-2019.
- (04) The respondent's whereabouts are not known to the applicant. Since it is impracticable to serve the Originating Summons and the Supporting Affidavit on the respondent personally, the Court made an Order for substituted service of the documents through an advertisement in local newspaper.
- (05) The Originating Summons and the Supporting Affidavit was brought to the notice of the respondent with an advertisement in the local newspaper.
- (06) The respondent did not enter an appearance.

[B] THE AFFIDAVIT

The applicant's Affidavit in Support is substantially as follows;

- (1) *I am the Applicant in this application in my capacity as the biological father of the late Anish Abhikash Narayan (hereinafter referred to as "the Deceased"); and the sole Administrator of the Deceased's Estate; and the legal parent of ARIHANT ABHIKASH NARAYAN pursuant to the adoption process.*
- (2) *I swear this Affidavit on my own belief and personal knowledge and all the information contained in this Affidavit is true to the best of my knowledge, information and belief.*
- (3) *I am married to one SADMA WATI also known as SADMA WATI, of Wailailaim Ba, Fiji Islands, Domestic Duties (hereinafter referred to as "my wife").*
- (4) *My son's name is ANISH ABHIKASH NARAYAN, of Wailailai, Ba, Fiji Islands, Plumber, who had passed away on 25th April, 2016 (hereinafter referred to as "the Deceased"). Annexed and marked with letters "JN-1" is a copy of the death certificate of the Deceased.*
- (5) *My wife and I have been residing at Wailailai, Ba with the deceased for almost 30 years and the house plus the Crown Lease land on which all of us resided on is under the name of my father's estate namely Estate of Ram Lal.*
- (6) *Prior to year 2015 the Deceased was not legally married nor was he involved in any de-facto relationship.*

- (7) Sometimes in the beginning of year 2015, DIPIKA DIPASHNI PILLAY (formerly of Malolo, Nadi) now residing in Suva, Fiji Islands (“hereinafter referred to as “the Respondent”) got into a de facto relationship with the Deceased.
- (8) The Respondent was not employed anywhere and was financially supported by the Deceased.
- (9) The Deceased and the Respondent had a child named ARIHANT ABHIKASH NARAYAN, who was born on 13th October, 2015 (hereinafter referred to as “the child”).
- (10) The Respondent stayed with the Deceased and us under the same roof for almost 1½ years from year 2015.
- (11) From my knowledge and belief, the Deceased never legally married the Respondent nor did the two ever had any traditional/religious wedding.
- (12) About 2 – 3 weeks before 25th April, 2016 the Respondent left the Deceased and the child and went away without informing anyone of us.
- (13) On 25th April, 2016 the Deceased passed away and on that day the Respondent and the child’s whereabouts were still unknown.
- (14) After the death rituals for the Deceased were completed, my wife and I, through our Solicitors, filed an application for Adoption Order for the child in the Ba Magistrates’ Court so that we could make decisions in relation to the child’s welfare in future rather than running back and forth searching for the Respondent to give consent in her capacity as the biological mother.
- (15) The Respondent was served with the said application for Adoption Order for the child and she consented to the adoption.
- (16) The formal Order for adoption was made by the Resident Magistrate thereafter and the birth certificate of the child was updated reflecting my name and my wife’s name as the father and mother respectively of the child. Annexed and marked with letters “JN-2” is a copy of the updated birth certificate of the child.
- (17) Since the Adoption order was granted the Respondent has not enquired about the child’s welfare at all, let alone meet him in person. My wife and I had never prevented the Respondent from meeting the child.
- (18) The Deceased had passed away intestate hence I had also made an application to be named Administrator of the Deceased’s Estate simply because the Respondent showed no interest in her relationship with us, the Deceased or the child.

- (19) *On 9th May, 2017 the Letters of Administration No. 59855 for the Deceased's Estate was granted in my name. Annexed and marked with letters "JN-3" is a copy of the said Letters of Administration.*
- (20) *To date my wife and I have been taking care of the child and fulfilling all his needs.*
- (21) *The Deceased, upon his death, had the sum of approximately \$20,006.63 (hereinafter referred to as "the money") standing to his credit with the Fiji National Provident Fund ("FNPF") however, due to the absence of a legal nomination by the Deceased. FNPF has paid the money to the High Court for disposal in accordance with the law. Annexed and marked with letters "JN-4" is a copy of the letter dated 6th July, 2016 from FNPF stating the same.*
- (22) *I have been informed that the Respondent has settled down with another man in Suva, Fiji, however, I am not sure whether she is legally married to him.*
- (23) *The Respondent had severed all ties with the Deceased and us a few weeks prior to the Deceased's demise. She had not attended the Deceased's funeral and traditional death rituals either.*
- (24) *The Respondent's dismissive attitude towards the Deceased (prior to his death and after) is evidence of the Respondent's stance that her de-facto relationship with the Deceased is over.*
- (25) *The child is now growing up and soon his educational, rearing expenses will increase, and with my less than average income as a farmer compounded with my old age, I will need assistance in the upbringing of the child.*
- (26) *The FNPF money would be of great assistance to me and my wife in raising the child.*
- (27) *In light of the foregoing, I hereby request this Honourable Court to release the money to me purely on trust to be used for the sole benefit of the child on the basis of the following reasons:*
- (a) *The child is the biological son of the Deceased.*
 - (b) *I am now the biological father of the Deceased plus the legal parent of the child pursuant to the Court Order, and also the Administrator of the Deceased's Estate.*
 - (c) *The Respondent, via her conduct, has severed all relations with our family, in particular, with the Deceased.*
 - (d) *The Respondent post-adoption has not shown any interest in the life of the child.*
 - (e) *The child will be entitled to the money under section 6 of the Succession,*

Probate and Administration Act 1970 if this Honourable Court accepts that the de facto relationship between the Deceased and the Respondent was over upon her leaving the Deceased prior to his death.

- (28) *I assure this Honourable Court that I will keep full accountability of the money released to me on trust.*
- (29) *I therefore humbly seek order in terms of the Originating Summons filed together with this affidavit.*

[C] **CONSIDERATION AND THE DETERMINATION**

- (01) This is an application seeking an Order for distribution of “monies paid to the High Court under the provisions of Section 57 of the FNPf Act”.
- (02) The amount (\$20,006.63) standing to the credit of the late Anish Abhikash Narayan has, in the absence of legal nomination, been paid to the High Court by the FNPf.
- (03) The applicant, Jai Narayan, is the biological father of late Anish Abhikash Narayan and the sole administrator of the deceased’s estate.
- (04) Anish Abhikash Narayan passed away on 25-04-2016. He was a plumber by occupation. Dipika Dipashni Pillay was in a *de-facto* relationship with the deceased. The deceased and the respondent Dipika Dipashni Pillay has a child, a male, born on 13-10-2015.
- (05) The applicant says;
- (*) *Prior to year 2015 the Deceased was not legally married nor was he involved in any de-facto relationship.*
- (*) *Sometimes in the beginning of year 2015, **DIPIKA DIPASHNI PILLAY** (formerly of Malolo, Nadi) now residing in Suva, Fiji Islands (“hereinafter referred to as “the Respondent”) got into a de facto relationship with the Deceased.*
- (*) *The Respondent was not employed anywhere and was financially supported by the Deceased.*
- (*) *The Deceased and the Respondent had a child named **ARIHANT ABHIKASH***

NARAYAN, who was born on 13th October, 2015 (hereinafter referred to as “the child”).

- (*) *The Respondent stayed with the Deceased and us under the same roof for almost 1½ years from year 2015.*
- (*) *From my knowledge and belief, the Deceased never legally married the Respondent nor did the two ever had any traditional/religious wedding.*
- (*) *About 2 – 3 weeks before 25th April, 2016 the Respondent left the Deceased and the child and went away without informing anyone of us.*
- (*) *On 25th April, 2016 the Deceased passed away and on that day the Respondent and the child’s whereabouts were still unknown.*
- (*) *After the death rituals for the Deceased were completed, my wife and I, through our Solicitors, filed an application for Adoption Order for the child in the Ba Magistrates’ Court so that we could make decisions in relation to the child’s welfare in future rather than running back and forth searching for the Respondent to give consent in her capacity as the biological mother.*
- (*) *The Respondent was served with the said application for Adoption Order for the child and she consented to the adoption.*
- (*) *The formal Order for adoption was made by the Resident Magistrate thereafter and the birth certificate of the child was updated reflecting my name and my wife’s name as the father and mother respectively of the child. Annexed and marked with letters “JN-2” is a copy of the updated birth certificate of the child.*
- (*) *Since the Adoption order was granted the Respondent has not enquired about the child’s welfare at all, let alone meet him in person. My wife and I had never prevented the Respondent from meeting the child.*
- (*) *I have been informed that the Respondent has settled down with another man in Suva, Fiji, however, I am not sure whether she is legally married to him.*
- (*) *The Respondent had severed all ties with the Deceased and us a few weeks prior to the Deceased’s demise. She had not attended the Deceased’s funeral and traditional death rituals either.*
- (*) *The Respondent’s dismissive attitude towards the Deceased (prior to his death and after) is evidence of the Respondent’s stance that her de-facto relationship with the Deceased is over.*
- (*) *The child is now growing up and soon his educational, rearing expenses will*

increase, and with my less than average income as a farmer compounded with my old age, I will need assistance in the upbringing of the child.

(The FNPf money would be of great assistance to me and my wife in raising the child.*

(06) The applicant says;

(a) In light of the foregoing, I hereby request this Honourable Court to release the money to me purely on trust to be used for the sole benefit of the child on the basis of the following reasons:

(b) The child is the biological son of the Deceased.

(c) I am now the biological father of the Deceased plus the legal parent of the child pursuant to the Court Order, and also the Administrator of the Deceased's Estate.

(d) The Respondent, via her conduct, has severed all relations with our family, in particular, with the Deceased.

(e) The Respondent post-adoption has not shown any interest in the life of the child.

(f) The child will be entitled to the money under section 6 of the Succession, Probate and Administration Act 1970 if this Honourable Court accepts that the de facto relationship between the Deceased and the Respondent was over upon her leaving the Deceased prior to his death.

(07) There is no nomination made by the employee, late Anish Abhikash Narayan. In terms of Section 57(3) of the FNPf Act 2011, in the absence of a legal nomination made by the employee, the amount standing to the credit of the employee should be remitted to the High Court for disposition in accordance with the Law. The law that should be considered is Succession, Probate and Administration Act, 1970 and more specifically Section 06 of the Act.

(08) Act No. 06 of 2018 amended the Succession, Probate and Administration Act, 1970 and de facto partner is recognized as a beneficiary in the distribution of the estate of the deceased. The amended Act came into operation on 16-03-2018. The deceased passed away on 25-04-2016.

(09) The deceased's de facto relationship with the respondent commenced in the beginning of year 2015.

(10) The applicant, the biological father of the deceased asserts that:

- (*) The deceased and the respondent were in a de-facto relationship from the beginning of the year 2015.
 - (*) The deceased passed away on 25-04-2016.
 - (*) About 2-3 weeks prior to the death of the deceased, the respondent left the deceased.
 - (*) Thus, the de-facto relationship ended 2-3 weeks prior to the death of the deceased.
- (11) The issue is whether or not the deceased and the respondent had separated **prior to the death of the deceased**. The standard of proof that I apply is one of “on the balance of probabilities”.
- (12) The applicant, the father of the deceased alleges that the relationship ended 2-3 weeks prior to the death of his son because the respondent moved out.
- (13) It is necessary to approach Mr Narayan’s (the applicant’s) affidavit evidence with caution. Mr Narayan seeks an order that the full FNPF amount standing to the credit of his son, late Anish Abhikash Narayan be released to him since he is the sole administrator of the deceased’s estate and the legal parent of Arihant Abhikash Narayan, the son of the deceased. **Mr Narayan is the only witness to aspects of his son’s de-facto relationship with the respondent**. Mr Narayan has reason to give a version of events which serves to advance his claim for the full FNPF amount standing to the credit of his son. Mr Narayan gave evidence by way of an affidavit. The affidavit was sworn by Mr Narayan on **05-12-2019**. In his affidavit Mr Narayan said that about 2-3 weeks before **25th April, 2016** the respondent left the deceased. Mr Narayan has no notes, diary or other documents to assist his memory of relevant events. The evidence in his affidavit is at a high level of generality. In his affidavit Mr Narayan also said that “*I have been informed that the respondent has settled down with another man in Suva, Fiji, however, I am not sure whether she is legally married to him*”. I do not place any weight on this fact because the deponent Mr Narayan has not adduced evidence of his source. The deponent Mr Narayan has failed to explain the source and grounds for his belief. **Besides it is important to bear in mind that a person may maintain a de-facto relationship even though they are in another de-facto relationship.**
- (14) Mr Narayan says in his affidavit that late Anish Abhinesh Narayan and Dipika Dipashini Pillay (the respondent) were in a de-facto relationship from about January 2015. A child was born on 13-10-2015 out of the de-facto relationship. Mr Narayan further says in his affidavit that 25-04-2016 the deceased (Anish) passed away and about 2-3 weeks prior to 25-04-2016, the respondent (Dipika) moved out. On that basis Mr Narayan says that the de-facto relationship ended 2-3 weeks prior to 25-04-2016.

- (15) At the costs of some repetition, I state that the issue is whether or not the deceased and the respondent had separated **prior to the death of the deceased**. The standard of proof that I apply is one of “on the balance of probabilities”.
- (16) There are three elements of **separation** in a legal sense. They are;
- (*) The development of an intention to separate. The intention need not be mutual.
 - (*) The communication of that intention to the other party. The communication of the intention is an absolute requirement. Whilst that communication can be spoken or unspoken, it should be unequivocal, unconditional and unambiguous.
 - (*) Some form of action upon the determination to separate.
- (17) Whether a separation has occurred? It is not possible to apply some mathematical formula to the above activities and determine whether a “separation” has occurred. I need to examine the evidence and contrast the state of the relationship before and after the alleged separation. (Some corroboration is usually required.) **I find no scintilla of evidence which would suggest the state of the relationship before and after the alleged separation.**
- (18) The applicant Mr Narayan is alleging separation. The party alleging separation must satisfy the court by showing that there has been a change in their relationship, gradual or sudden, constituting a separation. [Some corroboration is usually required]. **I find no scintilla of evidence which would suggest that there has been a change in their relationship, gradual or sudden, constituting a separation.**
- (19) In his affidavit Mr Narayan says that about 2-3 weeks prior to the death of his son, the respondent moved out.
- (20) I do not consider such evidence sufficient. **Residing together is a characteristic of most marriage relationships but some spouses have an intimate relationship but live at separate addresses usually because of constraining circumstances.**
- (21) I find **no** scintilla of evidence which would suggest some overt separation or some evidence that there are two households.

- (22) It is important to bear in mind the distinction between a relationship “**breaking down**” and “**broken down**”.
- (23) I find **no** scintilla of evidence which would suggest:
- (*) The development of an intention to separate. The intention need not be mutual.
 - (*) The communication of that intention to the other party. The communication of the intention is an absolute requirement. Whilst that communication can be spoken or unspoken, it should be unequivocal, unconditional and unambiguous.
 - (*) Some form of action upon the determination to separate.
- (24) What is required is an overall assessment of the facts and of all the relevant elements of the relationship.
- (25) I find **no** scintilla of evidence which would suggest that;
- (*) they had not attempted to contact each other after she moved out.
 - (*) the respondent did not have a commitment to a shared life with late Anish Abhikash after she moved out.
 - (*) she entered into a new relationship prior to the death of Anish Abhikash.
 - (*) each of them were financially independent after she moved out.
 - (*) they did not communicate, or attempt to communicate with each other 2-3 weeks before Anish Abhikash died.
 - (*) they had no mutual commitment to a shared life before Anish Abhikash died.
- (26) Having regard to those matters taken together, I am **not** satisfied that there has been a severance of the de-facto relationship at the date of the death of Anish Abhikash Narayan. I hold that the respondent remained the surviving de facto partner of the deceased at the date of his death in the eyes of the law which entitled her to her share and interest in the FNP money standing to the credit of late Anish Abhikash Narayan.


- (27) The applicant cannot claim the amount standing to the credit of the late Anish Abhikash Narayan, as the biological father and the administrator of the deceased son's estate.
- (28) Act. No. 6 of the 2018 amended the Succession, Probate and Administration Act, 1970 and de-facto partner is recognized as a beneficiary in the distribution of the estate of the deceased.

[D] CONCLUSION

The FNPF money standing to the credit of the late Anish Abhikash Narayan is \$20,006.63. The surviving de-facto partner (the respondent in this case) is entitled to \$20,000.00 and one third of the residue of the FNPF money in terms of Section 6 (i) (c) (i) and the child is entitled to two-third of the residue of the FNPF money in terms of Section 6 (i) (c) (ii) of Succession, Probate and Administration (Amendment) Act No-6 of 2018.



**At Lautoka
Tuesday, 28th April, 2020**


..... 28/04/2020.
Jude Nanayakkara
[Judge]