IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 492 of 1983

Between:

LITIA SEREVI WAQA Plaintiff

and

PUBLIC TRUSTEE OF FIJI Defendant

Mr. R.I. Kapadia for the Plaintiff
Miss I.V. Helu-Mocelutu for the Defendant

J U D G M E N T

The plaintiff in this action is the widow of Luke Waqalevu who died at Suva on 8th August, 1981, and to whom I shall refer to in this judgment as the Testator. He made a will on the 9th April, 1969. The will (which is set out below) appointed Eleanor Lagataki sole executrix. At the request of the nominated executrix the defendant, as Public Trustee, obtained letters of administration (with the will annexed) of the estate of the Testator. The sworn value of the estate is $10,813.05.

The writ was issued on the 26th May, 1983. The plaintiff makes two distinct claims :

(1) that the will of the Testator does not make reasonable provision for the maintenance of his dependants; and

(2) a claim for the repayment of loans amounting to $8,994.67 made by the plaintiff to the Testator during his lifetime.

The Testator left surviving him, in addition to his widow, a son Samuela, born on the 4th December, 1962 and two daughters, Ilisapeci, born on 20th April, 1965 and Talica, born on the 9th May, 1968.

I shall deal first with the claim made under the Inheritance (Family Provision) Act Cap. 61. The plaintiff purports to bring this action on her own behalf and on behalf of her children, who at the time the action was instituted, were all minors. However, the son of the Testator reached his majority in December 1983 and I shall not consider him to be a dependant of the Testator who could be entitled to any relief in view of section 3(2)(c) of the Act. The two daughters are still unmarried.

The application under the Act should have been made to the Court, not by writ of summons, but, by originating summons under Order 99 of the Rules of the Supreme Court. However, the decision to combine two classes of claims in a writ of summons was not unreasonable in the circumstances. For the purposes of section 4 of the Act, which prescribes a limitation of six months from the date on which representation is first taken out for an application to the Court, I accept that the writ filed herein is equivalent to an application in all respects.

The Testator's will reads as follows :

"THIS IS THE LAST WILL AND TESTAMENT of me LUKE WAQA of Suva in the Colony of Fiji, an Executive Officer in the Ministry of Fijian Affairs and Local Government.

1. I HEREBY REVOKE all former wills and testamentary dispositions at any time heretofore made by me.

2. Because my legally married wife, LITIA LEVULEVU SERLVI has deserted me, and that she had

occasionally made it clear to me that I am 'dead' as far as she was concerned, IT IS MY WILL that, should I be seriously ill or even in the event of my death, I do not want the said Litia Levulevu Serevi to have anything to do with me, or have any legal rights over my estate.

3. Should I be seriously ill, and in the event of my death, IT IS MY WILL that my lover, ELEANOR LAGATAKI of Hunts Travel Service, Nadi Airport, shall have the right to see me and take care of me in accordance with her wishes.

4. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situated unto my lover Eleanor Lagataki absolutely and I APPOINT my said lover to be the sole executrix and trustee of this my will.

IN WITNESS WHEREOF I have hereunto subscribed my name this 9th day of April, 1969.

Sgd. Luke Waqa "

There is no dispute about the essential facts of the case. In 1968 the Testator formed an adulterous association with Mrs. Lagataki which continued until August 1980. By that time the Testator was a sick man. He returned to the wife and family whom he had deserted 12 years previously and remained with them until his death in August 1981.

The plaintiff was unaware of the existence of the Testator's will. According to Mrs. Lagataki, the Testator told her about the will and where he kept it, which was in her suitcase. She further testified that on the 15th July, 1981 the Testator sent her a note which instructed her to take the will to the Public Trustee. Unfortunately, she threw away the note in a dustbin.

When cross-examined by Mr. Kapadia as to her knowledge of the existence of the will, Mrs. Lagataki said that although it was in her suitcase she had never read it or learned about its contents until the end of 1980 when

she came across it while looking through her papers. At that time the Testator had already gone back to his wife. She said she did not think much about it, as she felt she deserved to inherit the Testator's property on account of all she had done for him. The Testator had told her that he would not change his will. Her attitude was that the plaintiff was under an obligation to nurse and look after the Testator in his last illness and that she should not receive any part of his estate because she had "deserted" him originally. Mrs. Lagataki denied that she had enticed the Testator away from his wife and she maintained she had done more for him during their life together than his wife ever had. It is also the evidence of Mrs. Lagataki that after the Testator had returned to his family he paid her $20 a week. Sometime in 1981, she formed an association with the plaintiff's brother.

Mrs. Lagataki is prepared to place all the blame for the breakdown of the Testator's marriage on the attitude of the plaintiff and her family. While she was prepared to admit that her association with the Testator was wrong in some respects, she adopted the attitude that she stayed with him as she wanted to help him advance in his career as a civil servant.

I do not propose to make a detailed examination of the complicated relationship which existed between the wife, the mistress and the husband as this would not necessarily assist in the solution of the problem. The rights and wrongs of the parties are no longer in issue. However, I did not form a very favourable impression of Mrs. Lagataki. She appeared to me to be a domineering woman. She was determined to justify her conduct on the basis that she was only human. She claimed to be a devout church goer and pretended that her misconduct had earned some kind of divine approval. I found her hypocracy nauseating. However, the conduct of Mrs. Lagataki is not the subject of this inquiry. I have to consider if the circumstances disclosed justify any interference by this

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Court with the expressed wish of the Testator that Mrs. Lagataki inherit all his property.

The plaintiff is a school teacher. She is a pensionable officer. When her husband died she was earning $4,000 a year net. Her present gross salary is almost double that amount. She was not therefore wholly dependent upon her husband and was able to maintain herself and her children throughout the long separation, but, not without difficulty. She obtained a maintenance order against her husband at one stage.

The plaintiff told the Court that, although a young woman, she is suffering from arthritis and she wishes to retire on pension. She has a vague idea of starting a small business using her gratuity as capital. She admitted having a love affair with a man over a period of about 18 months, during the time she lived apart from her husband, but, it is apparent that this had no real effect upon the then existing relationship between the Testator and his wife. The Testator appears to have been a weak character. His wife may have displayed an independent spirit without a desire to dominate. She made her own way with her children when faced with an impossible situation. But, she proved to be tolerant and forgiving. She took her husband back when Mrs. Lagataki had no further need of him.

Most of the cases in the books are concerned with families which broke up for one reason or another and the courts had to consider claims made by spouses or dependants who had been cut off by testators. The present case is unusual in that the Testator and his wife became reconciled about a year before the former died. The Testator may have felt a continuing obligation to give financial support to his former lover even after he returned to his wife. After all she had become estranged from her own family by virtue of her misconduct with him and her new lover (the brother of the plaintiff) does not appear to have been in a position to offer her much additional support.

Section 3 of the Act gives the Court power to order reasonable provision for a dependant (as defined) of a testator where it "is of opinion that the will does not make reasonable provision for the maintenance of that dependant." The section in the Fiji Act was derived from the Inheritance (Family Provision) Act, 1938 of the United Kingdom section 1. The correspondent section of the United Kingdom Act was substantially amended by the Intestate Act, 1952, which has no application to Fiji. Before that amendment was passed there were a number of cases decided in England which are of great persuasive effect in deciding how this Court should interpret section 3 of the Act.

In re Styler, Styler v. Griffith [1942] Ch 387 at 389 it was held :

> " The Court will not interfere with a will merely because it appears suitable that provision should be made for a particular person, but must, before making provision or larger provision for any applicant find that, as a result of the testamentary disposition, the applicant has been treated unreasonably. "

This was followed in re Pugh, Pugh v. Pugh (1943) Ch. 387.

Wynn Parry J. in re Inns, Inns v. Wallace [1942] 1 Ch. 576 at 581 said :

> " .. .. the mere circumstance that if a judge had been sitting in the testator's arm chair he would have made more provision for the dependants, is no ground of itself for exercising the jurisdiction. I must be satisfied that the provision is unreasonable."

After the amendment to the English Act to which I have referred, later English decisions applied an objective and not a subjective test. (In re Goodwin (1969) 1 Ch. 283 and Millward v. Shenton (1972) 1 W.L.R. 771). The later English decisions introduced the idea of a testator's moral responsibility to his dependants.

The first matter to be decided, therefore, is whether the plaintiff has been treated unreasonably in all the circumstances. Before he died the Testator had been re-united to his family and he was being cared for by his wife. For the first time in many years the Testator was being a true father to his children. He had earlier made a will which excluded all of them from any benefit from his estate. He had allowed that will to remain unaltered up to the date of his death. It has been said that the Court must consider the position as it was at the date of the Testator's death (Dun v. Dun (1959) A.C. 272). I am satisfied that it was unreasonable for the Testator not to make any provision for his family and that the plaintiff and her daughters are entitled to some consideration. I am dealing with a small estate, which, as far as I am aware, consists of money presently in the hands of the Public Trustee. The eventual size of the estate which may be available for distribution depends on how his Court deals with the other claims of the plaintiff and on any order as to the costs of these proceedings as may be made.

The only evidence relating to the claims against the estate for the recovery of loans made by the plaintiff to the Testator during his lifetime is that of the plaintiff herself. In 1979 she purchased a house from the Housing Authority. She said that during the following year the Testator suggested that she sell this house and that he would provide a bigger one for her. She agreed to this and as a result she received from the Housing Authority a total of $4,891.25. On the 19th August, 1981 she received $3,553.20 as part payment.

From this amount she lent her husband $1,200 and she claimed that she spent most of the balance on repairing the new house.

In November 1980 after she received the second instalment she lent her husband a further $600 to enable their son to go to Australia. None of this money has been

repaid to the plaintiff. In the absence of any contrary evidence, I have no reason to disbelieve the plaintiff's testimony, which I accept as true.

I consider that the claim by the plaintiff that she spent much of the money on re-furbishing the new house to be vague and unsatisfactory. I have not even been informed as to what happened to that house eventually. It is the kind of expenditure which a husband and wife might jointly embark upon without creating or intending to create any obligation inter se.

However, I am satisfied that the plaintiff is entitled to recover from the estate the $1,800 lent to her husband for particular purposes and in this she is in no different position than any other creditor.

I therefore direct that judgment be entered for the plaintiff for this amount. I am also satisfied the plaintiff is entitled to the costs of these proceedings, as is the Public Trustee. I direct that the costs of both parties be taxed and paid out of the estate of the Testator.

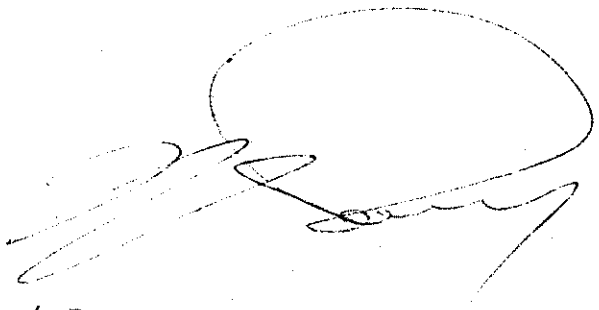
This will leave a reduced estate. I therefore direct that two-thirds of that residue be set aside by the Public Trustee and that the income derived therefrom be paid as follows :

(1) one half thereof to the plaintiff for her lifetime or until she re-marries;

(2) one quarter each to the two daughters for their lifetime or until they marry.

In the event that the total residue does not exceed $4,000, the plaintiff shall be at liberty to apply under section 3(4) of the Inheritance (Family Provision) Act for the payment of maintenance in whole or in part.

by way of a payment of capital, subject to the limitation imposed by subsection (3).



(F.X. Rooney)
JUDGE

Suva,

1st March, 1985