

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

APPEAL NUMBER:	20/Suv/ 0030
BETWEEN:	SAIMONE APPELLANT
AND:	MANASA
AND:	SELINA RESPONDENT
Appearances:	Ms. S. Kunatuba for the Applicant. Mr. N. Sharma for the Respondent.
Date/Place of judgment:	Tuesday 04 August 2020 at Suva.
Coram:	Hon. Madam Justice Anjala Wati
Category:	All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.

JUDGMENT

A. Catchwords:

FAMILY LAW – *PROPERTY - DECLARATORY ORDERS – Jurisdiction and Locus – initiating property proceedings when one party deceased – no jurisdiction to initiate proceedings in respect of property of a party who is deceased – proceedings can however be continued by or against the estate – proceedings challenging the will is not within the purview of family court – son of a party to the marriage who is alive cannot initiate proceedings irrespective of the power of attorney.*

B. Cases:

1. In the marriage of Sims (1981) FLC 91-072.

C. Legislation:

1. Family Law Act 2003 (“FLA”): ss. 2; 160; 161; and 163(5)

Cause and Background

1. The applicant is the son of ACKM and the now deceased Saimone. Saimone died in April 2019. The respondent Manasa is the son of the deceased from his first marriage. He has been appointed as the executor and trustee in the will of Saimone. The will is dated January 2017.
2. The applicant's mother is still alive and currently lives in the United States of America. The applicant is relying on the power of attorney dated 26 December 2019 through which his mother has given him the powers to act on her behalf in all issues including legal matters in respect of the property for which the proceedings are brought.
3. The applicant seeks an order that the property contained in the Native Lease registered in the name of the deceased be declared the property of the parties to the marriage.
4. When the application was brought in Court, I questioned the counsel for the applicant as to whether the Family Division of the High Court has any powers to make such orders in light of the fact that there was no pending proceeding in Family Court between the parties to the marriage for the matter to be continued against the estate.
5. My concern was that proceedings in relation to the property of a party to the marriage can only be initiated during the lifetime of both parties. It is another matter to allow the proceedings to be continued by or against the estate of one of the parties to the marriage.
6. The parties were also asked to address whether the son of a party to the marriage who is alive has locus to bring proceedings in respect to the property of one of the parties to the marriage.
7. This judgment will therefore only focus on the two aspects identified above.

Analysis: Re: Locus and Jurisdiction

8. The Family Division of the High Court and the Magistrates Court has powers to hear proceedings in respect of which jurisdiction is granted to it by the Family Law Act or any other written law. Specifically, the Family Court has powers, amongst other matters to hear proceedings which are defined as matrimonial causes.
9. S. 2 (1) of the FLA defines “*matrimonial causes*”. It includes proceedings between parties to a marriage with respect to the property of the parties to the marriage or either of them. The provision specifically indicates that the proceedings have to be between the parties to a marriage. The provision also indicates that the proceedings can be initiated during the lifetime of both the parties and not when one party has died.
10. It is my finding that if there is a dispute regarding the property of the parties to the marriage, one of them can file proceedings for various orders including orders for declarations as well. The proceedings have to be initiated when the parties are alive. During the pendency of the proceedings, if one party dies, then the matter can be either continued by or against the estate of the deceased. This is specifically provided for by s. 163(5) of the FLA.
11. The above provision only allows for continuation of proceedings by or against the estate. It should not be confused with the right to bring or initiate such proceedings. S. 160 and 161 of the FLA both indicate that proceedings in respect of declaratory orders and for orders altering the interest of the parties in the property is to be initiated between the parties to the marriage and it is brought during the lifetime of the parties.
12. The Full Court of the Family Court in Australia has clarified this principle that proceedings for property settlement can only be commenced when both parties to the marriage are alive. This was done in the case of *In the marriage of Sims (1981) FLC 91-072*. The Full Court, comprising of Evatt C.J., Emery S.J. and Strauss J, found that:

“The structure and the terms of the Family Law Act 1975 do not contemplate the continuance or institution of property proceedings after the death of one or both of the parties”.

and

“...when the definition of “matrimonial cause” in cl. (ca) of sec. 4 speaks of “proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them...”, it refers to proceedings between two living persons who either are parties to an existing marriage, or who were parties to a marriage which has been dissolved.”

13. In 1983 the Australian law was amended by the insertion of a new section to specifically provide for the continuation of property proceedings after the death of one of the parties. However the rule that property proceedings are a personal right that cannot be commenced after the death of one of the parties remains.
14. If there are no proceedings pending between parties to the marriage and if one party dies, his property will be disposed according to his will or the rules of intestacy. A party who is affected by the making of the will has recourse to bring proceedings in the probate jurisdiction to challenge the same. If one party to the marriage wants to realize his or her debt from the estate then he or she can sue the estate as the creditor.
15. The Family Court does not have powers to intervene in the probate jurisdiction and decide about the rights of a party to the marriage who has not been provided for in the will. The matter is not within its mandate to resolve.
16. I understand from the current proceedings that there is a proceeding pending in the civil jurisdiction where the will has been challenged. That is where the matter should be resolved. An order sought in this proceeding is now not available to the applicant.

17. I must also state that the applicant, as the son of the affected party, who is still alive does not have the locus to bring the proceedings. The power of attorney cannot override the requirements of the law on the issue of standing.

18. I had informed Ms. Kunatuba that there are little chances of success on the question of jurisdiction and locus. I have expressed the views in order to save costs for unnecessary litigation. Ms. Kunatuba insisted that the matter be heard. I find that this has unnecessarily incurred legal costs for the respondents as a result of which they are entitled to costs.

Final Orders

19. I therefore grant the following orders:

(a) The application is dismissed; and

(b) The applicant is ordered to pay to the respondent's costs of the proceedings in the sum of \$3,000 to be paid within 14 days.

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Hon. Madam Justice Anjala Wati

Judge

04.08.2020

To:

- 1. Law Solutions for the Applicant.***
- 2. Nilesh Sharma Lawyers for the Respondent.***
- 3. File: High Court Family Case Number: 20/Suv/0030.***