NARAYAN REDDY

v

1. MENCHAMA WEBB
2. LAWRENCE WEBB

[HIGH COURT, 1994 (Fatiaki J), 25 March]

Probate Jurisdiction

Estate-caveat-effect of failure to respond to warning-meaning of "contrary interest"-interest of illegitimate child how established-Succession Probate and Administration Act (Cap 60) sections 5,6,47(1)-Non-Contentious Probate Rules 1954 (England & Wales).

A Caveat was lodged on behalf of an illegitimate child. Upon application to remove, the High Court discussed the nature of caveats lodged pursuant to the Non-Contentious Probate Rules and examined the evidence required to prove paternity.

Case cited:

In re B [1958] N.Z.L.R. 362

Application to remove caveat in the High Court.

V. Kapadia for the Estate
H.M. Patel for the Caveators

Fatiaki J:

On the 27th of September 1991 Narayan Reddy s/o Ranga Sami Reddy ("the deceased") died intestate leaving his widow Rosy Reddy and a son Shiu Narayan Reddy. Pursuant to her right as the wife of the deceased and as the first person entitled to a grant of letters of administration of the deceased's estate, the widow appointed the Public Trustee to assume administration of the estate.

Before any application could be made however, a caveat No. 39/91 was lodged on the 13th of November 1991 against the sealing of any grant in the deceased's estate, by Menchama Webb and Lawrence Webb ('the caveators') acting through their local solicitor.

On the 3rd of September 1992 the Public Trustee lodged the necessary papers to obtain a grant of Letters of Administration of the deceased's estate. The oath of the Public Trustee deposed generally to his appointment by the widow and the value of the estate and in particular, paragraphs 1 and 2 inter alia deposed that besides the lawful widow the deceased had an "... only son ..." and "... did not leave any other issue".

On the 30th of October 1992 the Public Trustee issued a Warning to the caveators (i) "... to enter an appearance" setting forth their contrary interest in the deceased's estate or (ii) serve a summons for directions should they wish to show cause against the sealing of a grant.

On the 10th of November 1992 a copy of the Warning was duly served on the office of the caveator's solicitor and an affidavit of service was filed on the 10th of December 1992.

Almost a year later on the 4th of November 1993 Messrs. Sherani & Company were appointed to contest the caveat on behalf of the Estate. This they proceeded to do by issuing an inter partes summons for the removal of the caveat on the sole ground that the caveators had taken no action in the matter.

A further 1 1/2 months elapsed and it was not until the 17th of January 1994 when the caveators filed an affidavit in reply in which they identified their contrary interest as follows :

> "2. THAT we filed the caveat on behalf of MICHAEL CAROLL son of the deceased Narayan Reddy born on the 18th March 1977 in Melbourne Australia.
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> 3. THAT the said MICHAEL CAROLL is the son of the deceased and is entitled to a share in the estate of the deceased pursuant to Succession, Probate and Administration Act Cap. 60, Section 6(1)(c) and 6(3).
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> 4. THAT we pray to Court that the application to remove the caveat in this Estate be withheld until the said Michael Caroll is included in the distribution of the said estate according to law."

Although no argument has been raised on the matter I would point out that the interest (if any) of the caveators themselves in the Estate is unclear from their affidavit nor has any relationship (if any) between the caveators and the child been deposed to therein.

Be that as it may on the 2nd of March 1994 the summons was fully argued in chambers by counsel representing both parties.

Learned counsel for the Estate's primary argument was based on a technical breach of the Non-Contentious Probate Rules, 1954 (U.K.) which are applied in Fiji by virtue of Section 52(2) of the Succession, Probate and Administration Act (Cap. 60) "... so far as the same can be read as applicable to local circumstances ..."

In particular counsel referred to Rule 44 which is entitled Caveats and contains

the following relevant paragraphs :

"(1) Any person who wishes to show cause against the sealing of a grant may enter a caveat in any registry ..., and the registrar shall not allow any grant to be sealed if he has knowledge of an effective caveat.

(5) Any person claiming to have an interest in the estate may cause to be issued from the registry ... a warning against the caveat, ... and shall require the caveator to give particulars of any contrary interest in the estate; and the warning ... shall be served on the caveator forthwith.

(6) A caveator who has no interest contrary to that of the person warning, but who wishes to show cause against the sealing of a grant to that person, may within 8 days of service of the warning upon him (inclusive of the day of such service), or at any time thereafter if no affidavit has been filed under paragraph (12) below issue and serve a summons for directions.

(10) A caveator having an interest contrary to that of the person warning may within 8 days of service of the warning upon him (inclusive of the deay of such service) or at any time thereafter if no affidavit has been filed under paragraph (12) below enter an appearance in the registry in ... by filing form 5 and making an entry in the appropriate book ; and he shall serve forthwith on the person warning a copy ... sealed with the seal of the Court.

(12) If no appearance has been entered by the caveator or no summons has been issued by him under paragraph (6) ... the person warning may at any time after 8 days of service of the warning on the caveator ... file an affidavit in the registry ... as to such service and the caveat shall thereupon cease to have effect provided that there is no pending summons under paragraph (6) of this rule.

(13) Unless a registrar ... by order made on summons otherwise directs, any caveat in respect of which an appearance to a warning has been entered shall remain in force until the commencement of a probate action."

A Reading from the above counsel's simple submission was that the caveators had been appropriately warned and had failed within the 8 days given them, to either enter an appearance or issue a summons for directions and the person warning having filed an appropriate affidavit of service in terms of rule 44(12) above, the caveat ceased to have effect.

The present application however acknowledges that the caveat has not in fact been removed and in terms of the provisions of Section 47(1) of the Succession, Probate and Administration under which the present application has been B brought, the Court retains a discretion whether or not to remove the caveat.

I am also mindful that the grant of Letters of Administration in this case has not yet been effected perhaps due in part to the apathy or dilatoriness on the part of persons representing the Estate, and in all the circumstances the application was fully heard on its merits.

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In this regard learned counsel for the Estate argued that the caveat was lodged to protect the interest in the Estate of an alleged illegitimate son of the deceased and without necessarily accepting the validity of such an interest, counsel submits that the caveatable interest (for want of a better term) which the caveator must raise in terms of rule 44(10) above is "an interest contrary to the person D warning ..." namely, the Public Trustee acting for and on behalf of the lawful widow of the deceased who is the person first entitled to the grant of Letters of Administration in the deceased's estate.

In other words the contrary interest of the caveator must refer and relate to the narrow issue of the grant itself and not to the estate such as might arise in a claim by a second more recent wife or (in the case of a grant of probate) based E on a more recent will.

In counsel's submissions there is at most an interest in the deceased's estate which does not amount to an "interest contrary to the grant" and for present purposes such an interest in the Estate is irrelevant.

F With all due regard to the submission I cannot agree that procedural Rules which are plainly made to facilitate applications for grants of probate and administration in non-contentious matters should be read so strictly.

I am of course mindful that a caveat has been described in Tristram and Coote's Probate Practice (27th edtn) at p. 508 as :

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> "a notice to the Court not to allow proceedings to be taken in the matter of the will or estate of the deceased without notice to the caveator. It does not commence litigation, it institutes no proceedings, and is not an `act' in any proceedings."

Furthermore, Rule 44(1) enables any person who wishes to show cause against the sealing of a grant to enter a caveat (See : also Section 46(1) of the Succession, Probate and Administration Act) and more particularly Rule 44(5) under which the Warning to Caveat is given refers to the caveator's contrary interest in the estate (not in the grant).

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This latter distinction is further exemplified in Rule 44(6) which recognises that a caveator although having no contrary interest in the estate may nevertheless show cause against the sealing of a grant to the person warning him. (See : also the Warning to Caveat form itself)

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Learned counsel for the caveators on the other hand firmly submits that the caveators have a contrary interest in the estate in terms of Section 6(1)(c) and 6(3) of the Succession, Probate and Administration Act (Cap. 60) and until that interest is recognised by the Public Trustee, the caveat ought to be maintained to protect that interest more so where there is no affidavit denying the alleged paternity of the child.

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I turn then to the statutory provisions which the caveators specifically rely upon in support of the caveat. Before doing so however and for the sake of completeness I note that Section 5 of the Succession, Probate and Administration Act provides:

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> "Notwithstanding anything to the contrary contained in any laws in force in Fiji at the date of the commencement of this Act, the property of an intestate dying on or after the commencement of this Act shall be distributed in accordance with the provisions of this Act, and no person shall have any right, title, share, estate, or interest in such property except as provided in this Act."

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Turning then to Section 6(1) which directs the administrator on intestacy to hold the property of the person who dies intestate on trust to distribute the same as follows (so far as relevant for present purposes):

> "(c) if the intestate leaves issue, the issue shall take per stirpes and not per capita the remaining two-thirds of the residuary estate."

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and Section 6(3) defines "issue" as including "a child ... whether legitimate or illegitimate, in any generation, of an intestate". The subsection further defines a "child" - "(a) in relation to an intestate, means any child, whether legitimate or illegitimate, of the intestate".

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In the light of above provisions and given the absence of any contrary affidavit it does appear as though the child Michael Caroll (not the caveators), being the illegitimate son of the deceased is entitled prima facie at least to a share in the residuary estate of the deceased.

The matter unfortunately does not end there because of the provisions of Section 6(4) of the Act which expressly provides :

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> "For the purposes of this Section, an illegitimate relationship between a father and his child shall not be recognised unless there is proof that the paternity of the father has been admitted by or established against the father while both the father and the child were living."

F.B. Adams J. in dealing wtih an almost identically-worded provision in In re B [1958] N.Z.L.R. 362 said at p.366.

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> "It will be observed that the formula has been admitted by or established against the testator, or the parent, has been in use in this connection for more than twenty years ... It seems to me that there are two issues in respect of which an onus of proof rests on an applicant. In the first place, he must prove the natural relationship - that is to say, that he is in fact a child of the testator. In the second place, he must prove the admission or establishment of the relationship while both parent and child were living. While the evidence which proves the one issue, may possibly in some cases be sufficient to prove the other, proof of either alone will not suffice."

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Then in dealing with the second limb (above) the learned judge said at p.367 :

> "For reasons that will appear, I find it unnecessary to construe the word 'established'. It would certainly include establishment in judicial proceedings against the testator or parent, at any rate in cases where paternity ... was directly in issue in such proceedings. The question whether it may have a wider meaning does not arise here for decision, as the evidence before the Court, ... amounts to proof of admission, rendering it unnecessary to inquire whether establishment is proved or not."

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Later in dealing with the nature of evidence required to support an admission His Honour said at p.368 :

> "The statute does not require that an admission shall be in writing; and in my opinion, a verbal admission sufficiently proved is within its words. Such admissions though made to the mother, only, are, in my opinion, sufficient for the purposes of the Act."

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and at p.369 :

> "If on the other hand, there were no verbal admissions, there

> was in my opinion, at the least, conduct amounting to tacit admission. I think that this also is within the statute."

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and later :

> "There can be no doubt, I think, that an admission for the purpose of this statute must be one which in fact acknowledges paternity, and that the mere admission of circumstances pointing to paternity will not suffice."

From the above it is patently clear that the caveators have fallen well-short of discharging the evidential onus placed upon them by the provisions of Section 6(4) of the Succession, Probate and Administration Act (Cap. 60). Equally clearly the discharge of the statutory onus is unlikely to be determinable upon affidavit evidence only. B

In all the circumstances I would exercise my discretion in favour of maintaining the caveat until such time as the claim or interest of the child in the Estate has been finally determined by an appropriately constituted action. The application is accordingly dismissed. C

(Application dismissed.)

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