ESTATE OF CARRUTHERS (RICHARD HETHERINGTON):
re: CARRUTHERS (BERNADETTE TAPUITFA)

Court of Appeal
Dillon, Wylie, Morling JJ
6 May 1992

WILL ESTATE - S47 Administration Act 1975 - Testator under moral duty to provide for spouse - no conduct by widow disentitling her to provision under the estate - value of the estate - provision of money to provide home - provision of money to provide income in lump sum or annual sum.

HELD: Supreme Court award increased - Testator owed moral duty to his spouse to provide adequate provision - adequate provision for the widow would not cause hardship to the beneficiaries under the will - lump sum of $275,000 ordered for future financial support and purchase of house.

CASES CITED:

- Little v Angus [1981] 1NZLR 126

LEGISLATION:

- Administration Act 1975; S 47

R Drake for Appellant
E Puni for Respondents

The hearing of this appeal was preceded by a careful argument by counsel for the respondents in support of an application to strike out the appeal because it was brought out of time. There is no doubt that there were procedural irregularities in the way in which the appeal finally came before this Court for hearing but we did not find it necessary to consider those technicalities in any depth. We were satisfied that the justice of the case required that the appeal proceed and that there would be no prejudice to the respondents as a result which could not be met by a costs order. Accordingly, we granted special leave to appeal pursuant to s.64 of the Judicature Ordinance 1961.

We mention this matter only for the purpose of making it clear to litigants, their solicitors and counsel that time limits and procedural rules must be strictly complied with and that our granting of special leave in this case should not be seen as a ready means of escape from non-compliance. Such leave is likely to be granted only in rare cases where justice demands it and where there will be no prejudice outweighing such demand.

Richard Hetherington Carruthers ("the testator") died on 14 May 1987 leaving a will dated 13 October 1983. Probate of the will was granted to the respondents on 20 November 1987. The appellant, Bernadette Tapuitea Carruthers, is the widow of the testator. No provision was made for her in the will. Accordingly, she brought a claim under s.47 of the Administration Act 1975 against the testator's estate. That section provides as follows:

> "The Court may grant to any widow, widower, parent, child or grandchild of the deceased person who has died leaving an estate in Western Samoa such relief thereof as to which seems just if the Court is satisfied (having regard to all the circumstances of the case) that such widow, widower, parent, child, or grandchild is insufficiently provided for."

The application was heard by Ryan CJ who ordered that provision for the appellant in the sum of $100,000 be made out of the estate. He ordered that this sum should be paid to the appellant upon her vacating the house presently occupied by her and upon her giving a written undertaking that she would not return to live in the house.

The appellant claims that she was entitled to a more generous order than was made by Ryan CJ and seeks additional provision out of the testator's estate.

The size of the testator's estate was a matter of contention at the hearing at first instance. Ryan CJ was unable to fix a precise value upon it, but was of the opinion that its value ranged anywhere between $600,000 and $1.2m.

The testator was a prominent businessman in Western Samoa. At the time of his death he was aged 73 years and had been married four times. He was first married in 1937. There were two children of this marriage which was dissolved in 1942. He married for the second time in 1945 and this marriage was dissolved in 1961. There was one child of the marriage. He was married for the third time in 1961. There were four children of this marriage which subsisted until March 1966. His final marriage was to the appellant in May 1966.

The appellant and the testator had two children both of whom are now adults. The appellant and the testator separated in December 1980 but were never divorced.

Apart from a legacy of $10,000 to a niece, the testator left the whole of his estate to the six children of his last two marriages. The provision for these children was not uniform, one son of the third marriage in particular being more generously provided for than the other children.

One child, Margaret, was only 15 at the date of the testator's death. An application on her behalf was also made under s.47 of the Administration Act. However this claim was not pursued and for the purpose of deciding the appeal it is unnecessary to make further reference to it.

It was virtually common ground at the hearing before Ryan CJ and upon the hearing of the appeal that the testator should have made some provision in his will for his widow. Apart from a section of land at Afiamalu and a motor car of minimal value, her only other significant asset at the time of her husband's death was a bank account in American Samoa with a credit balance of about U.S.$10,000. She claimed that the money in this account was held on trust for her children but Ryan CJ found that she had liberal access to it.

After the appellant separated from the testator in 1980, she sought and obtained a maintenance order from the Magistrates' Court in the sum of $130 per week, but in terms of s.35 of the Maintenance and Affiliation Act that order ceased to have effect (except as to arrears) from the date of death. Prior to the testator's death the appellant lived in a house, the former matrimonial home, at Vailima provided for her by the testator. She now lives in another house at Vailima devised by the testator to her son, Irving. This house is situated on the same large block of land at Vailima owned by the testator which has been in the Carruthers family for at least two generations and where some members of the family of the third marriage now live.

At the trial the appellant sought orders that she be provided out of the estate with a block of land at Vailima, with sufficient money to enable her to build a comfortable residence on that land, and with sufficient income for her needs.

The relationship between the appellant and the children of the testator's third marriage is not good. For that reason Ryan CJ was of the opinion that it would be inappropriate for the appellant to continue to reside at Vailima. He thought her continued residence there would be a source of continuing friction and disharmony. It was for this reason that the orders which he made were subject to the appellant vacating the residence which she presently occupies.

There was conflicting evidence at the trial as to the relationship between the appellant and the testator and between her and some of the testator's children. We do not think it is necessary to refer to this evidence. The Chief Justice found that there was nothing in the evidence to establish that the appellant's claim should be diminished by reason of her conduct and we agree with this finding.

The bulk of the testator's estate consists of shares in I.H. Carruthers Limited and of the land and buildings at Vailima. His Honour found that the company was totally dominated and controlled by the testator, that it was used by him as his private bank, and that he had access whenever he wished to its cash and assets. His Honour said:

> "There seems to have been very little differentiation made by the deceased between the assets of the company and his own personal assets and the ultimate conclusion which I have [been] driven to is that the company was basically a legal fiction which operated as the personal fiefdom of the deceased."

That is probably a fair commentary in relation to the period prior to the testator's death. However, the legal realities cannot now be altogether ignored. The testator, and now his estate, owns only 19,582 shares out of a total of 57,600 shares, and there is no evidence that the estate has any controlling interest. What can be said is that the bulk of the remainder of the shares is held by family members who collectively have it in their power to deal with the company, its income, and its assets, in a way which justifies assessing the share value very differently from that advanced by the respondents on an earnings basis.

In the company's latest balance sheet, its net assets are shown as being worth almost $1.8 million. The dividends declared by the company have been extremely modest, but the latest balance sheet in evidence showed that there were unappropriated profits of $218,979. Ryan CJ accepted that the cash position of the company was not strong but pointed out (correctly in our opinion) that the cash position could have been improved by the sale of some of its property holdings. There was evidence at the trial that the value of each of the 57,600 shares in I.H. Carruthers Limited was $2. We agree with Ryan CJ that this is a completely inappropriate and unrealistic valuation of the company's shares.

The complete block of land and buildings at Vailima is valued at $700,000 and Ryan CJ's statement of that figure was not challenged before us, but it may be open to debate whether the whole is to be regarded as part of the testator's estate for the purposes of this appeal. Some time before his death the testator had executed conveyances of parts of the land to three of his

children, but those conveyances had never been stampted or registered. The evidence does not show whether the gifts (as they would have been) were completed in the sense that the testator had done all that needed to be done on his part to make them effective. The point was not argued and may not have been considered. The respondents put forward the whole property as part of the estate and we should no doubt accept it as such, but the matter just raised adds to our general sense of unease at attempting any precise evaluation of the total estate. The testator had other miscellaneous assets said to be worth $62,000 odd and liabilities of $104,000 odd.

We see no reason to disagree with the view reached by his Honour that the net value of the testator's estate is very substantial indeed. On the whole of the evidence, we think the value of the estate as at the date of death was in the region of $1 million, rather than the lesser figure of $600,000 which Ryan CJ thought was the minimum value of the estate. However, like Ryan CJ, we do not find it necessary to determine the precise net value of the testator's estate.

It is plain that it was of sufficient size to have enabled the testator to have made adequate provision for his wife.

We should add that since the hearing of the appeal the main homestead erected on the land at Vailima has been destroyed as the result of a fire which followed cyclone Val. However, the homestead was insured and a substantial sum of money has been received from the insurer. In these circumstances, we do not think that the total value of the estate has been significantly diminished.

It appears from submissions made to us by counsel for the respondents that one of the deceased's children paid the premium on the insurance policy covering the homestead. The Court was invited to rule that this son and not the estate was therefore entitled to the proceeds of the policy. However, the Court is unable to give a ruling on this matter as all the facts are not before it. Prima facie, it would appear that since the main homestead was owned by the estate, the son has no insurable interest in it and that therefore the proceeds of the policy belong to the estate. If the son wishes to maintain his claim to the proceeds of the policy it will be necessary for him to take independent proceedings to establish what he claims to be his entitlement.

Counsel for the respondents submitted that the value of the main homestead before the fire was nearly $200,000, which is about twice the amount received from the insurance company. Even if

this is the case, the net value of the estate is still very substantial and any diminution arising from that factor would not affect our determination of the proper award to be made to the appellant.

As the learned Chief Justice pointed out in his careful reasons, there is very little precedent in Western Samoa in cases of this kind. We agree with his Honour that as the New Zealand legislation is similar, the principles adopted in that country in determining applications of a similar kind afford a reliable guide in determining claims under s.47 of the Administration Act. We should add that the same principles are applied in Australia.

We agree with Ryan CJ that the principles which should be applied in a case such as the present are as set out in the following passage in the decision of the New Zealand Court of Appeal in Little v Angus [1981] 1 NZLR 126 at 127:

> "The principles and practice which our Courts follow in Family Protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just testator or testatrix; and if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has been a breach of moral duty is customarily tested as at the date of the testator's death; but in deciding how a breach should be remedied regard is had to later events."

It is plain in the present case that the testator failed in his moral duty to the appellant. At the time of his death she was aged 47 and the mother of two of his children, one of whom was then aged only 15. It is true that he had separated from the appellant but not in circumstances that disentitled her to be maintained by him in his lifetime or to be provided for in his will.

The testator's estate is large and although he left a number of children none of them appears to be in financial need. This is not a case in which an order making adequate provision for the widow will cause hardship to the beneficiaries under the will. In any event, the moral claim of the appellant is stronger than that of the testator's children, who are now all adults.

The order for payment to the widow of $100,000 was intended to give her a fund from which she could finance the construction of a home for herself on land which she owned some 12 km from where she presently resides. However, since the hearing at first instance she has been compelled to sell this land to gain funds

to support herself. It will be necessary for her to acquire other land upon which to erect herself a home. She seeks an order that part of the land owned by the estate at Vailima be transferred to her so that she can use it as a home site. We do not think such an order should be made but, on the other hand, she must be provided with a sum of money which she can use to acquire suitable land upon which to erect a home.

Having regard particularly to the size of the estate, we think the appellant is also entitled to an order which will give her an income which will be sufficient to maintain herself in reasonable comfort. The appellant is now aged 51 years. Although she worked for some years during her marriage to the testator her employment was in one of the family company shops and on a family plantation and she does not appear to have any significant income-earning potential. She has relied on her son Irving, who is a member of the United States Army, for day-to-day living expenses since the testator's death. She has also been able to resort to the moneys in the bank account in American Samoa to which we have referred. Ryan CJ thought that as she was a relatively young woman, she should be able to gain some employment from which she can derive income for her day-to-day needs. Whether this is the case is problematical. In any event, any employment which she might obtain in the short run will not necessarily continue indefinitely and she may well live for many years after employment ceases to be available to her.

The amount of $130 for maintenance was fixed in the Magistrates' Court in 1981. The testator at that time and until his death provided the appellant with a residence. That amount seems very low having regard to the testator's wealth. However it is to be noted that an application for an increased amount was refused by the Magistrates' Court in 1984. In considering an appropriate income to be allowed to the appellant now we must take account, in a general way, of inflationary trends since that order was made and we must also not be unmindful of the possibility of future inflation.

It is not easy to frame an appropriate order making provision for the appellant's future support. If an order is made for payment to her of a weekly or annual sum during her lifetime or until she remarries, it would be necessary to devise some formula for the payment to be escalated to take account of inflation over future years. Since it is impossible to determine the rate of future inflation it would be necessary for the trustees of the estate to set aside a very large capital sum to enable the estate to meet future income payments to the appellant. Such payment could well be payable over a lengthy period which could well exceed thirty years, since the appellant may never remarry and may live to a great age. The beneficiaries under the will would be kept out of their full entitlements if the trustees could not distribute the estate until the death or remarriage of the appellant. On the

other hand, if an order is made giving the appellant a lump sum in lieu of future annual or weekly payments, she may die or remarry in the near future. Moreover, the value of the lump sum is likely to be eroded by inflation unless the sum is invested in inflation-proof investments.

In all the circumstances of the present case, we think the better course is to order the payment of a lump sum to the appellant for her future financial support.

In his reasons the Chief Justice said:

> "As I have said the affidavits filed show a state of disharmony at the very least between the Plaintiff and the four children of the third marriage, many of whom will in the ultimate it seems to me, reside on the family estate and for that reason it does seem to me to be quite inappropriate for the Plaintiff to continue to reside at Vailima. Her continued residence will be nothing less than a source of friction, disharmony and possibly even worse and for that reason I intend to make my orders subject to a rider which will ensure that she lives elsewhere.

Accordingly, the orders made by the Chief Justice were expressed to be conditional upon the widow vacating the house presently occupied by her at Vailima on a permanent basis and upon her giving an appropriate written undertaking that she should not return to live in that property after she had vacated it. We have anxiously considered whether we should make the orders which we propose to make conditional upon the widow ceasing to live at Vailima. We appreciate the considerations which led the Chief Justice to require the widow to move elsewhere as a condition of her receiving benefits from the estate. But we think there are sound reasons for not imposing a condition of the kind referred to in the Chief Justice's reasons.

In the first place, it would be very difficult, if not impossible, to enforce such a condition. Secondly, it is impossible to predict what the circumstances of the various members of the family will be in the years ahead. For all that is now known, the children may not be living in Vailima until the widow dies. Thirdly, we are not at all persuaded that the children of the third marriage should have the right to control where the widow resides.

It is one thing to require the widow to vacate the home which her husband formerly provided for her so that some of the beneficiaries may occupy it or dispose of it. It is quite another thing to require her to leave the area in which she has been living for many years. We fail to see why the widow's wishes as to where she lives should be subordinated to those of some (not all) of the children. It is not as if they are all

living in the same house, with consequent friction. It is entirely possible that the children of the third marriage might themselves move away from Vailima and if that occurred there would be no point in preventing the widow from living there.

The widow is presently living in a home owned by her son on the Vailima estate land. For the reasons we have given, we do not think that we should impose a condition on her that she should leave this house. However, we are not persuaded that we should accede to her application that the estate be ordered to transfer to her a part of its land so that she can erect her own home upon it.

We think the better course is to ensure that the lump sum order which we propose to make in her favour will enable her to purchase land elsewhere upon which she can erect her own home. We see no reason to disagree with Ryan CJ's view that the cost of construction of an appropriate house would be about $100,000. We think in fixing the lump sum award we should contemplate that the appellant may have to incur a total expenditure including the purchase of a building site of up to $125,000, although, of course, she may choose to settle for something more modest.

That leaves for determination what additional amount should be awarded to ensure a sufficient fund overall for both housing and future financial support. We were told from the bar that current rates of interest in Western Samoa are in the region of eight per cent. We think that the "wise and just" testator in 1987 acknowledging his proper obligation to provide a house and financial support to his estranged wife measured in light of the maintenance already determined and not increased by the Magistrate's Court should have made a total lump sum provision for her of $275,000. Within that sum the appellant would have a degree of flexibility as to how much she should spend on housing and how much she should invest for income. To a substantial extent future inflation will reflect in both an increased value for her house and land and an increased value earning rate on her investments.

We think too that in the present instance it would be appropriate to regard such an order as if it were a legacy provided by variation of or codicil to the will. This would have the effect that from one year after the testator's death the award will carry interest at five per cent in accordance with the common law rule. That will have the effect of increasing the award to the appellant at this stage by approximately $55,000. True, she has had no maintenance from the estate since the date of death (other than $15,000 which we directed to be paid on account as an interim measure at the conclusion of the hearing in November 1991), but she has managed in the intervening period by using some of her own resources and with help from her son, Irving. But the practical effect of such an order will be that she will

now have a lump sum of approximately $330,000 - probably close to one-third of the value of the estate.

In all the circumstances we do not see that as unduly generous bearing in mind the primary obligation of the testator to make adequate provision for his widow's maintenance and support notwithstanding their separation. It is true that the estate will have to dispose of or mortgage assets to pay the widow the amount which, pursuant to our orders, she will be entitled to receive from the estate. But that, of course, is no reason why appropriate orders should not be made. Nevertheless, we think the estate should be given reasonable time to comply.

We make orders as follows:

1. The appeal is allowed.

2. In lieu of the order made by Ryan CJ, the appellant is to receive out of the estate the sum of $275,000 payable as follows:

   (a) The sum of $15,000 having already been paid pursuant to the interim order made in November 1991 is to be taken into account as partial satisfaction thereof.

   (b) The sum of $35,000 is to be paid on or before 30 June 1992.

   (c) The further sum of $125,000 is to be paid on or before 31 December 1992.

   (d) The balance of $100,000 together with interest as hereinafter specified is to be paid on or before 30 June 1993.

3. The order for payment of $275,000 is to take effect as if it were a legacy incorporated in the will of the testator and accordingly the amount thereof or so much as from time to time remains outstanding is to carry interest at the rate of five per cent, calculated from one year after the date of death of the testator until the date or dates of actual payment.

4. Costs of all parties are to be paid out of the estate of the deceased except for the first $350 of the appellant's costs are to be borne by her in respect of the failure to bring this appeal within time. Failing agreement within 28 days of the date of this judgment as to the amount of the appellant's remaining costs, such costs are to be determined by the Registrar.

5. All parties are given liberty to apply.