

Megrina Kapasule (on her own behalf and on behalf of other beneficiaries of the estate of Ralph Nkawasenga (Deceased)) v Edna Mikola Nkawasenga and The Administrator General

Order

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| Court: | High Court of Malawi |
| Registry: | Family and Probate Division |
| Bench: | Honourable Justice Jean Rosemary Kayira |
| Cause Number: | Probate Cause Number 132 of 2022 |
| Date of Judgment: | October 01, 2023 |
| Bar: | appellant unrepresented respondent unrepresented |

In the present case, the Claimant alleged that she was in a romantic relationship with the deceased and they had a child in common. The first issue for consideration is whether the person who is said to be a child of the deceased is a child under the laws of Malawi. Section 23 (6) of the Constitution defines a child as a person under the age of eighteen years. This Constitutional provision is explicitly providing the rights of children and these in turn create legal obligations on the part of parents as the primary duty bearers towards their

children. It is important to state that once a child has been adopted, the adoptive parents have a duty towards that child to ensure that he or she enjoys the corresponding rights. This Court reproduces Section 6 of the Adoption of Children Act on the effect of an adoption order as follows:

'(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock:

Provided that, in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively.'

Thus far, it is only right and reasonable to point out that the word child here is referring to either biological, or adopted or fostered child. According to the evidence on the file, the Claimant states that she bore a son for the deceased in

2009. As of today, the said child is aged 16. This is below 18 years and therefore qualifies as a minor.

The second issue for determination is whether the said child is indeed a biological child for the deceased so as to entitle him to the deceased estate as a beneficiary. To begin with, Section 23 (1) of the Constitution provides that all children, **regardless** of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them. Additionally, Section 3 of the Deceased Estates (Wills and Inheritance) Act-DEWIPA which is the comprehensive law on inheritance and succession of deceased estate is very informative. The provision defines a child as a child of the deceased person, **regardless** of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother. The use of the word '**regardless**' in this provision means that the law is protecting children who are born in a legally recognised marriage; children who are born to parents who are not married to each other; children born to parents who are either separated or on a court sanctioned divorce.

It is striking to note that this approach is similar in other pieces of legislation. For instance, Section 2 of the Marriage, Divorce and Family Relations Act- MDFRA states that "child" means a person who is below the age of eighteen years. This provision does not discriminate as to the prevailing circumstances at the time that the child is born. Section 2 of the Statute Law (Miscellaneous Provisions) Act states as follows: It is striking to note that this approach is similar in other pieces of legislation. For instance, Section 2 of the Marriage, Divorce and Family

Relations Act- MDFRA states that “child” means a person who is below the age of eighteen years. This provision does not discriminate as to the prevailing circumstances at the time that the child is born. Section 2 of the Statute Law (Miscellaneous Provisions) Act states as follows:

‘(1) In this Part, except where the context otherwise requires— “child” means a son, a daughter, a grandson, a granddaughter, a stepson and a stepdaughter; “parent” means a father, a mother, a grandfather, a grandmother, a stepfather and a stepmother. (2) For the purposes of this section, a person shall be deemed to be the child or parent of the deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption; and accordingly in deducing any relationship which under this section is included within the meaning of the expression “child” and “parent”, any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.’

In the considered view of this Court, the above provisions are talking of one and the same thing. No child will be disregarded in terms of benefits simply because of how he or she was born. In other words, whether the union of the parents was legally recognised or not, is immaterial. The fact that parentage has not been disputed is sufficient to make a child or children beneficiaries of deceased estate of their parents.

As this Court determines these issues, it directs its mind to Section 23 (2)(3(4) of the Constitution which provide as follows:

'(2) All children shall have the right to a given name and a family name and the right to a nationality. (3) Children have the right to know, and to be raised by, their parents. (4) All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance.'

The above provision is essentially placing an obligation on a parent and that obligation is finally honoured or executed through the estate which a parent leaves upon death. Considering the claim raised by the Claimant, this Court had recourse to Section 96 of the MDFRA which states that an unborn child is entitled to care and maintenance from their father once paternity has not been disputed. In this provision, what is critical is the establishment of paternity between the child and the father who is under duty to provide for the child. This provision is relevant in a sense that the benefits that a child derive from a father are derived from an undisputed paternity. That being the case, the child was subjected to Deoxyribonucleic Acid (DNA) test to establish if the child was fathered by the deceased.

The witness statement of the 1st Defendant confirms that the parties submitted their samples for DNA tests at Mwaiwathu Private Hospital. This was to assess whether indeed the putative father of the child was the deceased. The results came out negative-EN1. The said document states that an incompatibility with paternity was found at more than 2 markers, indicating that the deceased is not

the biological father of the child-JRS. This being the case, it will be unfair for this Court to allow the said child to benefit from the estate of the deceased. The claim is hereby dismissed.

It is so ordered.

**PRONOUNCED IN CHAMBERS ON 1st
OCTOBER, @14:00.**