IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150001443

UNDER	Section 81A, Māori Affairs Amendment Act 1967
IN THE MATTER OF	Reihana Kopa also known as Richard Cooper - Transfer from Administrators to Beneficiaries
BETWEEN	ROBYN COOPER Applicant

Hearings: 112 Taitokerau MB 166-171 dated 24 August 2015
117 Taitokerau MB 278-297 dated 24 November 2015
127 Taitokerau MB 139-142 dated 14 March 2016
(Heard at Whangarei)

Appearances: Ken Brown for the applicant
Wayne Coutts for Gary Cooper

Judgment: 03 June 2016

RESERVED JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Robyn Cooper applies to succeed on intestacy to the Māori land interests of Reihana Kopa, also known as Richard Cooper, on the basis that she was his whāngai daughter. The application is opposed by Gary Cooper and other members of the Cooper family.

[2] Mr Kopa passed away, and letters of administration were granted with respect to his estate, before the commencement of Te Ture Whenua Māori Act 1993 ("TTWMA"). As such, part 4 of TTWMA does not apply.[1]

[3] The parties have agreed that I should make a preliminary determination on whether whāngai are entitled to succeed on intestacy in this case pursuant to the provisions of the preceding legislation.

Background

[4] Mr Kopa died on 19 March 1992. He was not married and he did not have any biological children, although Ms Cooper asserts that she was his whāngai daughter.

[5] Mr Kopa had seven siblings: Harata Tipene; Nau Kopa; Marara Munn; Charlotte Tipene; Piri Kopa; Charlie (Hare) Kopa; and Alice Edward.[2] Charlie, or Hare, is Gary Cooper's father.

[6] On 16 June 1992, letters of administration were granted appointing Harata Tipene and Kare Tate as administrators of Mr Kopa's estate. On 7 August 1992, an order was granted vesting Mr Kopa's Māori land interests in those administrators.[3]

[7] Mr Kopa's estate holds 0.981 shares in Motatau 2 Section 22D which is Māori freehold land. The remaining 0.019 shares in this block are held by Ms Cooper. Ms Cooper received these shares from Mr Kopa prior to his death by way of gift.

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1 TTWMA, s 100.

2 I note that I have only received preliminary evidence as to Reihana's siblings. A final determination on Reihana's siblings is yet to be made.

3 8 Registrar's Whangarei MB 93 (8 RGTO 93).

[8] On 9 March 1990, an order was granted transferring those shares to Ms Cooper so that she could build a dwelling on the block.[4] The Court minute with respect to that application records Mr Kopa referring to Ms Cooper as his "daughter". Despite that, it is accepted in this case that Ms Cooper is not Mr Kopa's biological daughter. Rather, she asserts that she is his whāngai.

Procedural history

[9] This application was first heard on 24 August 2015.[5] Both Ms Cooper and Mr Cooper appeared. During the course of that hearing, I raised with the parties whether a whāngai is entitled to succeed on intestacy in this case as, on the face of it, the provisions of TTWMA did not apply. The application was adjourned so that both parties could seek legal advice.

[10] The application was then heard on 24 November 2015.[6] Ken Brown appeared as a lay advocate on behalf of Ms Cooper. Mr Coutts appeared on behalf of Mr Cooper. Once again I raised whether a whāngai is able to succeed if Part 4 of TTWMA did not apply. Both parties agreed that I should make a preliminary determination on this issue, following which, a further hearing would be convened to determine who was entitled to succeed.[7] The application was adjourned and I directed both parties to file written submissions, following which I would determine this preliminary issue on the papers.[8]

[11] Mr Coutts filed submissions on behalf of Mr Cooper. Mr Brown did not file any submissions on behalf of Ms Cooper.

[12] A further hearing was held on 14 March 2016.[9] Neither Mr Brown nor Ms Cooper appeared. I adjourned the application and directed Mr Brown to file any further submissions within two weeks, following which I would issue my decision.

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4 17 Kaikohe MB 304 (17 KH 304).
5 112 Taitokerau MB 166-171 (112 TTK 166-171).
6 117 Taitokerau MB 278-297 (117 TTK 278-297).
7 117 Taitokerau MB 286-287 (117 TTK 286-287).
8 At this hearing I also considered a separate application filed by Ms Cooper seeking an interim injunction. The application for an interim injunction was subsequently dismissed and is not relevant to this preliminary issue.
9 127 Taitokerau MB 139-142 (127 TTK 139-142).

[13] On 31 March 2016, Mr Brown sought an extension to file submissions by 8 April 2016. Despite that, no further submissions were received.

[14] On 27 April 2016, two further documents were filed on behalf of Ms Cooper. The first document sets out Ms Cooper's whakapapa. The second document contains signatures of those who support the contention that Ms Cooper was raised by Mr Kopa as if she were his natural daughter.

Are whāngai entitled to succeed on intestacy pursuant to the applicable legislation in this case?

Does TTWMA apply?

[15] Section 109 of TTWMA states:

> **109 Succession to Maori freehold land on intestacy**
>
> (1) Subject to subsection (2), on the death intestate of the owner of any beneficial interest in Maori freehold land, the persons primarily entitled to succeed to that interest, and the proportions in which they are so entitled, shall be determined in accordance with the following provisions:
>
> (a) where the deceased leaves issue, the persons entitled shall be the child or children of the deceased living at his or her death, in equal portions if more than 1, together with the issue living at the death of the deceased of any child of the deceased who died before the deceased, that issue to take through all degrees, according to their stocks, in equal portions if more than 1, the portion to which their parent would have been entitled if living at the death of the deceased:
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> (b) where the deceased leaves no issue, but leaves brothers and sisters, the persons entitled shall be the deceased's brothers and sisters living at the death of the deceased (including brothers and sisters of the half blood descended from the parent or other ascendant through whom the deceased received his or her entitlement to that interest), in equal portions if more than 1, together with the issue living at the death of the deceased of any such brother or sister of the deceased who died before the deceased, that issue to take through all degrees, according to their stocks, in equal portions if more than 1, the portion to which their parent would have been entitled if living at the death of the deceased:
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> (c) where the deceased leaves no issue and no brothers and sisters, the persons entitled to succeed shall be ascertained always by reference to the derivation of entitlement by the deceased and shall be the issue, living at the deceased's death, of the person nearest in the chain of title to the deceased who has issue living at the deceased's

death, that issue to take through all degrees, according to their stocks, in equal shares if more than 1.

(2) Where the owner of a beneficial interest in any Maori freehold land dies intestate leaving a person who is the owner's surviving spouse or civil union partner, that person is, subject to subsection (4), entitled as of right to an interest in that interest for life, or until he or she remarries or enters into a civil union or a de facto relationship.

(3) Such a surviving spouse or civil union partner may, on the death of the deceased or at any time thereafter, surrender in writing his or her entitlement under subsection (2), whereupon the court shall vest the interest absolutely in the persons entitled to succeed to the interest.

(4) A surviving spouse or civil union partner shall not be entitled under subsection (2) if, at the date of the death of the owner, a separation order, or a separation agreement made by deed or other writing, is in force in respect of the marriage or civil union between the surviving spouse or civil union partner and the owner.

[16] Section 115 of TTWMA states:

115 Court may make provision for whangai

(1) In the exercise of its powers under this Part in respect of any estate, the court may determine whether a person is or is not to be recognised for the purposes of this Part as having been a whangai of the deceased owner.

(2) Where, in any such case, the court determines that a person is to be recognised for the purposes of this Part as having been a whangai of the deceased owner, it may make either or both of the following orders:

(a) an order that the whangai shall be entitled to succeed to any beneficial interest in any Maori freehold land belonging to the estate to the same extent, or to any specified lesser extent, as that person would have been so entitled if that person had been the child of the deceased owner:

(b) an order that the whangai shall not be entitled to succeed, or shall be entitled to succeed only to a specified lesser extent, to any beneficial interest in Maori freehold land to, or than that, which that person would otherwise be entitled to succeed on the death of that person's parents or either of them.

(3) Every order under subsection (2) shall have effect notwithstanding anything in section 19 of the Adoption Act 1955.

[17] These provisions provide the Court with a discretion to recognise a person as having been a whāngai of the deceased owner, and to grant an order that the whāngai shall be entitled to succeed, to the same or any lesser extent, as that person would have been entitled if they were the child of the deceased owner.

[18] However, s 100 of TTWMA states:

> **100 Application of this Part**
>
> (1) Subject to subsection (2), this Part applies to all estates of deceased persons (whether or not Maori) comprising in whole or in part any beneficial interest in Maori freehold land.
>
> (2) This Part does not apply—
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> (a) where administration of the estate of the deceased owner has been granted before the commencement of this Act; or
>
> (b) in respect of any beneficial interest in Maori freehold land, owned by the deceased person at his or her death, that has been vested in the person or persons entitled to the interest before the commencement of this Act; or
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> (c) to the estate of a person who dies before 1 July 1994 leaving a will executed before the commencement of this Act;—
>
> and in any such case the law applying immediately before the commencement of this Act shall continue to apply as if—
>
> (d) this Act had not been passed; and
>
> (e) the Maori Land Court may make an order vesting in the persons entitled thereto the undivided beneficial freehold interests in common in Maori freehold land regardless of the value of the interests in land affected by the application.

[19] Mr Kopa died on 19 March 1992. Letters of administration were granted on 16 June 1992. TTWMA came into force on 1 July 1993.[10] As administration of the estate was granted before the commencement of TTWMA, Part 4 of that Act does not apply. As such, I must consider the law that applied before the commencement of TTWMA.

Are whāngai entitled to succeed on intestacy pursuant to the preceding legislation?

[20] In *Sandys – Estate of Hinehou Te Reweti* an application was filed per s 45 of TTWMA to amend a succession order granted on 16 July 1963.[11] The applicant alleged that the order was incorrect as it determined that the deceased had no issue, however, the applicant argued that the deceased had a whāngai child who should be entitled to succeed.

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10 TTWMA, s 1(2).

11 *Sandys – Estate of Hinehou Te Reweti* [2004] Chief Judge's MB 8 (2004 CJ 8). Also see *Whittaker v Māori Land Court* [1997] NZFLR 707.

Deputy Chief Judge Isaac (as he then was) considered the legislative history as to the recognition of whāngai from 1901 to 1953. He found:

> 3.3 To satisfy the above requirement for the purposes of this application it must be shown that the Māori Land Court had jurisdiction, as at 1963, to award an interest in the Māori land interests of the deceased on intestacy to a whāngai.
>
> 3.4 In order to understand how the law stood at 1963 it is helpful to outline the legislative history as to the recognition of customary Māori adoption, and the law regulating succession on intestacy.
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> 3.5 The statutory regulation of Māori customary adoption began with the Native Land Claims Adjustment and Laws Amendment Act 1901. Section 50 of that Act made it necessary for any Māori adopted by custom to have the adoption registered in the Māori Land Court if he or she wished to succeed to the estate of a person dying intestate after 31 March 1902.
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> 3.6 In 1909 the Native Land Act was enacted and section 161 had the effect of denying any recognition to customary placements. That section read:
>
> > (1) No Native shall, after the commencement of this Act, be capable of [adopting] a child in accordance with Native custom, whether the adoption is registered in the Native Land Court or not: and, save as hereinafter in this section provided, no adoption in accordance with Native custom, whether made before or after the commencement of this Act, shall be of any force or effect, whether in respect of intestate succession or otherwise.
> >
> > (2) Any adoption so made and registered before the commencement of this Act, and subsisting at the commencement of this Act, shall, as from the commencement of this Act, have the same force and effect as if lawfully made by an order of Adoption under this Part of this Act.
> >
> > (3) It shall not be lawful for any magistrate to make an order under the Infants Act 1908, for the adoption of a child by a Māori.
>
> 3.7 For a brief period in 1927 the legislative policy was reversed, Section 7 of the Native Land Amendment Act 1927 and the Native Claims Adjustment Act 1927 re-instated customary adoptions made before 31 March 1902, if they were subsisting at the date of commencement of the Native Land Act 1909. This provision only applied "in the case of a Maori who dies or has died subsequently to the commencement of the principal act."
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> 3.8 However, in 1931 the Native Land Amendment Act reinstated the original s 161. Section 202 provided, as before, that "no adoption in accordance with Native Custom, whether made before or after the commencement of this Act, shall be of any force or effect."
>
> 3.9 This provision was carried forward into s 80(1) of the Māori Affairs Act 1953, which provided:

(1) No person shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable of adopting any child in accordance with Māori custom, and, except as provided in subsection (2) of this section, no adoption in accordance with Māori custom shall be of any force or effect, whether in respect of intestate succession to Māori land or otherwise.

(2) Any adoption in accordance with Māori custom that was made and registered in the Māori Land Court before the 31st day of March 1910 (being the date of the commencement of the Native Land Act 1909), shall during its subsistence be deemed to have and to have had the same force and effect as if it had been lawfully made by an adoption order under Part 9 of the Native Land Act 1909.

The exact wording of this section is reproduced in section 19 of the Adoption Act 1955, which is still in force today.

3.10 The first substantive change to the law in this respect came in 1993 with the enactment of Te Ture Whenua Māori Act 1993. Sections 108 and 114 of that Act allow, inter alia, for disposition by will to whāngai and for the Court to make provision for whāngai. Up to this point the law did not recognise the legal validity of whāngai placements, and the present Adoption Act confirms that Māori customary adoptions made after the introduction of the Native Land Act 1909 have no legal effect beyond the recognition afforded by Te Ture Whenua Māori Act 1993.

3.11 This position has been recently confirmed in two Court of Appeal decisions. In *Whittaker v Māori Land Court of New Zealand* [1997] NZFLR 707 the Court held that "successively there were periods when the parent/child relationship between (Meriana and Ngawini) was recognised by law (1892-1901), was recognised by law (1892-1901), was recognised by law contingent upon registrations (1902-1909), was of no legal effect (1910-1927), was contingently of full force and effect (1927-1929) and was of no legal effect (1930 onward)." This finding was repeated by the Court of Appeal in *Keelan v Peach* [2003] 1 NZLR 589 at paragraph 34:

> Section 19 of the 1955 Act can be traced back to 1969 and Part IX of the Native Land Act of that year. Section 161(1) and (2) of that Act are essentially to the same effect as s 19. They were carried forward into s 202(1) and (2) of the Native Land Act 1931 and s 80 of the Māori Affairs Act 1953 with some changes. That is to say, the bar on customary adoptions and the denial of legal force to them has existed, if with some qualifications, for the whole of that last century.

3.12 Having regard to the above legislation and case law, it is clear that until 1993, whereby the law changed to give some recognition to whāngai placements, Māori customary adoptions had no legal effect. Bearing this in mind, it now has to be determined whether the Māori Land Court, as at 1963, had the necessary jurisdiction to award any Māori land interests of the deceased on intestacy to a whāngai.

3.13 Section 116 of the Māori Affairs Act 1953 provides that:

> (1) Except as otherwise expressly provided in this Act, the person entitled on the complete or partial intestacy of a Māori [who has died before the 1st day of April 1968] to succeed to his intestate estate, whether real or personal, and the shares in which they are so entitled, shall, so far as the estate consists of property other than beneficial freehold interest in Māori land …, be determined in the same manner as if he were a European and as if all the persons living at the death of the intestate who, if they had then attained the age of 21 years, would take an absolutely vested interest in any part of the estate, had then attained that age:
>
> (2) Except as otherwise expressly provided in this Act, the persons entitled on the complete or partial intestacy of a Māori or the descendant of a Māori [who has died before the 1st day of April 1968] to succeed to his intestate estate so far as it consists of beneficial freehold interests in Māori land, and the shares in which they are so entitled, shall be determined, shall be determined by the Court in accordance with Māori custom.

3.14 The above section is the governing provision in respect of who can succeed to the beneficial freehold interests in Māori land on intestacy. Section 135/53 then gives the Māori Land Court the power to determine names and shares of persons legally entitled to freehold interests in Māori Land. The power of the Court to dispose of beneficial freehold interests is contained in s 136.

3.15 There is no mention of whāngai in these sections. However, section 116(3) states that the power to determine succession entitlement in accordance with Maori custom is only exercisable "except as otherwise expressly provided in this Act." As mentioned above, section 80(1) expressly provides:

> No Māori shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable of adopting any child in accordance with Māori custom, and, except as provided in subsection two hereof, *no adoption in accordance with Māori custom shall be of any force or effect, whether in respect of intestate succession to Māori land or otherwise.* (Emphasis added)

3.16 The effect of this law is, unfortunately, inescapable. Until 1993, the Māori Land Court had no jurisdiction to award any beneficial freehold land interests to a whāngai on intestacy. Accordingly, I have to conclude that as at 1963 the Court had no jurisdiction to vest the beneficial freehold land interests of the deceased to Rupi Niwha as a whāngai of the deceased. By contrast, the Court did have jurisdiction to vest the beneficial freehold land interests of the deceased into Heni Paea te Reweti, Ramari Haami and Tamaikoha Takao. Therefore the orders complained of dated 16 July 1967 at 37 WHK 141-142 were not made in error.

[21] These principles apply in the present case.

[22] I note that in *Sandys*, the order complained of was granted on 16 July 1963. Further amendments were made to the Māori Affairs Act 1953 by the Māori Affairs Amendment Act 1974 ("the 1974 Amendment Act"). Sections 76 and 76A of the 1974 Amendment Act state:

> **76 Succession to Maoris on intestacy generally**
>
> (1) Except as provided by subsection (2) of this section, the persons entitled on the complete or partial intestacy of a Maori who dies on or after the 1st day of January 1975 (being the date of commencement of Part VI of the Maori Affairs Amendment Act 1974) to succeed to his intestate estate, and the shares in which they are so entitled, shall be determined in the same manner as if the deceased were a European.
>
> (2) The persons entitled on the intestacy or partial intestacy of a Maori who dies on or after the 1st day of January 1975 to succeed to his intestate estate so far as it consists of undivided beneficial freehold interests in common in Māori freehold land (not including any interest owned as a joint tenant) and the shares in which they are so entitled shall be determined in accordance with the provisions of section 76A of this Act.
>
> (3) The provisions of this section shall apply in respect of the estate and the undivided beneficial freehold interests in common in Maori freehold land of any Maori who has died on or after the 1st day of April 1968 (being the date of commencement of the Maori Affairs Amendment Act 1967) and before the 1st day of January 1975, if at the latter date no grant of administration of his estate has been made, to the extent of any such beneficial freehold interests in common in respect of which no action has been taken having the effect of vesting them in the persons entitled thereto.
>
> **76A Succession to undivided interests in Maori land on intestacy-**
>
> (1) Where any Maori dies intestate as to any undivided beneficial freehold interest in common in Māori freehold land, the persons entitled to succeed to the interest shall, subject to subsections (2) and (3) of this section, be ascertained in accordance with the following provisions:
>
> (a) Where the deceased leaves issue, the persons entitled shall be the child or children of the deceased living at his death in equal shares, together with the issue living at the death of the deceased, of any child of the deceased who predeceased him, the said issue to take through all degrees, according to their stocks, in equal shares if more than one, the share to which their parent would have been entitled if living at the death of the deceased:
>
> (b) Where the deceased leaves no issue, but leaves brothers and sisters, the persons entitled shall be his brothers and sisters living at his death (including brothers and sisters of

> the half blood descended from the parent or other ascendant through whom the deceased received his entitlement to the interest) in equal shares, together with the issue living at the death of the deceased, of any such brother or sister of the deceased who predeceased him, the said issue to take through all degrees, according to their stocks, in equal shares if more than one, the share to which their parent would have been entitled if living at the death of the deceased:
>
> (c) Where the deceased leaves no issue and no brothers and sisters, the persons entitled to succeed shall be ascertained always by reference to the derivation of entitlement by the deceased and shall be the issue alive at the deceased's death of the person nearest in the chain of title to the deceased who has issue living at the deceased's death; and the issue shall take through all degrees, according to their stocks, in equal shares if more than one:
>
> (d) The Maori Land Court, on application, shall have jurisdiction to determine who is entitled to succeed to any interest pursuant to the provisions of paragraphs (a) to (c) of this subsection, and, if in its opinion, no person is so entitled, to determine in accordance with Maori custom who is so entitled.
>
> (2) Notwithstanding the other provisions of this section, the surviving spouse of any Maori, who dies after the commencement of this Act intestate as to any undivided beneficial freehold interest in common in Maori freehold land, shall be entitled as of right to receive an interest for life or until remarriage in that interest, unless [the spouse] signifies in writing that [he or she] does not wish to take the interest.
>
> [Provided that the surviving spouse shall not be so entitled if, at the death of the intestate, a decree of separation or a separation order is in force in respect of the marriage between the surviving spouse and the intestate]
>
> (3) The provisions of subsection (1) of this section shall be read subject to the provisions of section 117 of the principal Act (as to interests in Maori land acquired by will, by gift, by purchase, and the like transactions).

[23] In *White v Brown – Estate of Nehe Te Raana Waiti*, the Court determined that since the passing of the 1974 Amendment Act, the only rights of succession by Māori custom that apply are in those cased covered by s 76A(1)(d) where no person qualifies as a successor under s 76A(1)(a),(b) or (c).[12]

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[12] *White v Brown – Estate of Nehe Te Raana Waiti* (1984) 22 Ruatoria MB 34 (22 RUA 34). Also see *Martin – Estate of Jackie Te Ratu Tio* (2013) 305 Aotea MB 1(305 AOT 1).

[24] As noted, Mr Kopa left siblings, one of whom was appointed as the administrator of his estate. As such, those entitled to succeed to his Māori land interests will be determined per s 76A(1)(b) of the 1974 Amendment Act. Section 76A(1)(d) does not apply and I cannot determine this application in accordance with Māori custom.

[25] Finally, I note that even if s 76A(1)(d) of the 1974 Amendment Act did apply, any recognition of whāngai pursuant to that provision may still be prevented by s 19 of the Adoption Act 1955. For the reasons set out above, it is not necessary to determine that issue in this case.

Decision

[26] Pursuant to s 100 of TTWMA, Part 4 of that Act does not apply to the Māori land interests of Reihana Kopa.

[27] Pursuant to the provisions of the Māori Affairs Act 1953, and the 1974 Amendment Act, whāngai are not entitled to succeed on intestacy.

[28] Ms Cooper's application to succeed to the Māori land interests of Reihana Kopa as his whāngai daughter must fail.

[29] I note however, that based on the whakapapa produced, it appears that Ms Cooper asserts that she descends from one of Mr Kopa's siblings. As such, she may still be entitled to succeed to Mr Kopa's interests through her biological parent, although this is yet to be determined.

[30] I set this application down for a further hearing on a date to be confirmed by the Registrar, to consider who is entitled to succeed to Mr Kopa's interests in light of this preliminary determination.

Pronounced at 12.50 pm on Friday this 3rd day of June 2016.

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M P Armstrong
JUDGE