

**IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT**

**58 Taitokerau MB 269
(58 TTK 269)
A20120002576**

UNDER Section 18(1)(a), Te Ture Whenua Maori
Act 1993

IN THE MATTER OF Joanna Davis

BETWEEN IRIS TUIONO
Applicant

Hearing: 21 January 2013
29 April 2013
(Heard at Whangarei and Auckland)

Judgment: 03 May 2013

RESERVED JUDGMENT OF JUDGE D J AMBLER

Introduction

[1] Iris Tuiono applies under s 18(1)(a) of Te Ture Whenua Māori Act 1993 (“the Act”) to extinguish the life interest of Joanna Davis in several blocks of Māori land. Joanna Davis is the widow of the late Trevor Davis. Iris Tuiono is one of several adult children of Trevor Davis who hold the remainder interests in the land. The respective interests were vested by a succession order of the Court on 1 October 1996.¹ At the time of the order, Joanna Davis was in a defacto relationship with another man. The issue that arises is whether the provision in s 109(2) of the Act as amended in 2005 – whereby a widow’s life interest ends automatically upon her entering into a defacto relationship – applies to the 1996 order.

Background

[2] Trevor Davis had nine children to three different women. At the time of his death he was married to Joanna Davis. The application for succession to Trevor Davis’ Māori land interests came before the Court in 1995 and 1996. At the time of the hearing on 9 June 1996 Joanna Davis was reported to be in a defacto relationship with another man. In evidence submitted in support of the present application, Iris Tuiono states that Joanna Davis had two children from that union which subsequently ended. The minutes of the hearing on 9 June 1996 record that iris Tuiono raised the question of the defacto relationship with the Court:²

Iris Tuiono: ...I have a question – Does a life interest cease if the surviving spouse is in a defacto relationship?

Court: No.

[3] At the subsequent hearing on 1 October 1996 Iris Tuiono expressed concern about Joanna Davis receiving a life interest in the land when she was in a defacto relationship. The Court made the succession order in accordance with the intestacy provisions in s 109 of the Act and granted Joanna Davis a life interest with the remainder interests to Trevor Davis’ nine children.

¹ 5 Auckland Succession MB 74 (5 AT(s) 74).

² 5 Auckland Succession MB 22 (5 AT(s) 22).

[4] In 2012 Iris Tuiono applied to the Court to have Joanna Davis' life interest extinguished. It would appear she initially intended doing this with the consent of Joanna Davis. Joanna Davis had signed a piece of paper dated 22 January 2012 where she states, "I never wanted anything to do with my husband Trevor James Davis/Rewi's lands." This does not amount to a surrender of the life interest in satisfaction of s 109(3) of the Act. Iris Tuiono was aware of the shortcomings of the statement and subsequently she and some of her siblings made two further approaches to Joanna Davis for her to confirm that she wished to surrender her life interest. She declined to do so. (I note that I have not heard directly from Joanna Davis though the application has been brought to her attention.) Consequently, Iris Tuiono asks the Court to extinguish the life interest by reason of Joanna Davis' defacto relationship and the two children that she bore to her then defacto partner.

Discussion

[5] The Court granted Joanna Davis' life interest in Trevor Davis' land interests on 1 October 1996. Section 109(2) of the Act as it then stood provided that:

Where the owner of a beneficial interest in any Māori freehold land dies intestate leaving a surviving spouse, that spouse shall, subject to subsection (4) of this section, be entitled as of right to an interest for life or until remarriage in that interest.

[6] As from 26 April 2005, ss 109(2) to (4) of the Act were amended pursuant to s 7 of the Relationships (Statutory References) Act 2005. Since that date, s 109(2) has been to the following effect:

Where the owner of a beneficial interest in any Māori 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 defacto relationship.

[7] Thus, at the time of the 1996 order only Joanna Davis' death or remarriage could automatically end her life interest. However, since 26 April 2005 a defacto relationship may also automatically end a life interest. But the question is whether the 2005 amendment affects Joanna Davis' pre-existing life interest.

[8] In my view, the 2005 amendment does not affect Joanna Davis' life interest. That is because at law there is a presumption against legislation having retrospective effect. That was the position at common law and is today reflected in ss 6 and 7 of the Interpretation Act 1999, which provide:

6 Enactments to apply to circumstances as they arise

An enactment applies to circumstances as they arise.

7 Enactments do not have retrospective effect

An enactment does not have retrospective effect.

[9] The application of these statutory presumptions is discussed in what the Brookers' commentators to the Interpretation Act 1999 describe as the comprehensive and scholarly analysis of Asher J in *Art Deco Society (Auckland) Inc v Auckland City Council*.³ As Asher J emphasises, ss 6 and 7 must be read with s 4 of the Interpretation Act 1999 and are not absolute rules.⁴ Thus, if the words of the enactment provide otherwise or the context of the enactment requires a different interpretation, an enactment may be of retrospective effect. But the presumption is that an enactment is not of retrospective effect.

[10] Asher J goes on to consider the nature of retrospectivity. He observes that "...Acts of Parliament, insofar as they change the law, almost always change existing rights".⁵ He then draws the important distinction between an enactment giving rise to disadvantage in the form of lost expectations (which are a natural corollary of law change) and disadvantage in the form of an actual vested or accrued and enforceable right being adversely affected (which is not an ordinary corollary of law change).

[11] After rehearing to the definition of retrospectivity in *Halsbury's Laws of England* (para 54) and other leading texts, Asher J quotes from *Foodstuffs (Auckland) Limited v Commerce Commission*:⁶

The common law concerning non-retrospectivity and related interpretation legislation have both long recognised the need to strike a balance between

³ *Art Deco Society (Auckland) Inc v Auckland City Council* [2006] NZMA 49 (HC)

⁴ *Ibid* at [44]-[45].

⁵ *Ibid* at [53].

⁶ *Foodstuffs (Auckland) Limited v Commerce Commission* [2002] 1 NZLR 353 at [20].

giving effect to Parliament's will, aimed at changing the law and introducing new policies, on the one hand, and, on the other, to protecting, for reasons of justice and fairness, positions already established under the old law. In terms of the second matter, Courts and Legislatures alike have stated the principle of non-retrospectivity and have protected legally recognised interests – such as rights, titles, immunities, duties, liabilities – which “exist” or have “vested” or “accrued”... But if, broadly speaking, no existing, vested or accrued legal interests are put in jeopardy the new manifestation of Parliament's will is to be given full effect.

[12] Asher J goes on to comment:⁷

Thus, legislation changes the law often in a sudden way, and this may work to the disadvantage of some persons who were relying on the existing law to improve their position at some future time. However, the Courts distinguish disadvantage due to lost expectations, from the disadvantage that arises when an actual vested or accrued and enforceable right is adversely affected. To quote again from *Foodstuffs (Auckland) Limited v Commerce Commission* at para [42]:

[42] We accept that arbitrary consequences may appear to occur when new law is brought in with instantaneous effect... But changes in law may and do advantage some and disadvantage others depending on matters of timing. In this case, while expectations based on administrative understandings may have been dashed, no existing right or interest based on the old test was, we consider, denied.

[13] Returning to the present case, in my view the plain wording and context of the 2005 amendment give no indication that it was intended to be of retrospective effect. In other words, it was not intended to affect rights that had already accrued. Section 109(2) as amended allowed the Court to grant a life interest to a spouse or civil union partner, and in any such case that interest was for life or until he or she married or entered into a civil union or a defacto relationship. But the expanded limitation on such a life interest was not intended to apply to life interests that had already accrued by order of the Court.

[14] To adopt the distinction drawn by Asher J, the 2005 amendment may have affected the expectations of potential successors to land but it was not intended to affect actual vested or accrued rights.

[15] My conclusion is, I believe, consistent with the operation of the relevant succession provisions of the Act, being ss 109, 113, 117 and 118. They operate in

⁷ *Art Deco Society (Auckland) Inc v Auckland City Council* at [61].

three different respects. First, s 109 sets out the legal “entitlement” upon intestacy. Second, by s 113 the Court determines the persons entitled. Third, by ss 117 or 118 the Court vests the interests in the persons determined to be entitled. Once the Court makes the vesting order the extent of the persons’ interests is fixed as at that date. Importantly, s 109(2) is only relevant to the Court’s determination of entitlement - once that occurs the door on s 109(2) is shut and the Court does not have any ongoing ability to revisit “entitlement” as per any legislative amendments. Thus, s 109(2) is truly “forward-looking” as ss 6 and 7 of the Interpretation Act 1999 contemplate.

[16] Consequently, Joanna Davis’ life interest is governed by s 109(2) as it stood in 1996 and can only end automatically upon her death or remarriage. A defacto relationship will not trigger its end. However, she may always voluntarily surrender her life interest under s 109(3), as she has always been able to do.

Outcome

[17] There being no basis to extinguish Joanna Davis’ life interest, the application is dismissed.

Pronounced at 4:17pm in Whangarei on Friday 3rd day of May 2013.

DJ Ambler
JUDGE