IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT

A20150005713

UNDER	Section 113 and 118 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Tairongo Te Wiremu Amoamo also known as Tarongo Amoamo (deceased)
BETWEEN	HINE TAPUARAU DELAMERE-AMOAMO Applicant

Hearing: 347 Aotea MB 208-211 dated 19 January 2016
(Heard at Wellington)

Judgment: 29 April 2016

RESERVED JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Tairongo Amoamo died on 8 July 2015. He left a will dated 14 February 2003. No grant of probate has been sought. By his will the deceased devised his entire estate to his wife on the condition that she survived him. She did. However, Mrs Delamere-Amoamo is unable to take an absolute interest in her late husband's Māori land as she is not a member of the preferred class of alienees.

[2] A hearing was held on 19 January 2016 to consider entitlement.[1] The widow confirmed that her husband had intended his estate go to her and then on to his nieces and nephews as specified in the will. Mrs Delamere-Amoamo also confirmed that she seeks a life interest.

[3] The issue in this case is who is entitled to succeed to the Māori land interests of Tairongo Te Amoamo. Consideration will also need to be given to whether or not the entire will fails and whether or not the widow is entitled to a life interest.

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1 347 Aotea MB 208-211 (347 AOT 211)

The Law

[4] Section 108 of Te Ture Whenua Māori Act 1993 provides:

108 Disposition by will

(1) Except as provided by subsections (2) and (3), no owner of any beneficial interest in any Maori freehold land has the capacity to dispose of that interest by will.

(2) An owner of a beneficial interest in Maori freehold land may leave that interest by will to any person who belongs to any 1 or more of the following classes:

(a) children and remoter issue of the testator:
(b) any other persons who would be entitled under section 109(1) to succeed to the interest if the testator died intestate:
(c) any other persons who are related by blood to the testator and are members of the hapu associated with the land:
(d) other owners of the land who are members of the hapu associated with the land:
(e) whangai of the testator:
(f) trustees of persons referred to in any of paragraphs (a) to (e).

…

(4) Any owner of a beneficial interest in Maori freehold land may by will leave that interest to the owner's spouse, civil union partner, or de facto partner for life or for any shorter period.

(5) Any provision in a will purporting to leave a beneficial interest in Maori freehold land to any person otherwise than in accordance with subsection (2) or subsection (4) shall be void and of no effect; and that interest shall, unless disposed of in accordance with either of those subsections by some other provision of the will, pass to the persons entitled on intestacy.

(6) Where any beneficial interest in Maori freehold land is left by will to any trustee, the trustee shall not have power under the will or under any Act to sell the interest; and any provision in the will purporting to confer such power shall be void and of no effect.

[5] Section 109 of the Act also 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:

(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:
>
> (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.
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> (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.

[6] In order to determine entitlement to succeed consideration must be given as to whether the entire will fails, per s 108(2), and the deceased Māori land interests are determined under the rules of intestacy; or whether only clause 3 fails and s108(5) of the Act enables the Court to make orders in terms of clause 5 of the will.

The Law

[7] It is trite law that the so called "golden rule" in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used.[2] It is also important to underscore that prima facie the words and expressions used in a will must be given their ordinary meaning.

[8] In *Re Beckbessinger* Tipping J said:[3]

> The starting point on any question of will interpretation must be the words used by the testator. The circumstances in which one may go beyond those words and have regard to extrinsic evidence save for armchair purposes have always been limited. It is only in very narrow circumstances that one can look outside the will to derive the intention of the testator. In general terms those circumstances amount only to cases of ambiguity.

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2 See Nicky Richardson, *Nevill's Law of Trusts, Wills and Administration* (11th ed, Lexis Nexis NZ Ltd, Wellington, 2013) at p 457 citing *Browne v Moody* [1936] AC 635 at 644, [1936] All ER 1695 (PC) at 1699

3 *Re Beckbessinger* [1993] 2 NZLR 362

[9] Further, Fisher J in *Re Jensen* said:[4]

> The overriding objective of construction was to give effect to the intentions of the testator. All canons of construction must be subservient to that end. The testator's intentions were to be gleaned from an objective appraisal of the testamentary documents viewed as a whole but in cases of doubt the wording was to be interpreted in the context of those facts which must have been in the contemplation of the testator
>
> If the testamentary language is unambiguous and discloses no obvious error, the Court must give effect to it as it stands. The Court must guard against conjecture as to the testator's possible true intention notwithstanding the actual testamentary provisions

[10] If possible the will must be construed in order to avoid an intestacy.[5] In *Re Harrison* Lord Esher MR expressed the rule thus:[6]

> …when a testator has executed a will in solemn form you must assume that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is the golden rule."

[11] Chief Judge Isaac applied the "golden rule" in *Southon v Southon* wherein the deceased had left his entire estate to his wife (per clause 2 of the Will) on the condition that she survived him by 30 days.[7] His wife met that condition but could not take under the will as she did not come within the class of persons set out s 108 of the Act. In that case the applicant argued that despite the fact that clause 2 failed there remained sufficient compliance in the balance of the Will to enable the disposition in terms of the residuary clause. The respondent contended that as clause 2 failed the estate fell to be determined on intestacy and the residuary clause did not need to be considered.

[12] The Chief Judge observed that such an issue as to entitlement had not previously been determined by this Court or the Māori Appellate Court and then turned to examine the general case law regarding wills and succession to assist in his interpretation of s 108(5). He made the following points:[8]

> [22] The effect of section 108(5) of Te Ture Whenua Māori Act 1993 is similar to the 'golden rule' expressed by Lord Esher. That is to side against intestacy occurring if at all possible.
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> [23] Section 108(5) of Te Ture Whenua Māori Act 1993 clearly states that notwithstanding that any non compliant provision in a Will is void that this does not render the entire Will void and the interests of the deceased can be dealt with by subsequent complying provisions in the Will.

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4 *Re Jensen* [1992] 2 NZLR 506
5 Ibid at p 458 citing *Re Williams (dec'd)* HC Auckland M1888/SD99, 24 July 2000 at [4]
6 Ibid at p 457 citing *Re Harrison* (1885) 30 Ch D 390 (CA) at 393-394
7 *Southon v Southon – Estate of Tame Raihania Southon* [2008] Chief Judge's MB 28 (2008 CJ 28)
8 Ibid at [22] to [23]

[13] The Chief Judge then determined that in the case before him the entire Will was not void and in fact the residuary clause applied so as to entitle the deceased's grandchildren (as provided for in the residuary clause) to succeed.

Discussion

Does the entire will fail?

[14] As foreshadowed, the deceased expressed a clear intention to leave his entire estate to his wife. That provision must fail given that the widow does not fall within the class of persons set out in s 108(2) of the Act. For completeness, I note that Mrs Delamere-Amoamo indicated that there may be some sort of whakapapa relationship to her husband some eight generations back. However, no further information has been provided. Following the Māori Appellate Court decision *Nicholas v Kameta - Estate of Whakaahua Walker Kameta, Te Puke 2A2A3B1 and 2A2A3B2*, a distance of eight generations may be too remote to be relevant to succession here.[9]

[15] Even so, it is plain that the deceased did not wish to die intestate as he made further provisions in the event that his wife predeceased him. Under clause 5 of the will specific gifts of Māori land interests were made:

> 5. Specific gifts
>
> …
>
> 5.2 I give such interests in Māori land situate in Waiariki, Opotiki Bay of Plenty to my niece **Hera Puhi Swinton** ("**Hera**").
> 5.3 I give my interests in Māori land situate in Whitianga Māori Land Blocks at Whitianga, Bay of Plenty to my niece **Marlene Rose Delamere** ("**Marlene**").
> 5.4 I give my other interests in Māori land in Waiariki to **Harry Delamere**.

[16] The residuary clause also provides:

> 5.5 I give the rest of my estate to my Trustees on Trust:
> …
>
> (b) To divide the balance then remaining ("the residue") equally among those of my nieces **Hera, Marlene and Jacqueline Manaehu Rose Swinton ("Jacqueline")** who survive me.

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9 [2011] Māori Appellate Court MB 500 (2011 APPEAL 500)

[17] These provisions confirm a clear intention by the deceased to make provision for his Māori land interests. Accordingly, it is important to examine the remaining provisions of the will in such a manner as to avoid intestacy if possible.

[18] Pursuant to clause 5.1 of the will the deceased gifted his Māori land interests in "Waiariki, Opotiki Bay of Plenty" to his niece Hera Puhi Swinton. Hera Swinton is the daughter of Wharemiria Amoamo who is Tairongo Amoamo's sister. Accordingly, this gift meets the conditions of s 108(2) of the Act.

[19] However clauses 5.3 and 5.4 of the will are problematic. First, they refer to Māori land interests which do not exist according to the case manager's search. Second, the deceased has sought to devise those interests to Marlene Rose Delamere and Harry Delamere both of whom are related through the widow and not the late Mr Amoamo. Therefore, and in the absence of relevant evidence of whakapapa and land interests, these clauses do not appear to meet the conditions of s 108(2) of the Act. Clauses 5.3 and 5.4 must fail.

[20] According to the Court's records the deceased also held Māori land interests in Whakapaupakihi No 2. That block is not dealt with by the specific gifts in clause 5 of the will. Accordingly, the interests in Whakapaupakihi No 2 must fall to be considered in terms of the residuary clause.

[21] By that provision Hera Swinton, Marlene Delamere and Jacqueline Swinton are to receive the residue equally. As I have previously determined that Marlene is unable to take under the will, that devise in so far as it concerns Marlene Delamere must fail. However both Hera and Jacqueline Swinton are nieces being the children of the deceased's sister Wharerima Amoamo. They therefore satisfy s 108(2) of the Act.

[22] That said, in light of the principles set out above, I conclude that the provisions set out in the will are such that clause 5 was only to be triggered in the event that the widow died before the deceased. She survived him. My conclusion is that the entire will fails and the question of entitlement falls to be determined on intestacy per s 109 of the Act.

Who is entitled to succeed?

[23] According to the application documentation the deceased did not have any children so the persons next in line to succeed upon intestacy are his brothers and sisters living at his death, together with the issue living at his death of any such brother or sister who died before the

deceased. The application lists his five siblings as Haimona Peter Amomo (deceased), Haina Armitage nee Amoamo, Raumoa Balneavis Amoamo (deceased), Weihana Amoamo and Wharemiria Celia Swinton nee Amoamo (deceased). Wharemiria Celia Swinton had three children – Hera Swinton-Robertson, Jacqueline Manaehu Swinton and Kerry Swinton. In conclusion I determine that these are the persons now entitled to succeed.

Decision

[24] The persons entitled to succeed per s 109 of the Act are Haina Armitage nee Amoamo, Weihana Amoamo, Hera Swinton-Robertson, Jacqueline Manaehu Swinton and Kerry Swinton.

[25] Per s 109(2) Hine Delamere-Amoamo is entitled to an interest for life, or until she remarries or enters into a civil union or a de facto relationship.

[26] There will be no order as to costs.

Pronounced at 4.30 pm in Whakatane on Friday this 29thday of April 2016

L R Harvey
JUDGE