

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

**A20180002714**

UNDER Sections 231 and 238, Te Ture Whenua Māori Act  
1993

IN THE MATTER OF Karatia 3B2A2B2B and others

BETWEEN KARAITIANA NGAMOTU, JOCELYN SMITH  
AND CHEYENNE NGAMOTU  
Applicants

AND JEAN AWHINA NGAMOTU, NGAINU  
NGAMOTU, ROBERT IRAIA NGAMOTU,  
TAUTAKAHI NGAMOTU, TUMANAKO  
DEREK NGAMOTU AND LILIAN RIRI  
NGATAI AS TRUSTEES OF HAPE AND  
RANGIMARIE NGAMOTU WHĀNAU TRUST  
Respondents

Hearing: 12 June 2018, 190 Waiariki MB 154-172  
27 May 2019, 215 Waiariki MB 13-31  
(Heard at Taupō)

Judgment: 8 November 2019

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**JUDGMENT OF C T COXHEAD**

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*Tēnā koutou i ō tātou aituā maha e ngapu nei te whenua i tō rātou hinganga. Hēoi anō, e tāea te aha atu i te tangi, i te maumahara ki a rātou me tā rātou i mahi ai? Nō reira, waiho rātou ki a rātou, ko tātou ki a tatou.*

### **Hei tīmatanga kōrero - Introduction**

[1] This decision is about a whānau house. While the application seeks a review of trust and enforcement of trustees' obligations the core issue for determination relates to the whānau home, in particular, who should be administering that whānau house.

[2] On one side are the Trustees of the Hape and Rangimarie Ngamotu Whānau Trust (the whānau trust). They are guided by a trust order that contains a two-page annexure specifying that the main goal of the trustees is to keep possession of the whānau house. This annexure also sets out some basic arrangements for the upkeep of the whānau house.

[3] On the other side are the executors and trustees of the estate of Rangimarie Ngamotu. None of the executors are the trustees of the whānau trust. The will of Rangimarie Ngamotu provides that the whānau house is to be given to the executors for the use and benefit of Rangimarie Ngamotu's children.

### **Te tono - The application**

[4] The executors of the estate of Rangimarie Ngamotu, the applicants, have filed pursuant to ss 231 and 238 of Te Ture Whenua Māori Act 1993. They seek a review and enforcement of obligations of the Hape and Rangimarie Ngamotu Whānau Trust. The applicants submit the trustees have not carried out their legal obligations to the beneficiaries and fraudulent activities have taken place in relation to trust funds.

[5] The trustees of the Hape and Rangimarie Ngamotu Whānau Trust deny the allegations and submit that they have continued to administer the trust in accordance with the terms of the trust order in a transparent and fair manner.

**Kōrero whānui - Background**

[6] The whānau trust was constituted on 29 September 2009.<sup>1</sup> The current recorded trustees are Jean Awhina Ngamotu, Ngainu Ngamotu, Robert Iraia Ngamotu, Tautakahi Ngamotu, Tumanako Derek Ngamotu and Lilian Riri Ngatai.

[7] The trust was constituted to hold the Māori freehold land interests of Hape Iraia Ngamotu for the benefit of his children. The terms of the trust also state that Rangimarie Ngamotu (Mr Ngamotu's wife) is to have an interest for life, or until she remarries or enters into a civil union or a de facto relationship.

[8] The trust order also contains a two-page document titled 'Annexed Trust Deed' (the annexure). The annexure specifies that the main goal of the trustees is to keep possession of the whānau house. This annexure also sets out some basic arrangements for the upkeep of the whānau house.

[9] These arrangements include a requirement that all beneficiaries of the trust pay \$10 per week into the trust bank account. These funds and any dividends from other land interests paid into the trust bank account are to be used for rates, maintenance and upgrades to the whānau house. The annexure also provides for people staying at the whānau house to pay board and utility bills.

[10] Sadly, on 25 August 2016, Rangimarie Ngamotu passed away. In her will she appointed Karaitiana Daniel Ngamotu, Emaly Rameka and Cheyenne Ngamotu to be the executors and trustees of her estate (the executors).

[11] The will of Rangimarie Ngamotu includes provisions related to the whānau home. Clause four of the will states that the whānau house is to be given to the executors for the use and benefit of Rangimarie Ngamotu's children.

[12] A search of the whānau house title shows that it sits on general land, approximately 713 square metres in size. The original owners registered on this title were Hape Iraia Ngamotu and Rangimarie Ngamotu. They held the property as joint tenants. In 2016,

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<sup>1</sup> 90 Taupō MB 135-140 (90 TPO 135-140).

following the death of Hape Iraia Ngamotu, Rangimarie Ngamotu became the sole owner of the property through survivorship.

[13] The current recorded owners of the whānau house are Daniel Karaitiana Ngamotu, Emaly Rameka and Cheyenne Ngamotu as executors.

### **Ko te hātepe ture o te tono nei - Procedural history**

[14] The application for review of trust and enforcement of obligations was filed by the applicants on 29 April 2018.

[15] The matter first came before me on 12 June 2018, with the applicants and some of the current trustees in attendance.<sup>2</sup> At the hearing, it became apparent that many of the applicants' concerns were in relation to the whānau trust funds and the possible misappropriation of these funds by the trustees. At the conclusion of the hearing, I adjourned the matter. I issued directions for the whānau trust's bank account to be audited from the period after Rangimarie Ngamotu passed away to the present day. I also directed the whānau trust to provide the Court with bank statements and any financial documents for this period.

[16] Subsequently, from the bank statements and financial documents provided by both parties, the case manager prepared a report to the Court on the income and expenditure of the whānau trust. The case manager recommended that an audit of the trust accounts was not required as the whānau trust had very minimal income. On 28 February 2019, the Court agreed with this recommendation.

[17] On 27 May 2019, I heard the matter again, with Rangi Coffey speaking on behalf of the trustees of the whānau trust.<sup>3</sup> During the course of the hearing, it became clear to me the core issue in this matter was in relation to the control of the whānau house, namely, whether this control rested with the trustees of the whānau trust or the executors of Rangimarie Ngamotu's estate. At the conclusion of the hearing, I adjourned the matter for a reserved decision to be given.

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<sup>2</sup> 190 Waiariki MB 154-172 (190 WAR 154-172).

<sup>3</sup> 215 Waiariki MB 13 (215 WAR 13).

**Ngā kōrero a ngā Kaitono - Applicants' submissions**

[18] The applicants sought to review the conduct and actions of the trustees regarding the administration of the whānau trust. They say the trustees have misappropriated trust funds and failed to fulfil the purpose of the trust. They made several allegations:

- (a) The trustees have made a series of withdrawals from the trust bank accounts without proper authorisation;
- (b) Financial reports have not been provided to the beneficiaries upon request; and
- (c) The trustees have failed to use whānau trust money for the purposes outlined in the terms of the trust, such as for the funeral costs of Rangimarie Ngamotu and the unveiling of her son Henare Ngamotu. As a result, these costs have been covered by the applicants in their capacity as executors of Rangimarie Ngamotu's estate.

[19] The applicants argued that the will of Rangimarie Ngamotu superseded the annexure to the terms of the whānau trust, and accordingly they were the rightful owners of the whānau home. Further, the applicants contended that, as per the will of Rangimarie Ngamotu, the rates for the whānau house were being paid from her estate. As a result, the whānau trust was not required to pay the rates or for the maintenance of the whānau house. This, they argued, indicated that the whānau trust was no longer required to administer the whānau house.

[20] Additionally, the applicants say the trustees have made it difficult for them to fulfil their obligations under the will, as they continue to prevent the executors from obtaining market rent from the tenants occupying the whānau house.

[21] Ultimately, the applicants sought that the whānau trust be terminated and any payments received by the trust in relation to other land interests be distributed to the beneficiaries individually or be paid into the estate of Rangimarie Ngamotu.

**Ngā kōrero a ngā Kaiurupare - Respondents' submissions**

[22] The trustees of the whānau trust opposed the application and denied the allegations made by the applicants. They argued that as trustees they have conducted themselves in a fair and transparent manner and it is their intention to comply with their mother's wishes and instructions, which she provided to them as responsible trustees, in the annexure to the trust deed.

[23] The trustees filed bank statements from the trust's 'everyday' account for the years 2011 through to 2016. They stated that they were aware that a sum of \$2000.00 was transferred to the putea bank account of the executors without proper authorisation. As a result, the trustees contended that they were the rightful owners to these funds. They also submitted that several other accounts of the whānau trust have been closed as they no longer receive any income.

[24] Further, the trustees say the executors have made demands of the current tenants of the whānau house that were unauthorised by them. In particular, the executors have demanded that the current tenants redirect their rent payments from the whānau trust bank account to the putea bank account of the executors.

[25] At the hearing, Mrs Coffey spoke on behalf of the trustees. She stated that the trustees have no intention to terminate the whānau trust, however, if the beneficiaries wanted to take their shares out of the trust, they should be allowed to do so. Mrs Coffey also sought clarification from the Court as to the conflict between the will, which the executors were following, and the trust deed annexure, which the whānau trustees adhered to.

**Kōrerorero - Discussion**

[26] As noted above, it is clear that the primary issue causing conflict between the parties is the question of which of them has the authority to administer and make decisions in relation to the whānau house. I will consider this question first, before turning to the broader issues raised by the applicants as a part of their application for review of trust and enforcement of obligations of trust.

*Who has control of the whānau house?*

[27] The Court may, in accordance with s 214 of the Act, constitute a whānau trust in respect of any beneficial interest in Māori or general land owned by Māori. There must also be compliance with rules 12.1 and 12.3 of the Māori Land Court Rules 2011, which require the written consent of each proposed trustee to act as a trustee, and the written consents from the beneficial owners of the shares to be vested.

[28] In 2009, the Hape and Rangimarie Ngamotu Whānau Trust was constituted pursuant to s 214 of the Act vesting the Māori freehold land interests of Hape Ngamotu in the whānau trust for his children. At the time the trust was constituted, an annexure was added to the terms of the trust. At the hearing it was stated that the annexure was added by Rangimarie Ngamotu as it was her way of ensuring the whānau house would be looked after. This annexure stipulated that the main goal of the trustees was to keep possession of the whānau house.

[29] However, the whānau house is situated on general land, and is not part of the land interests vested in the whānau trust. The record of title shows that this land was jointly owned by Hape Ngamotu and Rangimarie Ngamotu. Upon the death of Hape Ngamotu, his wife, Rangimarie Ngamotu became the sole owner through survivorship. This was recorded on the title in 2016.

[30] Rangimarie Ngamotu executed her will on 6 July 2016. Clause four of her will provides that:

I GIVE the principal residence owned by me at the date of my death (situate at 11 Hinerau Grove, Taupo) to my trustees, for the use and benefit of my children. My trustees are to ensure that whoever is residing in the property shall pay market rent, the proceeds of which shall be used to pay rates, insurance and any maintenance required to keep the house in good repair. Should however no one wish to reside in the property then it is to be sold and such proceeds of sale shall fall into and form part of my residuary estate.

[31] Additionally, clause eight of the will provides:

MY executors and trustees will hold the rest of my estate on trust either to retain or sell it and:

8.1. To pay all my debts, taxes, funeral and administration expenses.

- 8.2. To set aside sufficient funds to pay for repairs and maintenance required on the property situated at 11 Hinerau Grove, Taupo.
- 8.3. The balance of my residuary estate is to be deposited into a Putea account to be administered by my trustees.

[32] It is understandable that confusion has arisen as to who is in charge of administering the whānau house. On one hand there is the annexure to the terms of the trust appointing the trustees to administer the whānau house, but on the other hand, Rangimarie Ngamotu's will states that her executors are to administer the property. Both the trustees and executors are attempting to follow the instructions of the trust order and the will respectively, and the terms of these documents are in conflict.

[33] As a matter of law, the question can be resolved relatively simply. While it was clearly the intention of Rangimarie Ngamotu at the time the whānau trust was formed that the trust would be responsible for the administration and control of the whānau home, the property was never vested in the trust and ownership of the land remained with Mrs Ngamotu. When she passed, she left explicit instructions in her will for her executors to take ownership of the property on trust for all of her children. The executors now hold the legal title to the land, and are responsible under the will for administering it for the benefit of all of the children of Rangimarie Ngamotu. Where there is a conflict between the executors and the trustees of the whānau trust as to how the whānau home should be managed, ultimately it is the executors – Daniel Karaitiana Ngamotu, Emaly Rameka and Cheyenne Ngamotu – who have the legal authority to make decisions as to the use and control of the home. Although they must be mindful in exercising this control that their guiding purpose is benefitting all of Rangimarie Ngamotu's children.

[34] That is the legal position as it currently stands. I note, however, that the parties may wish to consider how they, as a whānau, wish to go forward with the management of the whānau home. It is clear that everyone involved ultimately wants to ensure that the house is well-managed for the benefit of all whānau members. It is also clear that Rangimarie Ngamotu saw a role for both the whānau trust and her executors in maintaining and managing the home. Ultimately, the goals of the executors and the whānau trust are not in conflict – they both wish to apply their resources and skills to the retention and maintenance of the whānau home for the benefit of the family. It seems entirely possible that an arrangement could be reached enabling all parties to do so.

[35] In any event, it is likely that an amendment to the whānau trust deed will be required, either to recognise the legal rights of the executors in relation to the whānau home (which could include variation or removal of the annexure to the trust deed), or to put in place a new agreement for how the home should be administered.

[36] I direct that the whānau trust call a meeting of beneficiaries, which will include the executors, to discuss how the whānau wishes to proceed with the management of the whānau home, and then make any necessary application to the Court for variation of the trust deed (or any other orders that may be required).

### **Kua hē ngā mahi o ngā taratī? - Have the trustees breached their duties?**

[37] A review of trust is conducted pursuant to s 231 of Te Ture Whenua Māori Act 1993. Section 231 provides:

#### **231 Review of trusts**

- (1) The trustees or a beneficiary of a trust (other than a kai tiaki trust) constituted under this Part may apply to the court to review the terms, operation, or other aspect of the trust.
- (2) There can be no more than 1 review of a trust within a period of 24 consecutive months.
- (3) The court may, on any review, -
  - (a) confirm the trust order for the trust without variation; or
  - (b) exercise its powers under section 244; or
  - (c) terminate the trust if the court is satisfied that there is a sufficient degree of support for termination among the beneficiaries.

[38] The Court's supervisory powers in relation to trusts are extensive. In conducting a review of trust, the Court tries to concentrate on higher level matters of policy. While there may be a need to look at matters of operational management, the Court is not concerned with day-to-day operational issues.<sup>4</sup>

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<sup>4</sup> *Corrigan – Ngatihine H2B* (2014) 71 Taitokerau MB 72 (71 TTK 72).

[39] On review, if the Court considers it is necessary, the Court may invoke any of the armoury of powers available under the Act, such as the enforcement of obligations under s 238, or the termination of trust under s 241.

[40] The applicants have made several allegations relating to the trustees. The main allegations are centred around the misappropriation of trust funds and non-payment of trust funds.

[41] Pursuant to the s 40 report prepared by the case manager, the trust receives income from Lake Taupo Forest Trust and Rotoaira Forest in the form of dividend payments.

[42] From the period of 1 October 2016 to 30 April 2018, the whānau trust received a total amount of \$730.10 in dividend payments and a total of \$5,914.85 in whānau contributions. As I understand it, the whānau contributions should be used for the various costs associated with the whānau house, such as rates, power and maintenance. Since Rangimarie Ngamotu passed away, these payments have been continued by several whānau members.

[43] I also note that there have been several withdrawals from the trust's bank account. However, in my reading of the accounts, funds and statements that have been provided, there does not appear to be any major expenditure by the trustees.

[44] Other than the misappropriation of trust funds, the applicants have not provided any further evidence to suggest the trustees have failed to adhere to their obligations. Therefore, I do not consider the trustees have breached their duties.

[45] As I have found that the trustees have not breached their duties, I do not think it is necessary that the whānau trust should be terminated. As noted above, however, it may be appropriate that the trust order be varied to recognise the issues that have arisen concerning the management of the whānau house.

[46] Section 244 of the Act provides the Court with an explicit power to vary trust orders. That section states:

**244 Variation of trust**

- (1) The trustees of a trust to which this Part applies may apply to the court to vary the trust.
- (2) The court may vary the trust by varying or replacing the order constituting the trust, or in any other manner the court considers appropriate.
- (3) The court may not exercise its powers under this section unless it is satisfied—
  - (a) that the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and sufficient opportunity to discuss and consider it; and
  - (b) that there is a sufficient degree of support for the variation among the beneficiaries.

[47] The Court has the discretion to vary a trust order at any time. If the Court decides to exercise its discretion to vary a trust order, it may do so in light of any meeting of beneficial owners which has discussed the matter on notice.

[48] As the issue of who has control of the whānau house has been clarified above, it seems necessary that the existing annexure to the terms of the trust, be varied or removed. However, pursuant to s 244, I cannot exercise my powers to vary a trust order unless I am satisfied that the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and an opportunity to discuss. In other words, a properly constituted meeting of owners should be called to discuss any variations.

[49] At the hearing, I was informed that only three beneficiaries were in favour of a partial termination of trust and the rest had not yet been consulted. I do not consider that this degree of support meets the required threshold for a partial termination. Given there is now clarity as to who owns the house, parties may no longer in fact seek such a partial termination. This should also be discussed at the meeting of owners.

**Kupu whakatau - Decision**

[50] I direct that the trustees of the Hape and Rangimarie Ngamotu Whānau Trust are to hold a meeting of owners to discuss the variation to the trust deed.

[51] The application is dismissed.

I whakapuaki i te 10.00 am i Rotorua te 8 o ngā rā Whiringa-ā-rangi o te tau 2019

C T Coxhead  
**JUDGE**