I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE TAITOKERAU
In the Māori Land Court of New Zealand
Taitokerau District

A20100008211
CJ 2010/84

WĀHANGA *Under*	Section 45, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Winika Hāwe
I WAENGA I A *Between*	RAELENE KOHA AND KATHRYN WHEELER Ngā kaitono *Applicants*
ME *And*	CECILIA TATANA Te Kaiurupare *Respondent*

Nohoanga: *Hearing*	29 July 2021, 2021 Chief Judge's MB 1249-1262 22 April 2021, 2021 Chief Judge's MB 707-720 4 September 2019, 2019 Chief Judge's MB 1056-1073 (Heard at Whangārei)
Kanohi kitea: *Appearances*	C Linstead-Panoho for Applicants H Ammundsen for Respondent
Whakataunga: *Judgment date*	4 July 2022

TE WHAKATAUNGA Ā KAIWHAKAWĀ MATUA TUARUA C L FOX
Judgment of Deputy Chief Judge C L Fox

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Hei tīmatanga kōrero
Introduction

[1] This application was originally filed on 4 February 2010 by Wiha Tuakana and Celia Morgan, both of whom are now deceased. They were two of the five children of Winika Hāwe from her first union to Hēnare Koha. On 22 April 2021, pursuant to s 71 of Te Ture Whenua Māori Act 1993 ("the Act"), I amended proceedings to reflect that Raelene Koha and Kathryn Wheeler are now continuing with the application.[1] For clarity, I note that Winika Hāwe had two marriages. The first was to Hēnare Te Koha and from that union she had five children, namely:

(a) Pita Koha;

(b) Wiha Koha;

(c) Renata Koha;

(d) Nau (Celia) Morgan; and

(e) Annie Lloyd.

[2] From her second marriage to Paenga Wikitera she had the following children:

(a) Maraea Matiua (or Maria Mathews); and

(b) Jade Ana.

[3] The applicants seek an order under s 44 of the Act to amend the succession orders made on 18 March 1975 at 9 Kaitaia MB 48, and on 4 September 1975 at 9 Kaitaia MB 199, relating to Winika Hāwe also known as Winika Hone Haku or Winika Hone Hāwe ("the deceased"). She died on 11 November 1972.

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1 2021 Chief Judge's MB 707-720 (2021 CJ 707-720).

[4] The original application alleged that the said orders were incorrect because of a mistake, error or omission both in the presentation of the facts of the case to the Court, and on the part of the Court, on the grounds that:

(a) There was no record of any agreement or arrangement made to transfer the Māori Land interests to Paenga Wikitera; and

(b) They were never notified concerning the claims put forward and they wanted to be included.

[5] The original applicants alleged adverse effects from the orders complained of because:

(a) The original applicants were the children of Winika Hāwe, yet they were not included in the succession; and

(b) They were treated unfairly because the land belonged to their father and they only found out approximately 38 years later.

Kōrero whānui

Background

[6] The Registrar's Report and Recommendation ("the Registrar's Report") dated 26 January 2018 sets out the background to this application. The Registrar's Report is reproduced in full as follows:

REPORT AND RECOMMENDATION

Details of the mistake or omission alleged by the applicants

1. Wiha Tuakana and Celia Morgan (the original applicants) seek to amend succession orders made on 18 March 1975 at 9 Kaitaia MB 48 and on 4 September 1975 at 9 Kaitaia MB 199 relating to Winika Hawe also known as Winika Hone Haku or Winika Hone Hāwe in the blocks Herekino-Manukau 2C, Waitaha C and Kaimaumau A.

2. Both the original applicants have now passed away with Wiha Tuakana's daughter, Kathryn Wheeler and Celia Morgan's niece, Raelene Koha taking over the application as applicants.

3. The applicants claim that the said orders are incorrect because:

    a. There was no record of any agreement or arrangement made to transfer the Māori Land interests to Paenga Wikitera; and

    b. They were never notified concerning the claims put forward and they wanted to be included.

4. The applicants claim that they have been adversely affected by the orders complained of upon the following grounds:

    a. That as the children of Winika Hawe, they were not included in the succession; and

    b. That they have been treated unfairly because the land claimed belonged to their father and they have only found out approximately 38 years later.

Concise history of Orders sought to be amended

5. On 20 January 1975 Paenga Wikitera applied for succession to Winika Hawe in respect of interests in Kaimaumau A, Manukau 2C and Blk VIII Ahipara S.D blocks.

6. A form letter was sent to Paenga Wikitera on 6 March 1975, from the Māori Land Court, enclosing a schedule of Māori land interests in the name of the deceased and stating the following:

> As the applicant, it is suggested that you discuss with the other members of the family, if more than one person is entitled to succeed, and try and come to some arrangement acceptable to all successors, whereby the deceased's interests are allocated among the persons entitled.
>
> Ideally, the arrangement should provide for each of the interests of less than $50 in value going to just one person.

7. The application was part ordered on 18 March 1975 at 9 Kaitaia MB 48, then adjourned as to the Kaimaumau A block. A copy of the minute is reproduced below:

> 148 Winika Hawe, dec'd
>
> 78A/67
>
> Paenga Wikitera applicant - deceased my wife - legally married. Died 11 November 1972 at Herekino - I was present. No Will.
>
> Order 78A/67
>
> | | |
> |---|---|
> | Herekino Manukau 2C | $96.00 |
> | Waitaha C | $0.70 |
>
> Order 32/53 Ben Card 17673 to applicant.
>
> Adjourned as to Kaimaumau A.

8. The effect of the order made, under section 78A of the Māori Affairs Amendment Act 1967, was vesting the interests in Herekino-Manukau 2C and Waitaha C blocks into Paenga Wikitera (the deceased's spouse), solely.

9. On 4 September 1975 at 9 Kaitaia MB 199 orders were then made in respect of the Kaimaumau A interests. A copy of the minute is reproduced below:

> 104 Winika Hawe, dec'd
>
> 78A/67
>
> Ref KT 9/48
>
> At request of Paenga Wikitera
>
> Order 78A/67
>
> Kaimaumau A $55.00 Annie Lloyd
> fa Herekino

Identification of evidence that may be of assistance in remedying the mistake or omission

10. The applicants have provided the following documents in support of their application:

    a. A certified copy of the birth certificate for Wiha Koha, showing her father as Henare Kohu and mother as Meriana Koha; and

    b. Two whakapapa as attached and marked "A" and "B".

    c. Copies of extracts from Court records regarding:

        i. Henare Te Koha or Henare Koha or Henare Te Koha Hapakuku;

        ii. Winika Hawe or Winika Hone Haku or Winika Hone Haawe; and

        iii. Annie Lloyd.

11. Court research shows that:

    a. On 7 October 1976 at 10 Kaitaia MB 91-92 Paenga Wikitera transferred his interests in Herekino-Manukau 2C block (7.380 shares) to Annie Lloyd (Daughter of Winika Hawe from her first marriage) by way of gift.

    b. Paenga Wikitera's shares in Waitaha C block (0.063 shares) were succeeded to on 16 February 1982 at 3 Rawene MB 178 by Ririana Wikitera (his grand-daughter) solely.

12. In summary, the affected shares, from the orders being reviewed by this application, are currently held by the following owners:

a.	Herekino-Manukau 2C	Annie Lloyd	7.380 shares
b.	Waitaha C	Ririana Wikitera	0.063 shares
c.	Kaimaumau A2C	Annie Lloyd	2.779 shares

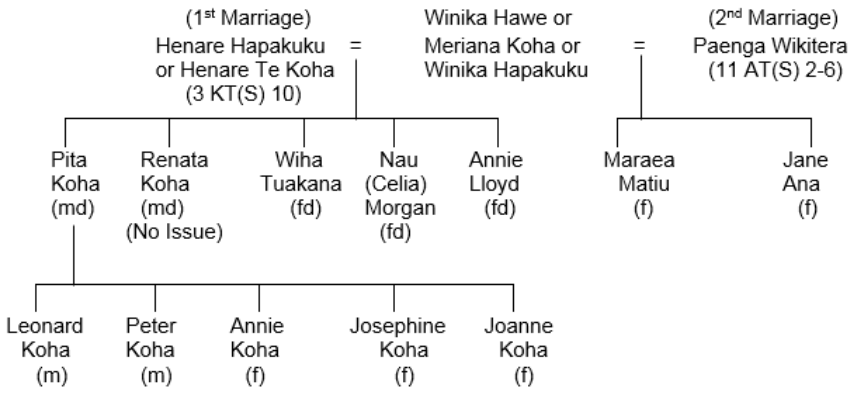
13. On 15 March 2004 at 3 Kaitaia Succession MB 10 succession to Henare Tekoha Hapakuku (first husband of Winika Hawe) took place. Evidence was given by Annie Lloyd that he only had issue from his marriage to Winika Hapakuku, namely:

i)	Pita Koha	md	Issue
ii)	Renata Koha	md	No issue
iii)	Wiha Tuakana	f	
iv)	Nau (Celia) Morgan	f	
v)	Annie Lloyd	f	

Issue of No. 1 - Pita Koha

vi)	Leonard Koha	m
vii)	Peter Koha	m
viii)	Annie Koha	f
ix)	Josephine Koha	f
x)	Joanne Koha	f

14. The following whakapapa has been compiled from evidence in Court records to show the known descendants of Winika Hawe, from both marriages:



15. The orders being reviewed were both made under section 78A of the Māori Affairs Amendment Act 1967, which provisions at the time stated:

> **78A Court may vest Māori land in successors without grant of administration**
>
> (1) Subject to the provisions of this section, where any person has died on or after the 1st day of April 1968 and administration (within the meaning of the Administration Act 1969) of the estate of that person has not been granted, the Māori Land Court may make an order vesting in the persons entitled thereto the undivided beneficial freehold interests in common in Māori freehold land of that person.
>
> (2) Application for an order under this section shall be made by the person or one of the persons claiming to be entitled to the interests in land under the will or on the intestacy of the deceased person.
>
> (3) No order shall be made under this section unless the Court is satisfied:
>
> (a) That the applicant or applicants together with any other persons named in the application are entitled to succeed to the interest;

and

(b) That the person or persons entitled to obtain a grant of administration of the estate of the deceased person do not intend to seek any such grant; and

(c) That there is no reason apparent why the estate of the deceased person should be formally administered; and

(d) That the value at the date of death, of the interests in land affected by the application did not exceed $4,000; and

(e) Where the deceased person is known to have owned beneficial freehold interests in Māori freehold land in more than one Māori Land Court district, the aggregate value, at the date of death, of his known interests in all such districts did not exceed $10,000.

(4) In making orders under this section the Court shall proceed as if all the persons living at the death of the deceased person who, if they had then attained the age of 20 years, would take any absolutely vested interest in any part of the estate, had then attained that age.

(5) No order shall be made under this section which vests in any person an interest in land which in the Court's opinion is of a value less than $50, unless either the person in whom the interest is to be so vested is already an owner of an interest in the same land or the interest to be vested in him comprises the whole of the interest of the deceased person in the land concerned.

(6) Where more than one person is entitled to share in the interests in the land covered by any application under this section, the Court may in making orders give effect to any arrangement or agreement whereby the share of any one person entitled is to be vested in any other person entitled: Provided that if the Court is satisfied that the projected arrangement or agreement is fair and equitable in the circumstances and is not contrary to the interests of the persons concerned, it may give effect to the projected arrangement or agreement notwithstanding that any of the persons concerned has not agreed thereto or objects thereto.

(7) Where the known estate of a deceased person has previously been administered and additional interests of the deceased in Māori freehold land are discovered, the Court, notwithstanding any other provision of this section, may deal with those interests under this section if it is satisfied any other course would be unduly expensive or difficult having regard to the value of the interests.

(8) Any money held by the Māori Trustee for a deceased owner of Māori land, being the proceeds of the alienation of Māori freehold land, shall for the purposes of subsection (6) of this section be deemed to be interests in Māori freehold land and the Court may dispose of them accordingly by making an order for payment thereof under section 32 of the principal Act.

16. The following provisions in place at the time, relating to succession to Māori on intestacy generally, also appear to be of relevance:

76 Succession to Māoris on intestacy generally

(1) Except as provided by subsection (2) of this section, the persons entitled on the complete or partial intestacy of a Māori who dies on or after the

> 1st day of January 1975 (being the date of commencement of Part VI of the Māori 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 Māori 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 Māori freehold land of any Māori who has died on or after the 1st day of April 1968 (being the date of commencement of the Māori 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.

17. In making the orders on 18 March 1975 at 9 Kaitaia MB 48, the Court appears to have used the provisions of sections 76 (1) and (3) by determining the person entitled to succeed, in the same manner as if the deceased were a European.

18. Section 77(1)(a) of the Administration Act 1969, deals with 'Succession to real and personal estate on intestacy', and, at the time, provided that the surviving spouse shall receive:

    a. The personal chattels absolutely; and

    b. The residue of the estate in the amount of $12,000.

19. In making the orders on 4 September 1975 at 9 Kaitaia MB 199, at the request of the deceased's spouse, the Court appears to have used the provisions of sections 78A(5) and (6) of the Māori Affairs Amendment Act 1967.

20. Those provisions clearly enabled the Court to vest interests in only some of the persons entitled, to the exclusion of others (even though those persons may not have consented to an arrangement or agreement), and taking into account the value of the interests.

Details of subsequent Orders affecting lands to which this application relates

21. The subsequent orders affected by this application are as follows:

    a. Transfer of shares from Paenga Wikitera, in Herekino-Manukau 2C block (7.380 shares), to Annie Lloyd on 7 October 1976 at 10 Kaitaia MB 91-92 (Section 213 of the Māori Affairs Act 1953).

    b. Succession to Paenga Wikitera, including interests in Waitaha C block (0.063 shares), on 5 October 1981 at 3 Rawene MB 131 in favour of Patrick Wikitera, as executor of the estate, solely (Section 81 of the Māori Affairs Amendment Act 1967).

c. Succession to Paenga Wikitera, including interests in Waitaha C block (0.063 shares), on 16 February 1982 at 3 Rawene MB 178 in favour of Ririana Wikitera (his grand-daughter) solely (Section 81A of the Māori Affairs Amendment Act 1967).

Details of payments made as a result of the Orders

22. There are no trusts formed over the blocks affected by this application, and therefore they are not expected to be revenue producing.

23. There have therefore been no payments made, in respect of the land affected, as a result of the orders made.

Reference to areas of difficulty

24. A list of affected parties has been compiled, but Court research has failed to find information regarding the descendants of Annie Lloyd, or recent contact details for Ririana Wikitera.

25. With this type of application, it is important that notice be given to as many affected parties as possible, to afford them the opportunity to provide any relevant evidence.

26. Annie Lloyd and Ririana Wikitera are the current owners of the affected shares, and therefore providing them with proper notice of this application is essential.

27. Accordingly, the applicants should be directed to provide names and contact addresses for the descendants of Annie Lloyd, and current contact details for Ririana Wikitera.

Consideration of whether matter needs to go to full hearing

28. A Court hearing is not necessary, and the matter can be dealt with on the papers before the Court.

29. The interests were correctly dealt with by the Court in accordance with the relevant provisions of succession law in place at the time.

30. In reliance on those provisions, the surviving spouse (Paenga Wikitera) was entitled to succeed to the Māori land interests of the deceased solely. Then, as sought by Paenga Wikitera, the Court had the authority to vest some of the interests into one of the deceased's descendants, to the exclusion of others, and without their consent.

Recommendation of course of action to be taken

31. If the Deputy Chief Judge is of a mind to exercise her jurisdiction, then it would be my recommendation that:

    a. A copy of this report be sent to **those affected parties, for whom we have contact details for, giving them an opportunity to comment or respond, in writing, within 28 days of the date this Report is sent to them.**

    b. The applicants are to provide names and contact addresses for the descendants of Annie Lloyd, and current contact details for Ririana Wikitera, within 14 days, so that Court staff can also provide them with a copy of the report.

c. As the orders were made pursuant to the law in force at the time, the application should be dismissed.

d. If any objections are received, then the matter should be referred to the Deputy Chief Judge for directions.

Te nohonga a te Kooti
Court hearing

[7] On 21 March 2018 and 14 May 2018, the Registrar's Report was distributed to all affected parties for whom addresses were known.

[8] Objections to the Registrar's Report were subsequently received, so the matter was set down for a preliminary hearing.

[9] The application was first heard before me in Whangārei on 4 September 2019.[2] I then adjourned the matter to enable the applicants time to discuss with affected parties the possibility of creating a whānau trust (noting that parties' interests could not be included in a whānau trust without their consent).

[10] A whānau hui arranged by the applicants was held in Auckland on 23 November 2019, however the attendance of parties was low and others that did not attend expressed their opposition to a whānau trust.

[11] A further whānau hui was held in Whangārei on 21 November 2020 to enable more parties to consider a resolution to vest their shares in a whānau trust; one voted for and seven voted against the resolution.

[12] The application was then heard by me in Whangārei on 22 April 2021 and 29 July 2021.[3]

[13] I reserved my decision at the last hearing.

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2 2019 Chief Judge's MB 1056-1073 (2019 CJ 1056-1073).
3 2021 Chief Judge's MB 707-720 (2021 CJ 707-720), and 2021 Chief Judge's MB 1249-1262 (2021 CJ 1249-1262).

Ngā Tuku Kōrero
Evidence and submissions of the parties

Te Kaitono – The Applicant

[14] Katherine Wheeler advised that she promised her mother Wiha Tuakana, she would take over this application before she died in 2011. Her mother was one of five children of Winika Hāwe to her first husband Hēnare Koha. Wiha claimed in her application that she received no notification of the Court hearings held in 1975. Wiha considered it unfair that all the children of Winika Hāwe did not benefit equally from her interests. As a result, some of Winika's mokopuna have been excluded from the land. The Herekino-Manukau block is important as Winika was "born and raised there. It was where her papakainga was." Ms Wheeler advised that after Hēnare Koha died, Winika built a home on the land. When she later met Paenga Wikitera, he moved into the house with her. Wiha lived on the land with her mother and left at the age of 28 years old. Their family urupā is there. Ms Wheeler's grandmother, grandfather and mother are buried there, yet because of the orders complained of, they have no interests that connect them to their papakainga. Ms Wheeler's siblings all support the application.

[15] The main submissions for the applicant were that:

(a) The Court granted succession in respect of Herekino-Manukau 2C and Waitaha C blocks in favour of Paenga Wikitera pursuant to s 78A of the Māori Affairs Amendment Act 1967, instead of her issue which, was wrong in law;

(b) The Court granted succession without evidence of a family arrangement; and

(c) It is necessary and in the interests of justice to correct the record to provide for the other descendants of Winika Hāwe who were excluded from receiving their entitlements or who were not provided the opportunity to have their say about who should hold the interests.

[16] Counsel for the applicant further submitted that s 76(3) of the Māori Affairs Amendment Act 1967 as amended in 1974 applied. Winika Hāwe owned undivided interests in Māori land, she died intestate on or after 1 April 1968 and before 1 January 1975, and as

at 1 January 1975 no grant of administration of her estate had been made and no action had been taken having the effect of vesting such interests in the persons entitled. Counsel therefore submits that in accordance with s 76A the persons entitled were all her children or their issue and Paenga Wikitera was at best only entitled to a life interest pursuant to 76A(2).

[17] Counsel accepts that s 78A(5) of the Māori Affairs Amendment Act 1967 prevents the Court making orders vesting interests of a value less than $50. However, in this case it is submitted that the Court did not investigate who the appropriate right holder was, therefore, counsel submits that I should cancel the orders due to the mistake made in the presentation of facts to the Court, and the mistakes of law made by the Court. Counsel further submits that I should then have the matter set down as a de novo hearing as was done by the Chief Judge in *Re: Estate of Gilbert*.

[18] Finally, counsel submits that I am required to weigh in the balance the Preamble, ss 2 and 17 of the Act, and that the evidence for the respondent was confused and inconsistent.

Ngā Kaiurupare – The Respondents

[19] Maria Mathews gave evidence that she was the only surviving family member of Winika Hāwe. She claimed that they were all involved and agreed to signing over the land. However, she admitted that she did not remember talking to Pita, Renata, Wiha, Nau (Celia) or Jade, and that the only persons she spoke to was Annie. She claimed she did not know them, although she later claimed that others such as Celia and Wiha were consulted, and they stated "whatever".

[20] The problem with her evidence is that technological problems occurred during her questioning and my direction to have counsel address the problem by filing an affidavit was not able to be complied with. Counsel for the respondent submitted that her evidence demonstrated that there were at least family discussions. He also pointed out that it was the contention of the respondents that all the children knew about the application for succession.

[21] The main submissions for the respondents, Celia Tatana and whānau, were that:

(a) The succession orders were rightly made under the Māori Affairs Amendment Act 1967 and the Administration Act 1969.

(b) Paenga Wikitera was entitled to take the land interests of Winika Hāwe, as her spouse, and in accordance with the law.

(c) That there was a family arrangement.

(d) That all the children of Winika Hāwe were aware of Paenga Wikitera's application for succession and so there is no basis for asserting lack of notice.

(e) There is the issue of passage of time; some 46 years have passed since the orders were made. In addition, several further succession orders have been made.

(f) There is a possibility that one of the interests came through Paenga Wikitera's family.

Te Ture

The Law

[22] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in s 44(1) of the Act:

> **44 Chief Judge may correct mistakes and omissions**
>
> (1) On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[23] The principles that are applied to s 45 decisions have been previously set out in numerous decisions made by the Chief Judge and myself. These are to be found in the

judgments *Ashwell - Rawinia or Lavinia Ashwell (nee Russell)*[4] and in *Tau v Ngā Whanau O Morven & Glenavy - Waihao 903 Section IX Block*.[5] I do not propose to repeat those principles again in this judgment.

[24] However, for the benefit of the parties, I note that s 44 explicitly refers to situations where the Court has made an incorrect decision due to a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct its record. For this reason, s 45 applications must be accompanied by proof of the flaw identified, either through the production of evidence not available or not known of at the time the order was made or through submissions on the law.

[25] Finally, as the Court of Appeal has confirmed, the power under s 44(1) falls into two parts:[6]

> The first is an evaluative decision as to whether the order made was "erroneous in fact and law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court or the Registrar." The second is a power, which is likely in most cases to involve discretion, to "cancel or amend the order … or make such other order …. as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission." We note that in making that decision, and exercising that power, the preamble to the Act and ss 2 and 17 are of particular significance.

Ngā Take

Issues

[26] The issues to determine in this case are:

(a) Whether there was any mistake or omission in the presentation of the facts to the Court or any error of law made; and

(b) If so, is it necessary in the interests of justice to remedy any mistake or omission.

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4 *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209), at [15].

5 *Tau v Nga Whanau O Morven & Glenavy – Waihao 903 Section IX Block* [2010] Māori Appellate Court MB 167 (2010 APPEAL 167), at [61].

6 *Inia v Julian* [2020] NZCA 423, at [10].

Te Take Tuatahi – The first issue

[27] The main legislative provisions of the Māori Affairs Act 1953 as amended in 1974 are as follows:

> **76 Succession to Māoris on intestacy generally**
>
> (1) Except as provided by subsection (2) of this section, the persons entitled on the complete or partial intestacy of a Māori who dies on or after the 1st day of January 1975 (being the date of commencement of Part VI of the Māori 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 Māori 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 Māori freehold land of any Māori who has died on or after the 1st day of April 1968 (being the date of commencement of the Māori 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 Māori land on intestacy**
>
> (1) Where any Māori 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: …
>
> (2) Notwithstanding the other provisions of this section, the surviving spouse of any Māori, who dies after the commencement of this Act intestate as to any undivided beneficial freehold interest in common in Māori freehold land, shall be entitled as of right to receive an interest in life or until remarriage in that interest, unless she signifies in writing that she does not wish to take the interest.

(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 Māori land acquired by will, by gift, by purchase, and the like transactions).

117 Rules as to succession on intestacy in special cases

(1) The persons entitled on the complete or partial intestacy of a Māori or the descendant of a Māori to succeed to his interests in Māori freehold land derived by him under or by operation of the will of any Māori or a descendant of a Māori who has died before the commencement of this Act, and the shares in which they are so entitled, shall be determined in accordance with Māori custom as it applies to gifts of land from one Māori to another, and for the purpose of determining the successors the devise of any such land shall be deemed to have been a gift thereof.

(2) Except as provided in subsection three hereof, the persons entitled on the complete or partial intestacy of a Māori or a descendant of a Māori to succeed to his intestate estate so far as it consists of a beneficial freehold interest in Māori freehold land shall be determined as if that land was European land in any case where the interest of the deceased owner was acquired by him or by a predecessor in title in any of the following ways, namely:

(a) By way of gift made after the commencement of this Act; or

(b) Under or by operation of the will of any person who dies after the commencement of this Act; or

(c) By purchase, whether effected before or after the commencement of this Act, for a pecuniary consideration; or

(d) By exchange, whether effected before or after the commencement of this Act, for land other than Māori land; or

(e) By means of a vesting order made under section four hundred and forty of this Act (relating to the vesting of sites for dwellings), or the corresponding provisions of any former Act.

(3) The rule prescribed by subsection two hereof (for the devolution on intestacy of beneficial freehold interests in certain Māori land as if they were interests in European land) shall not apply in any of the following cases, namely:

(a) Where the deceased owner personally acquired the interest in any manner referred to in subsection two hereof, if on the death of the owner there is any person who by reason of descent from him is entitled in accordance with Māori custom to succeed to the said interest; or

(b) Where the interest was acquired in any manner referred to in subsection two hereof by a predecessor in title of the deceased owner, if on the death of the owner there is any person who by reason of descent from the person who originally acquired the said interest in manner aforesaid is entitled in accordance with Māori custom to succeed to that interest; or

(c) Where the person who originally acquired the interest in any manner referred to in subsection two hereof would have been entitled in accordance with Māori custom to succeed thereto if the person from whom he acquired the land had died intestate possessed of the same. In any case to which this paragraph applies the person who originally acquired any interest as aforesaid shall be deemed to have acquired it by way of intestate succession, and all questions that may arise in relation to that interest shall be determined as if it had been so acquired.

(4) Nothing in the foregoing provisions of this section shall be construed to invalidate any succession order heretofore made with respect to any interest in Māori land, or to affect any lawful condition subject to which any interest in land has been or is hereafter acquired in manner referred to in subsection two hereof.

(5) The provisions of this section shall apply to the succession to the intestate estate of a Māori, in so far as it consists of any undivided beneficial freehold interests in common in Māori freehold land if the deceased-

(a) Died on or after the 1st day of April 1968 and before the 1st day of January 1975 and at the latter date no grant of administration of his estate has been made and no other action taken having the effect of vesting the interest in the persons entitled thereto; or

(b) Dies on or after the 1st day of January 1975.

78A Court may vest Māori land in successors without grant of administration

(1) Subject to the provisions of this section, where any person has died on or after the 1st day of April 1968 and administration (within the meaning of the Administration Act 1969) of the estate of that person has not been granted, the Māori Land Court may make an order vesting in the persons entitled thereto the undivided beneficial freehold interests in common in Māori freehold land of that person.

(2) Application for an order under this section shall be made by the person or one of the persons claiming to be entitled to the interests in land under the will or on the intestacy of the deceased person.

(3) No order shall be made under this section unless the Court is satisfied:

(a) That the applicant or applicants together with any other persons named in the application are entitled to succeed to the interest; and

(b) That the person or persons entitled to obtain a grant of administration of the estate of the deceased person do not intend to seek any such grant; and

(c) That there is no reason apparent why the estate of the deceased person should be formally administered; and

(d) That the value at the date of death, of the interests in land affected by the application did not exceed $4,000; and

(e) Where the deceased person is known to have owned beneficial freehold interests in Māori freehold land in more than one Māori Land Court district, the aggregate value, at the date of death, of his known interests in all such districts did not exceed $10,000.

(4) In making orders under this section the Court shall proceed as if all the persons living at the death of the deceased person who, if they had then attained the age of 20 years, would take any absolutely vested interest in any part of the estate, had then attained that age.

(5) No order shall be made under this section which vests in any person an interest in land which in the Court's opinion is of a value less than $50, unless either the person in whom the interest is to be so vested is already an owner of an interest in the same land or the interest to be vested in him comprises the whole of the interest of the deceased person in the land concerned.

(6) Where more than one person is entitled to share in the interests in the land covered by any application under this section, the Court may in making orders give effect to any arrangement or agreement whereby the share of any one person entitled is to be vested in any other person entitled: Provided that if the Court is satisfied that the projected arrangement or agreement is fair and equitable in the circumstances and is not contrary to the interests of the persons concerned, it may give effect to the projected arrangement or agreement notwithstanding that any of the persons concerned has not agreed thereto or objects thereto.

(7) Where the known estate of a deceased person has previously been administered and additional interests of the deceased in Māori freehold land are discovered, the Court, notwithstanding any other provision of this section, may deal with those interests under this section if it is satisfied any other course would be unduly expensive or difficult having regard to the value of the interests.

(8) Any money held by the Māori Trustee for a deceased owner of Māori land, being the proceeds of the alienation of Māori freehold land, shall for the purposes of subsection (6) of this section be deemed to be interests in Māori freehold land and the Court may dispose of them accordingly by making an order for payment thereof under section 32 of the principal Act.

[28] Counsel for the respondent submitted that the relevant provisions are s 76(1) and (3), and s 117(5). He contended that these provisions indicate that the Administration Act 1969 applies to this estate. Under s 77 of that statute a surviving spouse was entitled to the residue estate of the deceased up to the sum of $12,000, and then one-third on trust for the spouse, then two-thirds on trust for any children of the deceased. He further contended that all the requirements of s 78A were fulfilled, including that there were discussions concerning the land, although he conceded that whether this "reached the threshold to be considered an

arrangement or agreement is open to interpretation." In Court, he submitted further that all the children of Winika Hāwe were aware of the application for succession so there is no basis for asserting lack of notice.

Kōrerorero
Discussion

[29] Winika Hāwe owned undivided interests in Māori land at the date of her death, she died after 1 April 1968 and before 1 January 1975. As at 1 January 1975, no grant of administration of her estate had been made and no action had been taken having the effect of vesting such interests in those entitled. These facts are important to the interpretation of the relevant provisions of the statute. First, section 76(1) is general in nature and does not refer to undivided beneficial freehold interests. Second, section 76(2) refers to such interests. Section 76(3) refers in the plural to the "provisions" of the section.

[30] Section 76(2) directly cross-referenced s 76A and so estates involving undivided beneficial freehold interests that were captured by that provision or by s 76(3) were to be determined in accordance with s 76A(1) which favoured the children of the deceased. Under s 76A(2), the deceased's spouse was merely entitled to a life interest.

[31] Therefore the Court mistakenly applied the wrong legislation when it made the orders complained of. The respondent's reliance on the insertion of s 117(5) takes the matter no further, as that provision merely made the legislation consistent for the purposes of intestate succession rules in the special circumstances outlined in that provision.

[32] In terms of s 78A, the Court did not conduct any inquiry into whether the applicant was entitled to bring the application. Neither did it investigate whether there was a family arrangement or agreement. I note for the avoidance of doubt, that the evidence from the respondents on this point was unconvincing as the witness did not provide clear testimony either in oral or written form. By comparison we have clear written statements from the original applicants that there was no evidence of a written arrangement. If the Court had properly turned its mind to the matter before the relevant orders were made, it could have addressed this issue. By failing to do so it made a mistake in terms of the law.

[33] Compounding these mistakes, is the fact that there is no evidence the applicants received formal notice of the application or Court hearing either from the Court or the applicant. Notice should have been provided and formally recorded. This was a mistake as it was a breach of natural justice. I deal with the effect of s 78A(5) below. I am not persuaded by the evidence of the respondent that family discussions regarding the application were sufficient to constitute proper notice.

Te Take Tuarua – The second issue

[34] I turn now to consider whether it is necessary and in the interests of justice to remedy any mistake or omission. In this respect, counsel for the respondent submitted that due to the passage of time since the orders were made and the fact that there have been further orders relating to the deceased's interests, successions by later generations will be rendered uncertain if I do not uphold the relevant orders.

[35] I am mindful that there has been a long passage of time and that certainty is important. I note further that even if the Court had applied the correct law in 1975, s 78A(5) would have prevented distribution to all the children of the deceased. Counsel for the applicant rightly conceded this was an issue. Her submission was, however, that I should adopt the position of the former Chief Judge as detailed in *Re: Estate of Gilbert*. In that judgment, his Honour Durie CJ (as he was then) found that a similar, although not the same provision, namely s 135(2)(e), was as a rule:[7]

> … patently an infringement or limitation upon individual property rights that would otherwise have accrued. I am of the view that serious consideration had therefore to be given to the manner and extent of the rules application. …
>
> Reading subsection 2 of section 136 as a whole therefore, it seems that the legislature intended to ameliorate that somewhat harsh effects of the paragraphs (e) by affording the beneficiaries a prior opportunity to kohi or gather their shares to avoid the total loss of them, by coming to what are usually called "family arrangements." Such arrangements may enable at least one sibling to come in and to uphold the tūrangawaewae for his brothers and sisters. … There is nothing on the record to show that they were given any such opportunity. …

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7 *Estate of Daniel Gilbert* [1982] Chief Judge's MB 35 (1982 CJ 35).

[36] The then Chief Judge cancelled the orders in the above case with leave to file any fresh application for succession. This decision was given in 1982, before Te Ture Whenua Māori Act 1993.

Kōrerorero
Discussion

[37] I am now required to weigh in the balance the Preamble, ss 2 and 17 of the 1993 Act. Those provisions make it clear that land is a taonga tuku iho and that as a person exercising functions under the 1993 legislation, I have a responsibility to facilitate and promote the retention of their lands by the owners, their whānau and hapū and their descendants. The facts of this case indicate that one of the blocks involved is a papakainga.

[38] I note further that a number of the children of the deceased have been excluded from the land due to mistakes made by the Court. That raises significant tikanga issues which I also weigh in the balance. Access to tūrangawaewae goes to the essence of cultural identity. I accept that s 78A(5) would prevent any remedy, but in this case there was no opportunity given to engage in a proper family arrangement. Now many of the parties are deceased.

[39] Taking these matters into account, along with the submissions and evidence presented by the parties, and the Registrar's Report, I find that it is in the interests of justice that I cancel the succession orders complained of, along with all consequential orders.

Kupu whakataunga
Decision

[40] The application is granted.

Ngā Ōta
Orders

[41] The orders made on 18 March 1975 at 9 Kaitaia MB 48, and on 4 September 1975 at 9 Kaitaia MB 199 relating to Winika Hāwe also known as Winika Hone Haku or Winika Hone Hāwe are cancelled with effect from the date they were issued.

[42] There is a further order pursuant to s 47(4) consequentially amending the Court record and any orders made dependent upon the orders so cancelled.

[43] The applicants are invited to file an application for succession to Winika Hāwe in the Māori Land Court under Te Ture Whenua Māori Act 1993.

[44] The Case Manager is directed to distribute a copy of this decision to all parties.

I whakapuaki i te 4 pm i Tūranganui-a-Kiwa, te 4 o ngā rā o Hōngongoi i te tau 2022

C L Fox
DEPUTY CHIEF JUDGE