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

**A20140007967**
**CJ 2014/8**

| | |
|---|---|
| UNDER | Section 45, Te Ture Whenua Māori Act 1993 |
| IN THE MATTER OF | Neville David Nathan Whānau Trust |
| BETWEEN | BETTY YATES<br>Applicant |
| AND | NEVILLE DAVID NATHAN<br>Respondent |

Hearing: 6 November 2015 at 2015 Chief Judge's MB 814-844
(Heard at Whangārei)

Judgment: 20 April 2016

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**RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX**

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## Introduction

[1] This application filed by Betty Yates, pursuant to s 45 of Te Ture Whenua Māori Act 1993 (the Act), seeks to cancel whānau trust orders dated 21 January 2013 at 55 Taitokerau MB 187-191, relating to 148 Mangawhai Heads Road - Lot 1 Deposited Plan 149622 (the property) and the Neville David Nathan Whānau Trust (the Trust).

[2] The applicant claims that there was a mistake, error or omission in the presentation of the facts of the case to the Court, in that Neville David Nathan failed to advise the Court that the applicant claims an interest in the property pursuant to the Property (Relationships) Act 1976 (the PRA).

[3] The applicant claims that she is adversely affected by the orders complained of as while they remain in force her potential claim to relationship property has been defeated. However, I note that there is provision in the PRA to set aside dispositions that are designed to defeat rights under the PRA and in some circumstances, payment of compensation can be made.

## Background

[4] The Case Manager's Report and Recommendation dated 23 February 2015 sets out the background to the application. The report is produced in full as follows:

**REPORT AND RECOMMENDATION**

**Introduction**

1. This application filed by Betty Yates (the applicant) pursuant to section 45 of Te Ture Whenua Māori Act 1993 (the Act), seeks to cancel whānau trust orders dated 21 January 2013 at 55 Taitokerau MB 187-191, relating to Lot 1 Deposited Plan 149622 (General land) and the Neville David Nathan Whānau Trust (the trust).

2. The applicant was in a de facto relationship with the owner, Neville David Nathan, who vested such interests into the trust by the orders complained of.

3. The applicant claims the said orders are incorrect because of a mistake, error or omission in the presentation of the facts of the case to the Court, in that Neville David Nathan failed to advise the Court that the applicant had an interest in the property, pursuant to the Property (Relationships) Act 1976.

4. The applicant claims that she is adversely affected by the orders complained of as while they remain in force her claim to relationship property is defeated.

**Concise history of Order sought to be amended**

5. On 5 June 2012 Neville David Nathan applied to Te Taitokerau district Māori Land Court, pursuant to section 214 of the Act, to create and vest his interest in the land known as "Lot 1 DP149622 Blk II Mangawhai SD" into the trust.

6. The grounds for the application were stated as being:

> I wish to form a Whānau Trust for myself and my children to protect their interests and have a place they can come home to and connect with one another in the future. The buildings on the property are to be included in this trust also.

7. Filed in support of the application were the following:

   a) Notes that Neville David Nathan was the absolute owner of the land, he is a Māori and that there was no mortgage on the property;

   b) A draft terms of trust order – being the standard Te Taitokerau Whānau Trust Order, with the addition of the following clauses:

      6(b) The property is not to be put at risk of sale, e.g. for non payment of rates; and
      6(c) That the house and land not to be sold or used as collateral for lending purposes

   c) Names of Neville David Nathan's children and their dates of birth;

   d) An undated letter from Neville David Nathan stating in part that the property is to be for the use and benefit of his "bloodline" only;

   e) A search of the Land Information New Zealand (LINZ) title to the land (CFR NA89A/562), dated 30 May 2011, showing Neville David Nathan as the sole proprietor.

8. The application was heard by the Court at Whangarei on 21 January 2013 (55 Taitokerau MB 187-191) and in part the evidence transpired as follows:

> **Court:** Well, that's all in order, thank you for following up on that. The one matter that I would just bring to your attention is that, I'm making one amendment to the draft trust order because as it presently stands, the trust is only for the benefit of your descendants, which excludes you. So, it should be for the benefit of you and your descendants, alright?
>
> **N Nathan:** Yes.
>
> **Court:** I'm satisfied on the basis of the letter from ANZ produced today that although the ANZ has a registered mortgage, it has no actual interest in the land as there is no lending to Mr Nathan as at today. It is therefore appropriate to make the order today and I therefore constitute the Neville David Nathan Whānau Trust in terms of the trust order approved and amended by the Court. The tupuna is Neville David Nathan and I appoint

Neville David Nathan as sole trustee, vesting the above General land interests in him as trustee.

9. Orders were then made as follows:

The Court makes orders pursuant to Te Ture Whenua Māori Act 1993:

(a) Sections 214 and 219 constituting the Neville David Nathan Whānau Trust on the terms of trust set out in the draft trust order now approved and amended by the Court. The Tupuna is Neville David Nathan; and

(b) Sections 220 and 222 appointing:

| | Name |
|---|---|
| 1 | Neville David Nathan |

as responsible trustee and vesting the above General land interests [and asset namely the house] in him in his capacity as responsible trustee.

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

10. The applicant has provided the following documents in support of their application:

a) Copy of an order complained of made on 21 January 2013 (55 Taitokerau MB 187-191), made pursuant to sections 220 and 222 of the Act;

b) Historical search of the LINZ title to the land (CFR NA89A/562) dated 19 February 2014;

c) Current search of the LINZ title to the land (CFR NA89A/562) dated 11 June 2014; and

d) Applicant's sworn affidavit dated 26 June 2014 (Appendix 1). In brief the applicant claims that:

i. She has an entitlement to a share in the property;

ii. By vesting this interest into a whānau trust, the applicant is now unable to make a claim to it through the Property (Relationships) Act 1976;

iii. That it should not have been so vested without her consent, as a person with an interest in the land; and

iv. At the time the orders were made in 2013, the applicant was not in a relationship with Neville David Nathan.

11. By letter dated 9 February 2015, counsel for the applicant advised that:

> When the application in your Court is resolved, Ms Yates will apply to the Family Court for a division of relationship property, relying on sections 23 and 25(1)(a) and section 44(c) of the Property (Relationships) Act 1976, in that the property at 148 Mangawhai Heads Road is relationship property to which she has a claim to a half share.

12. Court research shows that:

    a) The orders made on 21 January 2013 (55 Taitokerau MB 187-191) vested a solely owned piece of General land owned by Maori, and the house thereon, into Neville David Nathan solely, as responsible trustee of the trust.

    b) Such orders were duly registered against the LINZ title (CFR NA89A/562), which records current interests in the land as follows:

        i. Proprietor – Neville David Nathan as responsible trustee;

        ii. Subject to a water supply right over parts marked A and B on DP 149622 specified in Easement Certificate 974832.2;

        iii. 5793547.1 Statutory Land Charge pursuant to section 32 Legal Services Act 2000 registered on 10 November 2003; and

        iv. 9694135.1 Caveat by Betty Yates registered on 27 May 2014.

    c) Details of the registered caveat are as follows:

> **Estate or Interest claimed**
> The abovenamed caveator claims a beneficial interest in the land contained in the above certificate of title as cestui que trust of which the registered proprietor, Neville David Nathan, is trustee.
>
> **Notice**
> Take notice that the Caveator forbids the registration of any instrument, having the effect of charging or transferring, or otherwise affecting, the estate or interest protected by this caveat, until this caveat has been withdrawn by the Caveator, removed by order of the High Court, or until the same has lapsed under the provisions of Section 145 or Section 145A of the Land Transfer Act 1952.

**Details of subsequent Orders affecting lands to which this application relates**

13. There are no subsequent orders affected by this application.

**Details of payments made as a result of the Order**

14. Due to this being General land, there is no information available as to whether any payments have been made as a result of the orders made.

15. The land concerned however is solely owned with a house on it, so it is believed to be non revenue producing.

**Reference to areas of difficulty**

16. The question at hand is one of jurisdiction and legal interpretation.

17. Does the Māori Land Court have jurisdiction to deal with property that may be the subject of a dispute under the Property (Relationships) Act 1976?
    a) Section 6 of the Property (Relationships) Act 1976 states that "Nothing in this Act shall apply in respect of any Māori land within the meaning of Te Ture Whenua Māori Act 1993".

    b) Section 214(1) of the Act states that "The Court may, in accordance with this section, constitute a whānau trust in respect of any beneficial interests in Māori land or General land owned by Māori ... ."

    c) General land owned by Māori is defined in section 4 of the Act as "General land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori."

    d) Neville David Nathan (a Māori) was recorded as the sole proprietor of the General land in LINZ records (CFR NA89A/562), and therefore the Māori Land Court did have jurisdiction.

**Consideration of whether matter needs to go to full hearing**

18. In terms of consent, section 214(2) provides that:

> (2) An application for the constitution of a whanau trust under this section –
> (a) Shall be made –
> (i) By or with the consent of the owner or all of the owners of the interests or shares to which the application relates; or ...

19. A search of the historic title to the land shows that it was transferred to Neville David Nathan solely on 3 May 1993 (Dealing No C.476594.3).

20. He was the registered owner and in this case his consent was provided to the Court, therefore the orders have been made correctly in terms of the law.

21. Whilst Neville David Nathan did not disclose to the Court that the applicant may have had a claim to the land under the Property (Relationships) Act 1976, no evidence has been produced to show that he was aware of such a claim or that a claim had been lodged.

22. The subject orders were made on 21 January 2013 (55 Taitokerau MB 187-191). The caveat on the property was not registered until 27 May 2014. At the hearing, the Court relied upon the evidence registered against the title. Had the caveat been registered earlier, notice of the Courts proceedings would have been served on the applicant, and her consent or otherwise would have been sought.

23. After taking into account all the above evidence it is considered that the Court acted within its jurisdiction, under section 214 of the said Act, when making the orders on 21 January 2013.

**Recommendation of course of action to be taken**

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

    a) A copy of this report be sent to **all affected parties to give them an opportunity to comment or respond, in writing, within 28 days of the date of this Report**;

    b) If no objections are received, then the application be dismissed; or

    c) If objections are received then the matter should be referred to the Chief Judge for directions.

## Procedure

[5] On 24 February 2015 the Case Manager's Report and Recommendation was sent to all parties, with objections and responses to be filed by 24 March 2015.

[6] McCarthy Law Limited, as counsel for the applicant, filed a memorandum of objection on 18 March 2015.

[7] On 22 July 2015 and pursuant to s 48A of the Act, the Chief Judge delegated this matter to me as Deputy Chief Judge. Accordingly, I may exercise the powers, functions and duties of the Chief Judge under ss 44 to 48.[1]

[8] Directions were issued on 12 October 2015 that counsel for the respondent file their submissions, including any evidence to be presented, by 28 October 2015. Reply evidence and submissions from counsel for the applicant were then to be filed by 4 November 2015. These were duly received.

[9] The matter was heard before me at Whangārei on 6 November 2015 where I reserved my decision.[2] Mr Nathan and Ms Yates were examined on their evidence. Following which, counsel for both parties were invited to make any further submissions in writing on the applicability or otherwise of equitable principles to this case.

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[1] 2015 Chief Judge's MB 409 (2015 CJ 409).
[2] 2015 Chief Judge's MB 814 (2015 CJ 814).

*Evidence for the Applicant – Ms Yates*

[10] In her affidavit evidence dated 26 June 2014, Betty Yates stated she believed she was entitled to a share of the property under the PRA. Her share, she believed, was derived from the fact that she and Neville David Nathan lived in a relationship for approximately 20 years at this address.

[11] Ms Yates explained that they separated for a period prior to the birth of their youngest daughter then resumed the relationship in 2004 and finally separated in 2012. They have three children from the relationship who are aged between 9 and 18 years old.

[12] The applicant noted that there has been no distribution of relationship property and by obtaining the orders to constitute the whānau trust dated 21 January 2013,[3] Mr Nathan has defeated her claim under that Act. She was not made aware that the application to constitute the whānau trust had been made and her lawyer has now registered a caveat on the title to protect her position. Ms Yates would like the whānau trust order to be cancelled.

*Evidence for Mr Nathan*

[13] An affidavit of Neville David Nathan was received on 28 October 2015 and in brief notes the following points:

(a) He bought the house in April 1993;

(b) The application to create the whānau trust was made on or about 5 June 2012;

(c) The parties were never in a de facto relationship, but did have a relationship and three children together;

(d) The applicant did not live in the house as claimed, but did come and stay for periods of time with the children;

[3] 55 Taitokerau MB 187 (44 TTK 187).

(e) The applicant lived at numerous other addresses during the time periods claimed for – he counted 11 in total in Mangawhai. These did not include addresses where she lived outside Kaitaia;

(f) They had an "on and off" relationship but never lived together in a de facto relationship;

(g) Child support was paid by the respondent for one child from 2002-2011 and from 2002-2011 for another child. He also appears to have paid some child support for a period from November 1997. All of this supports his position that they were not living together during that time;

(h) During most of the time that Mr Nathan paid child support, Betty Yates was on the Domestic Purposes Benefit for which she made declarations indicating that she was not in any sort of relationship;

(i) Custody and guardianship orders were issued by the District Court in 2002, 2003, and 2004, which also supports the evidence that they were not living together during that time; and

(j) The respondent claims that the applicant has never financially contributed or worked on the house property at Mangawhai.

*Reply evidence for Ms Yates*

[14] Ms Yates filed a further affidavit (dated 5 November 2015) in which she disputes the evidence of the respondent that they were never in a de facto relationship. Letters between her lawyer and the solicitor then acting for Mr Nathan were produced demonstrating negotiations took place in early 2013 over relationship property when an offer of $30,000 was made on behalf of Mr Nathan.

[15] The applicant claimed she lived with Mr Nathan at different times over the years of the relationship. She acknowledged that while doing so, she also collected the Domestic Purposes Benefit for a period of time. She produced evidence that she was the subject of an investigation by WINZ who had found out that she was living in a relationship with the

respondent during the period 1995-1998. She acknowledged that during this time she obtained the Domestic Benefit dishonestly. However, she was in the process of paying the money back to WINZ.

[16] Ms Yates further acknowledged that she did live at the addresses that Mr Nathan had identified, but that was only when they were not getting along.

[17] She produced documents from the Family Court, where issues over custody and guardianship were heard. In an Information Sheet prepared for those proceedings, Mr Nathan refers to Ms Yates as his "Ex de facto partner."

**The Law**

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

[15] For the benefit of the parties, I repeat the standard approach that I must follow with respect to applications made under s 45 of the Act as set out in *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)*:[4]

> (a) When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence provided by the Applicants (and any evidence in opposition);

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

(b) Section 45 applications are not to be treated as a rehearing of the original applications;

(c) The principle of *Omnia Praesumuntur Rite Esse Acta (*everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;

(d) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;

(e) The burden of proof is on the applicant to rebut the two presumptions above; and

(f) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in section 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[16] In *Tau v Nga Whanau O Morven & Glenavy – Waihao 903 Section IX Block*,[5] the Māori Appellate Court noted that the Chief Judge must exercise his jurisdiction by applying the civil standard of proof. That is, the applicant must prove their case on the balance of probabilities.

*What is the nature of Ms Yates' claim, if any, to the land?*

[18] There were two possible routes that could have been argued to establish that Ms Yates had a potential claim to this property. The first was by way of the statutory scheme under the PRA and the second through equitable principles.

[19] At the hearing, Ms McCarthy for the applicant made the following salient points relating to the nature of her claim:

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

(a) She contended that the claim of Ms Yates is not one of equity, but rather one of statutory relief, and therefore the principle "he who comes into equity must come with clean hands" does not apply in this case;

(b) If the Court finds that the claim is one of equity, then it is submitted that the applicant's conduct in receiving a benefit October 1995-April 1998 when she was not entitled to it, was not a material part of her claim for half share in the family home, and nor does it have an "immediate and necessary relation" to her claim.

(c) If the Court finds that Ms Yates' impropriety was material, then Ms Yates "washed her hands" of any previous wrongdoing. This occurred when her conduct came to an end well before the claim to the house began.

(d) Following the cessation of any impropriety, the parties were in a qualifying relationship from 1998-2012, which entitles Ms Yates to a half share in the relationship home.

(e) If the Court finds that equity applies, then Ms Yates should be granted relief and the order constituting the whānau trust should be cancelled as it is in the interests of justice to do so.

[20] On behalf of Mr Nathan, Mr Lawes contended that:

(a) He agrees that Ms Yates is seeking statutory relief, rather than relief in equity. As such, statutory rules such as s 4 of the PRA apply;

(b) However, if the principles and rules of equity apply, and with reference to the applicant having "washed her hands", counsel submitted that the applicant could not be found to have washed her hands of any previous wrongdoing.

(c) It was submitted that Ms Yates' claim was inequitable and unfair, given the applicant's behaviour and denial of the relationship in previous years. Collecting a benefit and in doing so, denying the parties were in a

relationship, was a "material part" of her claim to the house and it does have an "immediate and necessary relation" to her claim. As such it should be denied.

*Discussion*

[18] Having considered all evidence provided by the parties and the submissions of both counsel, I am satisfied that Ms Yates' claim is not one made in equity, but rather one seeking statutory relief, and therefore the principle "he who comes to equity must come with clean hands" does not apply in this case. Thus I do not need to weigh the evidence associated with her receipt of the Domestic Purposes Benefit.

[19] Both counsel agreed that the question of whether there was a qualifying de facto relationship of three or more years' duration, will need to be determined by a Court. Mr Lawes opined that in order for me to find there was a mistake or error by the Court in this case, I would have to find that the applicant has a prima facie claim under the PRA. It was counsel's submission that she does not. He noted that the PRA only applies to de facto relationships that have lasted 3 years. He submitted that the evidence in this case indicates that the relationship that Betty Yates and Neville David Nathan were involved in was not a de facto relationship as defined under the PRA and thus she does not have a claim to the property.

[20] I agree that a Court with the relevant jurisdiction should determine whether there was a qualifying de facto relationship of three years or more duration to enable a successful claim under the PRA. That is an issue for the Family Court given its expertise in matters concerning that Act. I accept that the PRA is the statutory framework that applies, and to the extent that the rules and presumptions of the common law and equity may apply, they do so in the context of that statutory code.

[21] I do not need to consider whether she has an actual interest in the land, all I need to do is determine whether there was a potential claim. I consider that the respondent knew such a claim may exist based on the evidence that negotiations under the PRA were underway. It is for the Family Court to determine whether that claim will ultimately be successful, but it cannot be denied that the possibility existed at all material times.

[22] I also disagree with Mr Lawes that the Court was entitled to take as definitive that there were no other interests involved because the applicant was not noted on the title to the property. While it is true she had no established legal interest, she still had a potential claim under the PRA. This was fully known and understood by Mr Nathan's legal counsel, and at least partially understood by Mr Nathan himself. That is why Mr Lawes' argument that she has not been able to demonstrate that any such interest exists is not relevant to how I should exercise the s 44 jurisdiction.

[23] I accept that a caveat could have been lodged on the title sooner than it was, thereby putting beyond doubt the existence of Betty Yates' potential claim, but that is a technicality. In terms of when a caveat should have been lodged, Ms Yates deposed that the relationship ended in 2012. The application to constitute the whānau trust was made in 2012. While a relationship property dispute was not an issue at that point, it was known to Mr Nathan by the time he went to Court in January 2013. There was not that great a lapse in time and negotiations had essentially just begun. Thus, I take little from the fact that a caveat was not lodged before the Court hearing and I do not consider that failure to have done so should be the basis upon which I should hold that the Court did not fall into error.

[24] Thus, there was no onus on the applicant to show that she had some *actual* interest in the property prior to the vesting in the whānau trust. What she has is a potential claim to that property under the PRA. I turn now to the issues that the existence of her claim raises in the context of exercising the s 44 jurisdiction.

**Issues**

[25] In the context of this case, and in exercising the jurisdiction of the Chief Judge under s 44, I must consider:

(a) Whether the orders made by the Court on 21 January 2013 at 55 Taitokerau MB 187-191 were erroneous in fact or in law and if so were they made as a result of any mistake or omission on the part of the Court?

(b) If the orders were erroneous, I have to consider whether it necessary in the interests of justice to remedy the mistake or omission by cancelling or amending the order?

*Discussion*

[26] Counsel for the applicant contended that under s 44 of the Act, whether or not there was a mistake made because of the presentation of the facts does not depend on the knowledge or awareness of the person giving evidence. It was argued that the test is not subjective. It was submitted that the test is whether the Court was misled by the presentation of the facts, and it is not necessary to establish whether Mr Nathan was aware that he was incorrect in his presentation of the facts.

[27] Counsel argued that even if that submission on s 44 was rejected and I decide that there is an element of subjectivity in this provision, then Mr Nathan was aware of Betty Yates' claim. Letters from solicitors for the parties were exchanged on 16 January and 12 March 2013 indicating that negotiations were under way as to relationship property matters. Those letters addressed the subject of the house as relationship property. The orders constituting the Whānau Trust are dated 21 January 2013. Therefore, at the time of the hearing, Mr Nathan and his solicitors were aware of the existence of the claim against the property. He should have told the Court. He did not and that led to the Court making a mistake.

[28] Mr Lawes, counsel for Mr Nathan, accepted that under s 44 whether or not there was a mistake made because of the presentation of the facts does not depend on whether Mr Nathan was aware of the facts. In other words, he accepted that there was no subjective element in s 44. However, he submitted that the order was not erroneous in fact or in law as Ms Yates has no claim under the PRA.

[29] I agree with both counsel that all that is needed is to ascertain whether there was a mistake or omission made by the Court. To that extent s 44 is objective in its application. However, in terms of whether it is in the interests of justice to remedy the mistake or omission, the behaviour of either the applicant or the respondent can be relevant and to this limited extent s 44 is subjective in nature.

*Were the orders made by the on Court 21 January 2013 at 55 Taitokerau MB 187-191 erroneous in fact or in law? If so, were they made as a result of any mistake or omission on the part of the Court or in the presentation of the facts to the Court?*

*The Law*

[30] Whether there was a mistake or omission turns on s 214 of the Act and other relevant considerations. Section 214 provides for the establishment of whānau trusts. It states that:

> (1) The court may, in accordance with this section, constitute a whanau trust in respect of any beneficial interests in Maori land or General land owned by Maori or, subject to any minimum share unit fixed by its constitution, any shares in a Maori incorporation.
>
> (2) An application for the constitution of a whanau trust under this section—
>
> > (a) shall be made—
> >
> > > (i) by or with the consent of the owner or all of the owners of the interests or shares to which the application relates; or
> >
> > > (ii) by the administrator of an estate to give effect to a testamentary disposition purporting to constitute a whanau trust; or
> >
> > > (iii) by the administrator of an estate acting by and with the consent of the persons entitled to succeed to the interests or shares to which the application relates; and
> >
> > (b) may be made in respect of any interests in 1 block of land, or in any 2 or more blocks of land, or in respect of any shares in 1 incorporation or in 2 or more incorporations, or in respect of any such interests and any such shares; and
> >
> > (c) may be made notwithstanding that the land or any part of it or the shares or any of them is or are already held for the purposes of any other kind of trust constituted under this Part.
>
> (3) The land, money, and other assets of a whanau trust shall be held, and the income derived from those assets shall be applied, for the purposes of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in life of the descendants of any tipuna (whether living or dead) named in the order.
>
> (4) Notwithstanding anything in subsection (3), the court may, either on the constitution of a whanau trust or on application at any time thereafter, empower the trustees to apply any part of the trust income that is not required for the purposes of the trust (as described in that subsection), for Maori community purposes generally or for such Maori community purposes as the court may specify; and, in such a case, the trustees may apply any such part of the trust income in accordance with section 218.
>
> (5) In any case to which subsection (4) applies, the beneficiaries shall be,—

> (a) where the trust is constituted in respect of any interests in any block or blocks of land, the persons beneficially entitled to those interests at the time the trust is constituted, and their descendants; or
>
> (b) where the trust is constituted in respect of any shares in a Maori incorporation, the persons who are for the time being the beneficial owners of those shares, and their descendants.
>
> (6) While a whanau trust constituted under this section remains in existence, no person shall be entitled to succeed to any interests or shares vested in the trustees for the purposes of the trust.

*Whānau Trusts*

[31] In terms of what the Court must take into account under s 214(2)(a)(i), Ms McCarthy contended that the application for the constitution of a whānau trust must be made with the consent of all the owners of the interests to which the application relates. She submitted that in this case Betty Yates consent was not sought, nor was the Court made aware of her potential claim in the property at the time of the hearing. There was an error made, she argued, because of the presentation of the facts to the Court. Counsel claimed that her client was adversely affected and while it is possible to claim for compensation for property disposed of into a trust under s 44C of the PRA, there is no other significant relationship property with which to compensate her, as Mr Nathan is on a welfare benefit.

[32] Mr Lawes argued that the provision requires consent from owners, and that means all owners of interests or shares. Betty Yates is not an owner. Thus the orders made were not erroneous.

[33] I agree with Mr Lawes as far as his interpretation of s 214(2)(a)(i) is concerned but not on the issue of whether the Court made an error.

*Relevant Considerations*

[34] That is because there are other considerations that must be relevant depending on the circumstances of any case. Thus a rigid adherence to the actual terms of this provision will not always mean that all relevant considerations have been addressed. In the area of

trust law, for example, the Māori Appellate Court has required the Lower Court consider matters beyond those strictly laid out in Te Ture Whenua Māori Act 1993.[6]

[35] I consider that the Court did not take into account a relevant consideration. It did not seek to establish whether there was a potential claim from a spouse or de facto partner due to the manner in which the facts were presented to the Court. For example, it was Mr Nathan's evidence on 21 January 2013 that his children had different mothers.[7] He indicated that the mothers should never have ownership or rights to property. That statement alone should have alerted the Court to the possibility that a claim from one of Mr Nathan's former partners existed or was imminent.

[36] The evidence is also clear that the parties were in some form of a relationship from which they had three children. This is not disputed. Only the issue of whether it was a de facto relationship for the purposes of the PRA is disputed.

[37] It would not have been hard to identify that a potential claim may have come from at least one of the respondent's previous partners. That is because Mr Nathan's original whānau trust application lists three other children. Together with the children that Mr Nathan had with Betty Yates, he has 6 children.

[38] However, the children he had with Betty Yates are the three youngest and they all hold the same surname. That too should have indicated where a potential claim may have come from. I note too that their daughter Monique was only 9 years of age in January 2013. Taken together these facts indentified in his application indicated there was some sort of relationship between Mr Nathan and Ms Yates that extended over a number of years.

[39] I further note that the property is not Māori land. It is General land acquired by Mr Nathan when he purchased it in 1993. As such, it lacks the same characteristics associated with land to which Māori people are associated in accordance with tikanga. Therefore, the principles in the Preamble and the duties outlined in ss 2 and 17 of Te Ture Whenua Māori Act 1993 do not have the same application given the facts of this particular case. As a

[6] See for example *Larkins v Kaitaia – Waihou Hutoia D2A Block* (2013) Māori Appellate Court MB 159 (2013 APPEAL 159).
[7] 55 Taitokerau MB 188 (55 TTK 188).

general rule, a property such as this is normally land that should be available for relationship property claims.

[40] As a result I find that the Court failed to take into account a relevant consideration and a mistake and error of law was made such that the associated orders constituting the whānau trust are erroneous.

*Is it necessary in the interests of justice to remedy the mistake or omission by cancelling or amending the orders?*

[41] I consider that the fact that Ms Yates has a potential relationship property claim was an important relevant consideration and the Court should have been told of it. Mr Nathan knew by January 2013 that Betty Yates intended to claim an interest in the property. Mr Nathan omitted to tell the Court of this fact during his presentation. I reject his reasons for not telling the Court and I remain unconvinced by his evidence.

[42] That is because when asked under cross-examination to explain why he failed to disclose Ms Yates potential claim to the Court, Mr Nathan claimed she did not have any such claim. He also stated that it was his solicitor who made the offer of $30,000. The advice from that solicitor, he claimed, was to settle as the cost of going to the Family Court would be expensive. He claims he did not know about the offer or agree to it at the time he went to Court to have the whānau trust established. He also did not consider he was in a relationship with Ms Yates, so he did not believe she had a claim to the property.

[43] The evidence demonstrates that Mr Nathan was fully aware of the fact that a $30,000 settlement had been offered to Ms Yates by the time he went to the Māori Land Court in January 2013. Lawyers do not make offers of that magnitude unless instructed to do so. I also consider that no negotiation would have occurred if his lawyer believed that Ms Yates had no potential claim under the PRA. It just does not seem credible that his lawyer would not have told him about the offer of $30,000 made to Ms Yates.

[44] The fact that he received legal advice during the hearing of the application to constitute the whānau trust also indicates that he knew exactly what he was doing and how he would directly benefit from it. The Court minutes for 21 January 2013 show that Mr

Nathan was still taking advice from the solicitor during the hearing, although on a different matter.

[45] Mr Nathan failed to disclose Ms Yates' potential claim to the Court and that is an issue. He should have disclosed her potential claim as that was a relevant consideration for the Court to consider before constituting the whānau trust. Rather, it is my view that Mr Nathan used the Māori Land Court process to constitute a whānau trust to defeat Ms Yates potential claim under the PRA.

[46] Therefore, I have determined that I should amend the orders made on 21 January 2013 because it is necessary in the interests of justice to remedy the mistake or omission of the Māori Land Court.[8]

[47] I have formed my opinion based upon the facts of the case, the relationship between the parties, the number of children they had together, the potential PRA claim and Mr Nathan's behaviour in Court in January 2013. He failed to disclose a relevant consideration. Due to his presentation of facts to the Court and his omission to advise the Court of a relevant consideration, the Court made an error of fact – essentially that none of Mr Nathan's former partners had a potential claim to the property.

**Orders**

[48] Accordingly, I make an order pursuant to s 44(1) of Te Ture Whenua Māori Act 1993 amending the orders made by the Māori Land Court on 21 January 2013 at 55 Taitokerau MB 187-191 constituting a whānau trust. Those orders are now made conditional. The condition is that they are subject to there being no successful PRA claim by Ms Betty Yates before the Family Court.

[49] The foregoing order is to issue forthwith pursuant to r 7.5(2)(b) of the Māori Land Court Rules 2011.

[8] 55 Taitokerau MB 187 (55 TTK 187).

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

Dated at Gisborne this 20th day of April 2016.

C L Fox
**DEPUTY CHIEF JUDGE**