IN THE MĀORI LAND COURT OF NEW ZEALAND
AOTEA DISTRICT

A20170005796

UNDER	Section 43, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Succession to Amiria Bowden
	EDWARD FORD Applicant

Hearing:	4 July 2018, 70 Tākitimu 180-192 (Heard at Hastings)
Appearances:	L Watson for Applicant
Judgment:	31 August 2018

RESERVED JUDGMENT OF JUDGE M J DOOGAN

Copies to:
L Watson, 342 Gloucester Street, Taradale, Napier 4112, leo@leowatson.co.nz

Introduction

[1] Amiria Bowden died on 18 April 1988 leaving a will dated 17 September 1980.

[2] On 18 May 2017, I made orders vesting her Māori land interests in her children in accordance with her will. There were however interests in Ōtaki 139 and Waiorongomai 1XA that she did not own at the time of her death.[1] I did not consider that they could be disposed of by her will, and dealt with them as if a partial intestacy arose.

[3] I reserved leave for any party who objected to file for a rehearing within 28 days of receipt of the minute.

[4] On 22 September 2017, Edward Ford applied for a rehearing with respect to the interests in Ōtaki 139 and Waiorongomai 1XA. Mr Leo Watson, counsel for Mr Ford, argued that I was wrong to conclude that the deceased could not dispose of the additional interests by will because she did not own them at the date of her death. I granted the application for a rehearing, to take place in Hastings at the request of Mr Ford.

[5] Judge Harvey heard evidence and arguments on 4 July 2018 in Hastings and referred the matter back to me for a final decision.

Background

[6] The interests in Ōtaki 139 and Waiorongomai 1XA were held by Pirimi Tahiwi, who died in 1969 without issue. The interests initially passed by will to his wife, Mairatea Tahiwi. When Mairatea Tahiwi died in 1996, the interests were vested in her nephew, David Pitt, in accordance with her will. In 2003, David Pitt renounced his interests as he did not consider himself properly entitled to them as he was not part of Pirimi Tahiwi's bloodline.[2]

[7] On 23 May 2005, the Court dealt with succession to the interests David Pitt had renounced. The Court ordered that the interests pass to the siblings of Pirimi Tahiwi. One

[1] 370 Aotea MB 83-86 (370 AOT 83-86).
[2] 153 Aotea MB 60 (153 AOT 60).

of these siblings was Emere Rawiri Tahiwi Gilbert, the mother of Amiria Bowden. Emere died in 1951 and her children (including Amiria) succeeded to her interests.[3]

[8] The issue now before the Court is whether the interests so received by Amiria Bowden can be disposed of under her 1980 will despite the fact that she only received these interests in 2005.

[9] If I determine that the will speaks to these interests, I must then determine how the interests should be distributed in accordance with the will.

Should the interests be dealt with under the deceased's will?

[10] Mr Watson argues that the question of whether the interests were owned by the deceased at the time of her death is irrelevant. He says that Amiria Bowden had a contingent interest.

[11] He further argues that, in the case of further interests, the Court will generally look to the will first to determine whether or not the interests can be dealt with in accordance with the will. If they cannot, or the deceased died intestate, the Court will then apply the intestacy provisions under the Act.

[12] Mr Watson referred to two examples involving the whanau in this case where the Court took the approach of first looking to the will for succession to future interests. The first is from 2005 when the Court noted that it must consider the will of Huatahi Edwards, one of Mairatea Tahiwi's successors who had predeceased her, to determine who should succeed to Huatahi's interest [4]. The other was in 2006 when the Court applied the residue clause of Amiria Bowden's will to vest further interests of Te Purewa Tahiwi in Millicent Ford.[5]

[13] Mr Watson admitted that David Pitt's renouncing of the interests in 2003 is an unusual feature which means it does not fit easily with prior precedent.

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[3] 60 Otaki MB 24-25 (60 OTI 24-25).
[4] 153 Aotea MB 60-64 (153 AOT 60-64).
[5] 177 Aotea MB 122-124 (177 AOT 122-124).

[14] Nonetheless, Counsel argues that if David Pitt was never entitled to succeed to the interests as he fell outside the bloodline, Amiria Bowden can be considered as having a contingent interest at the time of her death. The interests can therefore properly be disposed of under her will. In support of this proposition, counsel relied upon definitions of "property" and "will" from the Wills Act 2007. They suggest that a contingent or future interest can be considered property for the purposes of succession, and property which the deceased becomes entitled to after their death can be disposed of by their will.[6]

[15] This approach appears to accord with that taken by Judge Harvey in *Holden – Succession to Hiraani Te Hei.*[7] The deceased in that case had died testate in 1904. She became entitled to further interests in 1992 following a title investigation for a block at Awarua o Hinemanu. Judge Harvey noted that the Native Land Court had previously dealt with further interests obtained by the deceased in another block, and had determined that they could be disposed of by the will under the residuary clause. Accordingly, Judge Harvey ordered that the further interests from the Awarua o Hinemanu block be distributed in the same manner.

[16] I also have regard to the principle that, wherever possible, the Court is to construe a will in order to avoid intestacy.[8]

[17] On balance then, I accept that Mr Watson's argument that the interests in question can be regarded as contingent interests to which Amiria was entitled and which can therefore be succeeded to in accordance with her will.

How should the interests be distributed under the Will?

[18] Two clauses of the will need to be considered. They are clause 4(a), which provides for succession to other land interests at Ōtaki and Waiorongomai, and the residue clause (clause 5).

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[6] Wills Act 2007, s 8.

[7] *Holden – Succession to Hiraani Te Hei* (2011) 271 Aotea MB 106 (271 AOT 106).

[8] See Te Ture Whenua Māori Act 1993, s 108(5); *Southon v Southon – Estate of Tame Raihania Southon* [2008] Chief Judge's MB 28 (2008 CJ 28) at [12]; *Re Harrison* (1885) 30 Ch D 390 (CA) at 393-394 as cited in *Delemere-Amoamo – Estate of Tairongo Te Wiremu Amoamo* (2016) 139 Waiariki MB 176 (139 WAR 176) at [10].

[19] Clause 4(a) provides:

> I GIVE DEVISE AND BEQUEATH the following:-
>
> (a) All that my right title share estate or interest **owned by me at my death** in the Maori land situate at Otaki and known as Waiorongomai to my said daughter ESTELLA REWA HANSEN should she be living at my death.

[20] Clause 5 provides:

> I GIVE, DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate not hereinbefore otherwise disposed of unto my trustee UPON TRUST to pay thereout my just debts funeral and testamentary expenses and all death duty payable in respect of my estate and to stand possessed of **the residue for my said daughter MILLICENT MOIRA FORD** should she be living at my death but should she predecease me then for my said granddaughter AMIRIA FORD should she be living at my death.

[21] While the reference to the land at Otaki and Waiorongomai in clause 4(a) may prima facie be sufficiently wide to incorporate the further interests from Ōtaki 139 and Waiorongomai 1XA, the words "owned by me at my death" are unequivocal in their meaning. Clause 4(a) does not therefore capture these additional interests. Clause 5, on the other hand, is sufficiently wide to encompass the further interests in Ōtaki 139 and Waiorongomai 1XA.

[22] For the avoidance of doubt, I note that there is no amendment to the vesting of the interests in Waiorongomai No. 10 in Estella Rewa Hansen.[9] As noted by counsel, these interests were owned by the deceased at the time of her death and are therefore able to be distributed to Estella Rewa Hansen under clause 4(a) of the will.

Decision

[9] 370 Aotea MB 86 (370 AOT 86).

[23] The interests in Ōtaki 139 and Waiorongomai 1XA go to Millicent Moira Ford in accordance with clause 5 of Amiria's will. They will be vested in the whanau trust along with the other interests succeeded to by Millicent at 370 Aotea MB 83-86 in May 2017.

Orders

[24] The orders made at 370 Aotea MB 83-86 as they relate to the interests in Ōtaki 139 and Waiorongomai 1XA are annulled to s 43(5) and replaced with the following orders.

[25] There are orders:

(a) Pursuant to s 78A(7) of the Māori Affairs Amendment Act 1967 vesting the deceased's additional interests in Ōtaki 139 and Waiorongomai 1XA in Millicent Moira Ford in accordance with clause 5 of the deceased's will; and

(b) Pursuant to s 220 of Te Ture Whenua Māori Act 1993 vesting these interests in the trustees of the Millicent Ford Whānau Trust.

Pronounced in Wellington at 4.30pm this 31st day of August 2018.

M J Doogan
JUDGE