IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT

A20070005001
CJ 2007/033

UNDER	Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	the Estate of Moehuarahi Te Ruuri also known as Mere Huarahi Rotohiko or Moe Huarahi Rotohiko (Mrs Duthie) or Merehuarahi Rotohiko or Merehuarahi Ruru (Mrs Duthie) or Arehuarahi Inia or Te Morehuarahi Te Mutu or Rotohiko or Moehuarahi Rotohiko and a succession order made at 237 Rotorua MB 74-76 dated 2 February 1995
BETWEEN	TUI KUIAKAHA JULIAN Applicant
AND	AUDREY RONGOTUHIATA INIA-MCCAULL and MARILYN WHARETOROA INIA-MCGARVEY, AS TRUSTEES OF THE INIA WHĀNAU TRUST Respondents

Hearings:	10 November 2014, 2014 Chief Judge's MB 520-529 25 May 2018, 2018 Chief Judge's MB 125-163 (Heard at Rotorua)
Appearances:	J Kahukiwa for Applicant T Wara for Respondents
Judgment:	3 September 2018

RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX

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Introduction

[1] Tui Kuiakaha Julian (the applicant) seeks an order under s 45 of Te Ture Whenua Māori Act 1993 (the Act) to cancel a succession order made on 2 February 1995 at 237 Rotorua MB 74-76 relating to Moehuarahi Te Ruuri, also known as Mere Huarahi Rotohiko or Moe Huarahi Rotohiko (Mrs Duthie) or Merehuarahi Rotohiko or Merehuarahi Ruru (Mrs Duthie) or Arehuarahi Inia or Te Morehuarahi Te Mutu or Rotohiko or Moehuarahi Rotohiko (the deceased), and the subsequent orders that followed. The orders complained of vested the deceased's estate in Paki Inia (also known as Pakiorangi Ruri Inia) as the sole successor, and vested the Māori land interests received by him from the estate in the trustees of the Inia Whānau Trust.

[2] The applicant claims that the said orders are incorrect because of a mistake, error or omission on the part of the Court. The grounds for this claim include:

(a) Full information regarding all of her children has never been presented to the Court;

(b) Moehuarahi's will was never granted probate and the opportunity to challenge its content was never afforded to her children;

(c) The Court failed to take into account the moral duty of the deceased to provide for all her children under the Family Protection Act 1955 and in particular: (a) The deceased's estate comprised Māori freehold land interests deriving from her mother's ancestors; (b) the applicant is a daughter of the deceased; (c) the applicant had a good relationship with the deceased; (d) the applicant maintains a strong identity with the ancestral lands of her mother; (e) the applicant expected to derive a benefit from such ancestral lands, including culturally; and (f) in terms of her Māori land interests, the deceased's last will appeared (on one interpretation) to not make provision for the applicant, and thus disconnect her from her whakapapa;

(d) The Court failed (and thus made an error) to adjourn the consideration of the application made to it in 1994 to make the said orders so as to, inter alia, not

defeat the right of the applicant to have the deceased's moral duty to her properly assessed; and

(e) The Court failed (and thus made an error) to deal with the matter of having a previous involvement with the deceased's husband's estate (being named in his will as the solicitor for his estate), and therefore failed to deal with any appearance of bias.

[3] The applicant claims that she has been adversely affected by the order complained of because the Māori land interests of the deceased were incorrectly vested in Paki Inia or Te Pakiorangi Ruri Inia solely, and not all the rightful successors, following which it was vested in the trustees of the Inia Whānau Trust.

Background

[4] The Registrar's Report and Recommendation dated 2 July 2014 sets out the background to the application. The report is reproduced in full as follows:

REPORT AND RECOMMENDATION

Introduction

1. This application filed by Matiu Payne (the applicant) on behalf of Kuia Ruri pursuant to section 45 of Te Ture Whenua Māori Act 1993 (the Act) seeks to amend orders dated 2 February 1995 at 237 Rotorua MB 74-76 relating to succession to Mere Huarahi Rotohiko also known as Moe Huarahi Rotohiko (Mrs Duthie) or Merehuarahi Rotohiko or Moehuarahi Ruri (Mrs Duthie) or Arehuarahi Inia or Te Moehuarahi Te Mutu or Rotohiko or Moehuarahi Rotohiko (the deceased), Kuia Ruri's mother.

2. 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 upon the stated grounds that:

> 'the full facts of this case were never presented in Court, in terms of her children – some were not named and because the families understanding of the will differed from the Court's interpretation in that the family believed that all of the children were entitled to succeed'.

3. The applicant claims that Kuia Ruri and her siblings have been adversely affected by the order complained of because the Māori land interests of the deceased were incorrectly vested in Te Pakiorangi Ruri Inia and Te Oriwa Clarke only and not all the rightful successors upon the grounds that:

   a) Probate of the deceased's Will (the Will) was never sought so the

opportunity to challenge the terms of the Will was never afforded to the deceased's children;

b) The Will did not include all the children; and

c) The Will left all the Māori lands to the two children named as executors – Te Pakiorangi Ruri Inia and Te Oriwa Clarke.

4. The applicant seeks to have all the Māori land interests vested at 237 Rotorua MB 74-76 dated 2 February 1995 (and any further interests held in the name of the deceased) vested in all the deceased's children, not just in those as stated in the Will.

Concise history of Order sought to be amended/cancelled

5. At a sitting of the Court held in Rotorua on 2 February 1995, the Māori Land Court made an order pursuant to section 118 of Te Ture Whenua Māori Act 1993 vesting the Māori land interests of the deceased in terms of her Will dated 23 July 1993.

6. The following evidence was recorded at that hearing:

The deceased's children were stated as follows:

	Name	Sex
1	Paki Inia	M
2	Oriwia Clarke	F
3	Jack Ruri	M
4	Hiko Ruri	M
5	Kuia Ruri	F
6	Cyril Ruri	M
7	Selwyn Ruri	M
	Te Kirata Ruri, deceased, no issue	Mdsp
	Percy Ruri, deceased, no issue	Mdsp

Those entitled as per terms of the Will were:

	Name	Sex	Proportion
1	Paki Inia also known as Te Pakiorangi Ruri Inia	M	1/2
2	Oriwia Clarke also known as Te Oriwa Clarke	F	1/2

7. The lands were vested in Paki Inia also known as Te Pakiorangi Ruri Inia, solely in terms of the Deed of [Renunciation] of Interest In Estate filed in the High Court.

8. At the same hearing, 237 Rotorua MB 74-76 dated 2 February [1995] the Court constituted the Inia Whānau trust, vested the lands now in the name of Paki Inia into the trust and appointed trustees as follows:

	Name
1	Inia Whānau Trust: Trustees being: Te Pakiorangi Ruri Inia Audrey Rongotuhiata Inia McCaull

9. The lands vested into the trust at 237 Rotorua MB 74-76 dated 2 February [1995] were as follows:

Waiariki District

Blocks	CT Ref	Owner Prior to Trust	Shares
Lot 38B No.3H No.3 Parish of Rangitaiki Block	428885	Mere Huarahi Rotohiko also known as Moe Huarahi Rotohiko (Mrs Duthie) or Merehuarahi Rotohiko or Moehuarahi Ruri (Mrs Duthie) or Arehuarahi Inia or Te Moehuarahi Te Mutu or Rotohiko or Moehuarahi Rotohiko	0.11111
Lot 38A No.2H No.1B Parish of Rangitaiki Block			0.11111
Maketu A 150	360468		37.88
Maketu A 151	376426		33.14
Matawhaura No 3	334070, 334061		108.48929
Matawhaura No 3	334070, 334061	Mere Huarahi Rotohiko also known as Moe Huarahi Rotohiko (Mrs Duthie) or Merehuarahi Rotohiko or Moehuarahi Ruri (Mrs Duthie) or Arehuarahi Inia or Te Moehuarahi Te Mutu or Rotohiko or Moehuarahi Rotohiko	58.84753
Mourea Papakainga 3D			11.25
Mourea Papakainga No.3E No.2	350835		11.25
Paengaroa North B 10A and Lot 7 Deposited Plan 431464 and Lot 9 Deposited Plan 414313	453640		0.5
Paehinahina Mourea			19.24900
Paengaroa North B4B & Paengaroa North K Aggregated	SA27D/1171 SA27D/1170		384.98
Paengaroa South No 4 Block and Section 2-3, 6, 8 Survey Office Plan 307080	326960		1.5

Blocks	CT Ref	Owner Prior to Trust	Shares
Pukaretu	332547		19.24900
Rangitaiki Parish 29A 1	SA28D/564		0.64286
Rangitaiki Parish 29R 2	275486		1.53679
Rangitaiki Parish Lot 29R No.1	273008		1.02452
Rotoiti 13D 2	SA11A/584 etc		7.4125
Tautara 13B No 2	485101		10.6
Te Rei and Papakiore	316365		11.25000
Tikitere A			19.24900
Waipapa 2B 2	256200		36.67891
Waione 3B8 Incorporation			31.45
Rotoma No 1 Incorporation			540.00

10. There is no tipuna specifically named in the Inia Whānau Trust Order. There is nothing to suggest that trust has been established for the benefit of anyone other than the settlor, Inia Paki, and his descendants. In other words, there is no benefit to the other children of the deceased.

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

11. The applicant has provided, in support of his application, a copy of the minutes where the orders complained of were made.

12. The Court research shows that:

    a) The conditions set out in the Will of the deceased dated 23 July 1993 were applied correctly; and

    b) One of the named executors and successors, Te Oriwa Clarke, renounced her right to seek Probate and execute the Will. She also renounced her right to all interests in the estate in favour of her co-executor and successor, Te Pakiorangi Ruri Inia, solely. Deeds of Renunciation (both dated 19 September 1994) were filed in the [High] Court at Rotorua.

Details of subsequent Orders affecting lands to which application this relates

13. All the lands were placed in the Inia Whānau Trust. This remains a working trust. Further lands have been added (from sources other than the deceased). There was a change of one trustee at 266 Rotorua MB 95 dated 7 June 2002.

Details of payments made as a result of the Order

14. If any payments were made they would have been to the Inia Whānau Trust.

Reference to areas of difficulty

15. There have been no areas of difficulty identified in researching and/or compiling the preliminary report on this matter.

Consideration of whether matter needs to go to full hearing

16. The complaint about the order is really around a will that has not received a grant of probate. Family members now want to be included – the Will didn't include all the children. It left all the Māori lands to the two children named as executors – Te Pakiorangi Ruri Inia and Te Oriwa Clarke.

17. The Will stated "to vest the residue of my estate in my said children". At 237 Rotorua MB 75-76 the Court agreed that the "said children" referred to Te Paki and Te Oriwa. The other five (plus two deceased) named in the minute were not mentioned in the Will at all. To challenge this bequest, the Will ought to have been contested at the time, in a "Court of competent jurisdiction" – the High and Family Courts.

18. The application states that the family couldn't contest the Will because it wasn't probated. There is no such barrier under the Family Protection Act 1955. Indeed, the only limitation to contesting a will is set out in section 9 which states:

> 9 Limitation of proceedings
>
> (1) No application in respect of any estate shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made before the expiration of the prescribed period specified in subsection (2) of this section:
>
> Provided that the time for making an application may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary; and this power shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this Act:
>
> Provided also that no such extension shall be granted unless the application for extension is made before the final distribution of the estate, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court [and after every notice (if any) of an intention to make an application has lapsed in accordance with [[subsection (1) of section 48 of the Administration Act 1969]] shall be disturbed by reason of that application or of any order made thereon, and no action shall lie against the administrator by reason of his having made any such distribution.
>
> (2) The prescribed period mentioned in this section shall be, -
>
> (a) In the case of an application by an administrator made on behalf of a person who is not of full age or mental capacity, a period of 2 years from the date of the grant in New Zealand of administration in the estate; and

(b) In the case of any other application, a period of 12 months

> from the date of the grant in New Zealand of administration in the estate.

19. Furthermore, if the lack of probate was the impediment, the estate beneficiaries could have applied to the High Court for a Grant of Administration, or at least sought legal advice. Now, nearly 20 years later, it must be deemed to be out of time.

20. The Court followed the Will, in the absence of any order to the contrary under the Family Protection Act 1955.

21. On this basis there doesn't seem to be any case to answer, on the grounds claimed.

Recommendation of course of action to be taken

22. 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 should be dismissed pursuant to section 44(5) of Te Ture Whenua Māori Act 1993;

    c) If objections are received then the matter should be set down for hearing.

Procedural History

[5] On 2 July 2014, the Registrar's Report and Recommendation was distributed to all affected parties, for whom addresses were known, with written responses or objections to the report to be filed with the Court no later than 30 July 2014.

[6] The applicant and other siblings subsequently objected to the report so the matter was set down for a preliminary hearing.

[7] That preliminary hearing was held by the Chief Judge in Rotorua on 10 November 2014, when the application was adjourned to ensure notice to all parties and to enable them time to seek legal advice.[1]

[8] After that time, it seems that the file was deactivated as there was a delay in counsel being instructed and internally there were two changes of case managers.

[9] An amended application under s 45 was received on 23 April 2017.

[1] 2014 Chief Judge's MB 520-529 (2014 CJ 520-529)

[10] In September 2017, the Chief Judge directed the parties to file submissions on the interpretation of the deceased's will.

[11] A synopsis of submissions for the applicant dated 25 September 2017 was received on 6 October 2017. Counsel advised that Moehuaraki Te Ruuri, the deceased, died at the age of 88 years. He also advised that during her lifetime she had 14 children, seven of whom predeceased her. Counsel for the respondent accepted this number and accepted that the children were not 'accurately identified' in the Court minute.

[12] On 16 October 2017, the Chief Judge recused himself from dealing with this matter, and directed that it be referred to the Deputy Chief Judge for completion. Since that date I have been charged with considering the application.

[13] On 31 October 2017, counsel for the Inia Whānau Trust (the respondents), filed a 'Notice of Representation' and a memorandum indicating that they had just taken instructions on this matter. Counsel was directed to file submissions in reply by 17 November 2017.

[14] A synopsis of reply submissions for the respondents dated 17 November 2017 was received on the due date.

[15] On 13 December 2017, a telephone conference was held with counsel. A timetable was set out for the filing of further evidence and a hearing date was set for February 2018.

[16] On 17 January 2018, I directed that a s 40 report be commissioned and produced on the income received by the Inia Whānau Trust over a seven-year period. On 12 February 2018, an appropriate person was commissioned from Iles Casey. That report was received on 29 March 2018 and it records that the total income accords to $51,340.84 and the portion of income that relates to the Māori land interests received from Moehuarahi Te Ruuri equated to $27,344.49.

[17] A hearing was held on 25 May 2018 in Rotorua, where submissions were presented on behalf of both parties.[2] I then reserved my judgment.

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[2] 2018 Chief Judge's MB 125-163 (2018 CJ 125-163).

The Law

[18] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in section 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.

[19] 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 judgment *Ashwell - Rawinia or Lavinia Ashwell (nee Russell)*[3] and in *Tau v Nga Whanau O Morven & Glenavy - Waihao 903 Section IX Block.*[4] I do not propose to repeat those principles again in this judgment.

[20] However, for the benefit of the parties, I note that section 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 where 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.

Issues

[21] The issues for me to determine are:

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3 [2009] Chief Judge's MB 209-225 (2009 CJ 209)
4 [2010] Maori Appellate Court MB 167 (2010 APPEAL 167)

(a) whether the Lower Court erred in making an order for succession in terms of the will;

(b) whether the applicant had notice of the application for succession and constituting the whanau trust; and

(c) whether the allegation of apparent bias on the part of the Lower Court Judge can be sustained.

Submissions of the Parties

Submissions for the Applicant

[22] Mr Kahukiwa, in his submissions received on 6 October 2017, submitted that the effect of s 3 of the Family Protection Act 1955 is that a parent owes a moral duty to each of his or her offspring and that a will may be 'disturbed' if a parent has breached that duty. Counsel referred to two authorities to support this approach to the legislation. These cases being *Little & Angus*[5] and *Rogers v Rogers & Tatana*[6]. Counsel contended that, in dealing with applications for succession, it is 'axiomatic' that the Māori Land Court is bound to exercise any powers or discretions over such applications in a manner that is procedurally fair, and substantively correct. It was his argument that the moral duty owed by the deceased as testatrix, was a relevant consideration. This proposition was supported by reference to the decision of the High Court in *Re Kua*[7] in which the nature and importance of Māori land was considered a highly relevant factor in those proceedings. Mr Kahukiwa submitted that, in this case, the deceased breached this moral duty and this was a relevant consideration that the Lower Court should have taken into consideration, but did not. If it had been taken into account, the Court could have adjourned the proceedings, and directed the parties before it to apply for probate of the will. This approach would have led to the executors of the will giving notice to the other children of the deceased so they could make claims under the Family Protection Act 1955. Thus, in a nut shell, counsel argued that the Māori Land Court failed to take into account a relevant consideration, leading to an unfair result.

[5] *Little & Angus* [1981] 1 NZLR 126.
[6] *Rogers v Rogers & Tatana* (1982) HC Whangarei, A34/81, 264.
[7] *Re Kua* (1996) 15 FRNZ 312.

[23] The final submission for the applicant was that, as the Judge in the Lower Court was the solicitor for the estate, his dealing with the case gives the appearance that the matter of the applicant's rights may have been overlooked, or gives the appearance of apparent bias.

[24] In closing before me, Mr Kahukiwa referred to the preamble of the 1993 Act and the fact that Māori land is a taonga tuku iho '…exemplifying the connection of Māori to whenua through whakapapa …'. He repeated his submission that the moral duty of the deceased as the testatrix in terms of the Family Protection Act 1955 was a mandatory (or at the least a highly relevant) consideration that the Lower Court Judge should have taken into account. This, he argued, can be discerned from the 'confluence' of the 1993 Act with the Family Protection Act 1955 which together elevate 'whenua tipuna'. The fact that it is mandatory relates to it being 'infused in the preamble and sections 2 and 17', he stated.

[25] In terms of the overall justice of the case, Mr Kahukiwa concluded that the applicant merely wants to be included so that her descendants are recognised in relation to their whenua.

Submissions for the Respondents

[26] Ms Wara for the respondents submitted in reply that there was no error of law made, and that the Judge did not make an error or mistake of fact. Referring to the standard approach to the application of s 44, she noted that my jurisdiction cannot be involved unless there was an error or mistake.

[27] She also referred to the principle of finality as provided for in ss 76 and 77 of Te Ture Whenua Māori Act 1993 (the Act). In closing, she contended that there should be strong limitations on how far the Chief Judge should disturb an order made many years previously, particularly where there are deceased persons who cannot give evidence.

[28] She invoked the maxim *vigilantibus no dormientibus aequitas subvenit* – and she contended that equity aids the vigilant. Here, however, the orders complained of were made in 1994. Thus, 13 years passed before the applicant took any action and no evidence has been given to explain the delay; the inference being that the applicant did not vigilantly follow through on this matter. Now she wants to test her moral claim; yet all those with knowledge of the deceased's estate, and perhaps the deceased's reasons for the gift, have passed away and that

evidence is no longer available. Thus, the respondents will be prejudiced in any attempt to respond to such a claim.

[29] In terms of the main argument of the applicant that the Lower Court Judge failed to have regard to the moral duty owed by the deceased to all her children, she contended there was no case law to support such a proposition. In closing, Ms Wara argued that the moral duty issue cannot be a mandatory consideration because it is not provided for in the 1993 Act. There are no authorities requiring such an approach, and those that are proximate in terms of reviewing wills relate to their interpretation where clearly the Māori Land Court has no jurisdiction.

[30] Ms Wara further noted that, in 1994, all the legal requirements provided for in ss 113 and 118 of the Act dealing with succession were considered as outlined in the Court minutes. She further contended that it is inherent within the contemplation of those matters that the Court gave due consideration to those potentially entitled to succeed. Alternatively, Mrs Wara argued that the Court was not required to consider the moral duty and thus the application must fail.

[31] In terms of the allegations concerning the Judge being the solicitor for the estate, counsel submitted that this raises the issue of apparent bias. She pointed to authority from the decision in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* requiring that a judge should disqualify themselves if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the question the judge is required to decide.[8] Counsel argued that the application before the Lower Court Judge was determined on the merits. She contended that the terms of the will were certain and that there was nothing to suggest that the Judge was not impartial in resolving the applications before him, and the allegation of bias was, therefore, baseless.

[32] Finally, in terms of the overall justice of the case, Ms Wara noted the fact that Paki Inia (the applicant's brother) is now deceased and that the applicant admitted that when he was alive she would not challenge him or, in her words, "come against him."

Discussion

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[8] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72.

Issue (a): did the Court err in making an order for succession in terms of the will?

[33] I begin my discussion by reference to the preamble and ss 2 and 17 of the Act. Māori land is a taonga tuku iho to be retained in the hands of the owners, their whānau and their hapū. In applying ss 113 and 118, the Lower Court was required to exercise its discretions and powers in a manner that furthers that objective of the legislation. I agree with counsel for the applicant that there is a nice confluence between the requirements of these provisions of Te Ture Whenua Māori Act 1993 and the manner in which the Courts under the Family Protection Act 1955 have recognised the significance and importance of Māori land to all members of a whanau. I consider the decision in *Rogers v Rogers & Tatana*[9]to be an excellent example of this, despite its age. This decision continues to be cited with approval by the Family Court and the superior Courts.

[34] However, I do not consider that the approach of those Courts adds anything to the standard approach that is usually adopted in the Māori Land Court jurisdiction, given the clear terms of the preamble, and ss 2 and 17. None of the authorities cited require this Court must adjourn proceedings such as these in order to require executors to seek probate for wills such as this. On this point I consider that the submissions of Mr Kahukiwa over-reach what was required in terms of the authorities he cites in support of his submissions. Thus, I do not consider that whether there is a family protection claim or not is a mandatory or highly relevant consideration for Māori Land Court judges when assessing succession applications pursuant to a will.

Issue (b): did the applicant have notice of the application for succession and constitution of a whanau trust?

[35] However, I do think that whether there is a family protection claim under the 1955 legislation is a relevant consideration when directing notice of an application or notice of a hearing. This depends very much on the circumstances of a particular case. Notice may discharge any concern regarding a possible family protection claim, as it allows those disaffected by a will to take any relevant action in the High Court or Family Court; a matter which the Māori Court has no control over.

[9] Above n 6.

[36] In this latter respect, I return to the procedure adopted by the Māori Land Court. In the early days of the Act, the Judges along with the clerks would finish the minutes, depending on what happened in Court. In this case the minute lists some of the children who survived the deceased and who did not benefit from the terms of the will. This evidence should have alerted the Judge to the fact that he was required to consider all of their interests. The Judge in this case did this when he nearly made an order for succession to be devolved in equal shares. This was based upon his initial interpretation of the will. He changed his mind after the error in his approach was noted by counsel representing Mr Paki Inia who was present in Court.

[37] However, what the Judge did not seemed concerned about was whether all the children of the deceased who survived her received notice of the application or the Court hearing held in February 1995. There is no evidence on file to suggest that they did. Consistent with that finding, is the evidence of the applicant who claimed that she knew nothing about it.

[38] The Judge knew this as counsel advised him during the hearing that, rather than apply for probate, the solicitors decided to lodge the succession application and "with the wish of the beneficiaries in terms of the Will establish a Whanau Trust." The Court was also told "that's the main reason why they haven't consulted the others." That made it clear that they did not know about the application and the hearing.

[39] A precautionary approach would have been to adjourn at this point and at least require notice to be sent through the Registrar. This did not happen. Instead the Judge proceeded to make orders in accordance with the will, subject to the variation due to the renunciation of Oriwia Clarke, so that Paki Inia became the sole successor. He also went further to constitute a whānau trust, appointing Paki Inia and Audrey McCaull as trustees, and he vested the land interests in these two people. This was all done without notice and that was an error of law as it was a breach of natural justice.

[40] Had he adjourned for notice to be given, would this have made a difference to the result? Despite the flaw in the Judge's approach, I do not consider that it would have. That is because the terms of the will are clear and reflect the order for succession that was made. In addition, given the evidence of the applicant, I do not consider that she would have

attempted to change the outcome in 1995. That is because under cross-examination by Ms Wara, the applicant admitted she signed a letter dated 10 July 2014 to the Registrar indicating she and some of her siblings relied upon Paki "who had advised them that the estate was to be left to him to execute as the eldest son's duty." While she claimed that someone else (a paralegal) wrote the letter for her and that she just signed it, the author was still acting under her instructions and with information that she had given him. Her answers on this point were less than convincing. Thus, I do not consider that notice would have led to a different result.

[41] I add to that the length of time that the applicant lived away from where the land is situated having left Rotorua in 1970, and the limited efforts she made to visit the land or her brother Paki in Rotorua before he passed in 2001. I also note that she said under cross-examination that after her mother passed she hardly came back as "there was nothing to come back here for."

[42] I also note that the applicant waited for 14 years after the death of her mother before she filed this application under s 44. I agree with Ms Wara that, during that time, all those who could challenge her evidence, including Paki Inia, have passed. Even her own evidence suggests that it was only when her own son wanted to build on the land at Mourea that her attitude changed. I find that, prior to that, she was comfortable with Paki Inia taking responsibility for the land. This goes to whether it is necessary in the interests of justice to remedy this error of law.

Issue (c): can the allegation of apparent bias be sustained?

[43] Turning to the issue of apparent bias, I note that the Judge did make these orders despite his own name being listed upon the will as the Solicitor of the Estate. That was a mistake and should not have occurred. No matter what authority is considered, these all suggest he should have disqualified himself. That is because a fair-minded lay observer would reasonably apprehend that the Judge might not bring an impartial mind to the question the Judge was required to decide.

[44] Counsel for the respondents argued that the application before the Lower Court Judge was determined on the merits, that the terms of the will were certain and that there was nothing to suggest that the Judge was not impartial in resolving the applications before him. None of these matters represent the test for apparent bias. This I also take into account when

I consider whether it is necessary in the interests of justice to remedy this error of law.

Is it necessary in the interests of justice to remedy the mistake or omission?

[45] Having regard to the special and unique circumstances of this case, I do not consider that it is in the interests of justice to remedy the errors of law in this case by *cancelling* the order for succession complained of.

[46] However, errors of law were made and the applicant has innocent children and mokopuna who have a whakapapa relationship with the land, which it seems some wish to enjoy. Taking into account the preamble and ss 2 and 17, I will *amend* the order constituting the Inia Whānau Trust by naming the tīpuna as Moehuarahi Te Ruuri also known as Mere Huarahi Rotohiko and thereby including the applicant, her natural children and grandchildren as beneficiaries of the trust. Also included will be any other natural children of this tipuna, and/or their issue.

Orders

[47] Having regard to the above, I decline to exercise my jurisdiction under s 45 of the Act to *cancel* the succession order made on 2 February 1995 at 237 Rotorua MB 74-76 relating to Moehuarahi Te Ruuri also known as Mere Huarahi Rotohiko or Moe Huarahi Rotohiko (Mrs Duthie) or Merehuarahi Rotohiko or Merehuarahi Ruru (Mrs Duthie) or Arehuarahi Inia or Te Morehuarahi Te Mutu or Rotohiko or Moehuarahi Rotohiko (the deceased).

[48] I am prepared to *amend* the order constituting the Inia Whānau Trust by renaming the tīpuna as Moehuarahi Te Ruuri also known as Mere Huarahi Rotohiko and thereby including the applicant, her natural children and grandchildren as beneficiaries of the trust. Also included will be any other natural children of this tīpuna, and/or their issue, and an order is made accordingly.

[49] I do not consider that there needs to be any accounting by the trustees for money expended prior to this decision due the inclusion of the further beneficiaries of the whanau trust. Until this point they have acted in good faith based upon their reasonable expectation that the orders of the Court were final. From this point on, as trustees for all the whānau they

are required to act impartially, in accordance with their obligations and duties as trustees and in a manner that furthers the interests of all beneficiaries of the trust.

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

Pronounced at 11.50 am in Gisborne on Monday this 3rd day of September 2018.

C L Fox
DEPUTY CHIEF JUDGE