IN THE MĀORI LAND COURT OF NEW ZEALAND
TĀKITIMU DISTRICT

A20150004258

UNDER	Sections 113 and 118, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An application per to succeed to the Māori land interests of James Keepa also known as Tohoriri Jim Kepa or Tonoriri (Jim) Kepa or Tonoriri Jim Kepa or James Tono Kepa or Jim Tonoriri Keepa or Tonoriri (Jim) Keepa
BETWEEN	FRANCES RACHEAL KEPA Applicant
AND	SHARON KAUTAI AND FRANCES ERUTOE Respondents

Hearing: 44 Takitimu MB 297-301 dated 8 September 2015
36 Te Waipounamu MB 113-118 dated 4 March 2016

Appearances: Frances Kepa in person
Sharon Kautai and Frances Erutoe in person

Judgment: 28 September 2016

INTERIM JUDGMENT OF JUDGE L R HARVEY

Introduction

[1] Frances Kepa says she is a child of James Keepa and now seeks to succeed to his Māori land interests. That claim is opposed by Sharon Kautai and Frances Erutoe, nieces of James Keepa, who argue that their uncle died without issue.

[2] On 4 July 2016 I directed Sharon Kautai to provide the Court with a DNA test regarding the link with Ms Kepa and the deceased within 21 days. Ms Kautai now seeks reasons as to why the test has to be arranged by her when the burden of proof should be on the applicant.

[3] This decision therefore addresses the issue of whether or not Sharon Kautai should be responsible for arranging the DNA testing.

Background

[4] On 3 March 1986 orders were issued per s 78 of the Māori Affairs Amendment Act 1967 vesting the interests of Piriniha Keepa in his son James Tonoriri Jim Keepa solely, the deceased in the present case.[1] The order was made on the basis that the deceased's widow, Rahera Keepa, appeared and gave evidence that she did not wish to take a life interest and that it was the wish of her and her three daughters that the interests should go to Mr Keepa solely.

[5] Following that, on 13 November 1986, Mary Erutoe (a daughter of Piriniha and Rahera Keepa) applied per s 452 of the Māori Affairs Act 1953 to amend the succession order issued on 3 March 1986. Ms Erutoe claimed that Rahera Keepa had not discussed the succession with her or her two sisters Heria or Elizabeth Keepa and Katerina Komene. She argued that her mother had no authority to claim on her behalf that she wished the interests to go to Mr Keepa solely. Ms Erutoe submitted that she and her sisters had been wrongly excluded from the succession and sought an amendment to include herself and her sisters with their brother to share equally.

[6] A hearing was held on 7 April 1988 to consider the s 452 application.[2] Ms Erutoe gave evidence that she was not aware of the application for succession and did not agree that her brother should succeed solely. Ms Erutoe was unsure whether her two sisters had agreed with that arrangement. She confirmed that her mother died in October 1986. Ms Erutoe considered that she should receive a share in her father's estate mainly for the benefit of her children and stated that her sisters supported her stance. Ms Erutoe also confirmed that her brother had no children. Mr Keepa was given notice of the hearing and an opportunity post the hearing to file an objection to the application. No response was received.

[7] Judge Marumaru subsequently filed a report to the Chief Judge recommending that the applicant's evidence be accepted. He considered that the Court had been wrong to exclude Ms Erutoe and her sisters without receiving direct evidence from them. Judge Marumaru considered that the order be amended to provide for the children of Piriniha Keepa equally.

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1 1 Auckland Succession MB 41 (1 AT(S) 41)
2 2 Aotea MB 31-32 (2 AOT 31-32)

[8] On 28 September 1989 the Deputy Chief Judge issued a decision which supported the recommendation of Judge Marumaru and the orders were amended accordingly.[3]

[9] Rahera Keepa died on 5 November 1986 and succession orders were eventually issued on 3 April 2014.[4] Rahera Keepa had 12 children in total from three unions. The first was with Parinihi Keepa - they had 6 children – Ngaiwi-O-Motu Keepa, Mary Erutoe, James Keepa, Haora Keepa, Katerina Keepa and Heria Keepa. The second union was with Raymond Growden and they had 4 children – Rita Shebank, Tamaki Mercer, Raymond Growden and Peter Growden. The third union was with Frank Glavish. They had 2 children Ivan Glavish and Frances Glavish.

[10] On 19 September 2013 Ms Erutoe and her sisters Katerina Komene and Heria Keepa applied for succession to the estate of James Keepa. Ms Erutoe is a daughter of Mary Erutoe and therefore a niece to Mr Keepa. A death certificate was filed with the application which records that he had two children, a daughter aged 30 years and a son aged 32.

[11] That application was heard before Judge Reeves on 5 December 2013.[5] At the hearing it became apparent that Ms Erutoe did not herself have personal knowledge of whether James Keepa in fact had any children. Judge Reeves spoke to Heria Keepa who acknowledged that she was not brought up with her brother and although she did not know if he had any children she considered it may be possible that he did. Judges Reeves then adjourned the proceedings and directed that a s 40 report be prepared as to whether or not there are children or whangai who should be considered in the succession.

[12] The s 40 report was completed on 11 February 2014, noting the evidence given on 7 April 1988 that James Keepa had no children. It also recorded evidence received from Katerina Komene showing James Keepa to have one child named Frances Racheal Kepa born on 9 June 1973. The report stated that Frances's age was different from that listed on the death certificate and that no information could be found on the son listed on the death certificate. A recommendation was made that a copy of the application be sent to Frances Kepa and that the case be adjourned sine die to allow the children of James Keepa to consider their options. A further hearing was held before Judge Reeves on 6 March 2014 where Ms Erutoe agreed with the adjournment sine die. [6]

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3 1989 Chief Judge's MB 220 (1989 CJ 220)
4 24 Te Waipounamu MB 1-6 (24 TWP 1-6)
5 21 Te Waipounamu MB 270-275 (21 TWP 270-275)

Procedural history

[13] As foreshadowed, on 17 July 2015 Frances Kepa applied to succeed to James Keepa. She provided a copy of her birth certificate which records James Keepa as her father. Her date of birth is recorded as 9 June 1973. She stated that the other person referred to in the death certificate is her brother Alexander Carroll whose birth certificate also has James Keepa recorded as his father. Ms Kepa claimed however that Mr Carroll is not the biological child of James Keepa.

[14] The application was heard before me on 3 November 2015.[7] An objection had been filed by Sharon Kautai who sought an adjournment to Christchurch so she could give evidence. At the hearing Ms Keepa stated that a half-sister of the deceased had told her that the whānau of James Keepa were split – that there are two of his half-sisters who acknowledged Ms Kepa as his child while there are three full sisters that did not. Ms Kepa's half-sister Sheena Carroll also spoke in support of the application. She stated that Mr Carroll was not James Keepa's son despite his name being recorded on the birth certificate. The case was then adjourned to Christchurch for receipt of the evidence of Sharon Kautai.

[15] Mr Carroll subsequently provided a letter to the Court confirming that the evidence given by Ms Kepa and Ms Carroll at the hearing was correct. He stated that he has no intention to succeed to or challenge Ms Kepa's application.

[16] Judge Reeves heard the proceedings on 4 March 2016 in Christchurch.[8] Ms Erutoe appeared along with Sharon Kautai and Mereare Grey-Schumacher. Ms Kautai stated that she had no knowledge that James Keepa had any children. She also referred to the evidence given at the 1988 hearing concerning the s 452 application where her mother stated that James Keepa had no children. Ms Kautai also pointed out the difference in age between what is recorded on the death certificate and Ms Kepa's age. She also raised doubt as to Mr Carroll being a son. Ms Grey-Schumacher stated that she had no knowledge of James Keepa having children. The case was then adjourned to Takitimu for a determination.

[17] As foreshadowed, I issued a direction on 4 July 2016 that Ms Kautai as respondent should provide the Court with a DNA test regarding the connection, if any, between the deceased and Ms Kepa within 21 days.

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6 23 Te Waipounamu MB 108 (23 TWP 108)
7 44 Takitimu MB 297 (44 TKT 297)
8 36 Te Waipounamu MB 113 (36 TWP 113)

Applicant's submissions

[18] Ms Kepa submitted that she is the child of James Keepa as evidenced by her birth certificate. She stated that she had met her father and has support from two of her father's half siblings. Ms Kepa confirmed that her brother Mr Carroll is not the biological son of the deceased despite being listed as such on his birth certificate. Her mother was in a relationship with James Keepa while she was married to the father of Sheena and Alexander Carroll.

Respondents' submissions

[19] Ms Kautai stated that she grew up with the knowledge that James Keepa had no children. She has not heard of the applicant or seen her at any family events. Ms Kautai also referred to the proceedings initiated by her mother in relation to the Chief Judge application regarding succession to Parinihi Keepa. At that hearing Mary Erutoe gave evidence that James Keepa had no children. Despite being given the opportunity to object James Keepa made no response.

[20] In addition, Ms Kautai questioned the reliability of the evidence provided at previous hearings. She pointed out that the ages of the children listed on the death certificate do not match the age of the applicant. She is also not convinced of that James Keepa is the applicant's father despite his name being recorded on the birth certificates for the applicant and her brother. Ms Kautai added that the applicant does not appear to be clear on her mother's circumstances.

[21] Further, Ms Kautai stated that Heria also provided evidence that James Keepa had no children. She considered that the evidence of the half siblings should not be counted as it is of no relevance to them. Overall Ms Kautai contended that the evidence was questionable.

The Law

[22] It is well settled that the Court has the ability per s 69(2) of Te Ture Whenua Māori Act 1993 to make inquiries and seek such evidence that it requires to deal effectively with proceedings:

> **69 Evidence in proceedings**
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> …
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> (2) The court may itself cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence, as it considers may assist it to deal effectively with the matters before it, but shall ensure that the parties are kept fully informed of all such matters and, where appropriate, given an opportunity to reply.

[23] This was underscored by the Court of Appeal in *The Proprietors of Mangakino Township v Māori Land Court*:[9]

> [25] We agree also with the High Court that the power for the Maori Land Court to direct the preparation of an independent report on the affairs of a trust for the purpose of a review is to be found in s69(2). That subsection says that "the Court may itself cause such inquiries to be made…as it considers may assist it to deal with the matters before it…" Those words are amply wide enough to empower a Judge to call for a report from an independent person which may assist in the review of a trust. They ought not to be read down, as Mr Mathieson would have this Court do, and confined to mere inquiries about what a potential witness may already know about the trust. It is noticeable that the Court is given express power to call expert witnesses. It would surely not do so in advance of receiving reports from them showing that they have something useful to say; and someone has to commission their reports. The Court must be able to do so.

[24] Further in *Hammond - Whangawehi* the Māori Appellate Court commented:[10]

> Section 69(2) of the Act gives the Court special powers to "…cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence…" as may assist the Court. That is, it has an inquisitorial role. In our view the Court is entitled to ask relevant questions of those who come before it. The nature of the Court's jurisdiction and the parties that come before it are such that the presiding Judge is often required to question witnesses where parties are not represented, or where there is no other party or where the issues before the Court simply require it. It must be remembered that, while the Court has one eye on the parties before it (who may often be in agreement), it will always have its other eye on its statutory jurisdiction (in particular the principles, intentions and objects of the Act as contained in the preamble to the Act and sections 2 and 17) and the interests of those with contingent interests who, in accordance with the preamble and section 2, include the whānau, hapu and descendents of owners.

[25] Section 98(9) provides the jurisdiction to pay the costs of any witness per s 69(2):

> **98 Maori Land Court Special Aid Fund**
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> …
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> (9) Except as the court may otherwise order, there shall also be paid out of the Fund
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> …
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> (b) all reasonable costs and reasonable out-of-pocket expenses of any person called by the court as a witness under section 69(2);

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9 CA65/99, 16 June 1999

10 (2007) 34 Gisborne Appellate Court MB 185 (34 APGS 185)

[26] The Special Aid Fund is generally only available for those who would otherwise not be able to prosecute cases because of the special circumstances of their case.[11] Applications must be considered congruent with the principles of the Act as outlined in the Preamble and s 2 and in a manner consistent with the primary objective of the Māori Land Court found in s 17 in light of the particular circumstances of the case.[12]

[27] The Court has on previous occasions accepted DNA evidence in determining succession applications.[13] The following conclusions can be drawn from those cases:

(a) In circumstances where the alleged parent is named on the birth certificate that certificate is considered prima facie evidence that the person named as the father is in fact the father. The onus therefore falls on the parties claiming otherwise to displace that evidence.

(b) Where there are no details recorded on the birth certificate the onus is on the person claiming to be a child to prove their case on the balance of probabilities.

(c) A DNA test can only be undertaken with the consent of the parties.

(d) Where matters are contentious and it would be expedient to finalise the matter the Court has paid for the DNA test per s 69(2) and s 98 of the Act.

[28] In *Coutts – Estate of James Pou* Judge Ambler commented on paternity issues:[14]

> [23] Paternity is by its nature a fraught issue. It is shrouded in the random biological act of conception and the intimacy (and often secrecy) of the relationship of the parents of the child. It is otherwise subjected to the speculative and ultimately hearsay views of the whanau and associates of the mother and the putative father. Paternity may be proved (in descending order of authority) by DNA blood testing, the testimony of the mother and the putative father and finally the hearsay evidence of the whanau and associates.
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> [24] Due to the fraught nature of paternity the law has developed certain presumptions. The presumption of paternity is now provided for in the Status of Children Act 1969.

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11 Ibid

12 *De Loree v Mokomoko – Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249)

13 See *Roche - Agnes Thelma Roche* (2005) 161 Aotea MB 139 (161 AOT 139), 111 South Island MB 19-31 (111 SI 19-31); *Whaitiri – Henry Rakaitauheke* (2006) 129 South Island MB 137 (129 SI 137); *Hauparoa – Whaiao Hihi Haupaora* (2008) Chief Judges MB 92 (2008 CJ 92); *Tawhai – Rita Mereaina Te Rau Tawhai White* (2008) Chief Judges MB 9 (2008 CJ 9); and *Jack – Estate of Rawiri Hamiora Kino* 29 Waikato Maniapoto MBN 217-224 (29 WMN 217-224) 31 Waikato Maniapoto MB 21-27 (31 WMN 21-27)

14 *Coutts - James Pou* (2008) 129 Whangarei MB 145 (129 WH 145)

[29] In that case the issue was whether the two children named in James Pou's will (Trez Potorata and Jade Potorata) were entitled to succeed. Trez Potorata's birth certificate did not record his father's details. It was accepted by all that James Pou was not his father. Jade Potorata's birth certificate recorded James Pou to be his father. It was claimed that despite the evidence on the birth certificate James Pou was not Jade Potorata's father. Evidence indicating James Pou to be infertile was provided as well as evidence from previous hearings where James Pou declared he had no children.

[30] Initially Jade Potorata's mother did not consent to the testing. However, consent was subsequently granted and Judge Ambler issued an order under s 69(2) and s 98(9)(a),(b) appointing DNA Diagnostics Ltd to be an expert witness to carry out DNA testing and provide a report to the Court. The report ultimately determined Jade to be James Pou's son.[15]

Discussion

[31] In the present circumstances James Keepa is recorded on the birth certificates of Ms Kepa and Mr Carroll and accordingly there is a prima facie presumption that he is their father.[16] The onus is therefore on those claiming otherwise to rebut that presumption.

[32] Ms Kautai and Ms Erutoe maintain their belief that James Keepa did not have any children. While all parties agree that Mr Carroll is not the child of the deceased the applicant maintains that she is the daughter of James Keepa. In any event, proceedings concerning the deceased's estate have been before the Court since 2013. I see no reason why it would not be expedient for the Court to procure the services of a suitable expert witness to provide the necessary DNA test per ss 69(2) and 98 of the Act.

[33] It is important to note that as James Keepa is deceased a test will be required between Ms Kepa and other relations. Alleged siblings, grandparents, aunts and uncles can be compared to establish if a biological relationship exists. However, it should be underscored that these tests are not as straightforward as the standard paternity test and can prove inconclusive.[17] The more distant the relative, the more detailed the analysis is required to come up with comprehensive results.

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15 24 Taitokerau MB 296-300 (24 TTK 296-300)
16 *W v R* (2000) 19 FRNZ 177 at [14], *Re Plato* [1989] 2 NZLR360 at 366
17 http://www.dnadiagnostics.co.nz/paternity-test-nz.htm#parentage

[34] Mr Keepa has three siblings, Mary Erutoe (deceased), Katerina Komene and Heria Keepa. The Registrar will need to obtain consent from either Katerina Komene or Heria Keepa (or one of their children) to partake in the DNA test.

Decision

[35] The Registrar is directed to contact the parties and determine whether Frances Racheal Kepa and either Katerina Komene or Heria Keepa consent to the DNA test within 2 months from the date of this decision.

[36] If such consent is given, the Registrar is directed to contact DNA Diagnostics Limited and make arrangements for the testing to be undertaken.

[37] The Court makes the following orders pursuant to Te Ture Whenua Māori Act 1993:

(a) Section 69(2) appointing DNA Diagnostics Limited to be an expert witness in relation to paternity testing and carry out DNA testing and provide a report to the Court.

(b) Section 98(a),(b) meeting the reasonable costs and expenses of DNA Diagnostics Limited in carrying out the paternity testing and report.

[38] Once in receipt of the report further submissions will be sought.

Pronounced at 2.15 pm in Rotorua on Wednesday this 28th day of September 2016

L R Harvey
JUDGE