IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150004064

UNDER	Sections 113 and 117, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Estate of Wiremu Eruera Pohe
BETWEEN	DEBORAH NOLAN Applicant

Hearing: 12 October 2016
(Heard at Whangarei)

Appearances: Deborah Nolan, Janine Pohe, Cherie Wilkie,Chantal Williams, Gazala Innes, Julie-Ann Nissen, Dawn Pohe, Veronica Turketo

Judgment: 13 October 2016

ORAL JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Deborah Nolan has applied to succeed to the Māori land interests of her late father Wiremu Eruera Pohe.

[2] The issue in this case is whether Chantal Pohe and Julie-Ann Nissen should be recognised as Wiremu's whāngai, and whether they should be entitled to succeed.

[3] As with all oral decisions, I reserve the right to amend this decision but any such amendments shall only be as to form not as to substance and not to change the outcome of the decision that I am about to make.

Background

[4] Wiremu Eruera Pohe passed away on 21 October 2012. He left a will dated 24 January 1997. On 7 November 2012, the will was probated appointing Deborah Nolan and Cherie Wilkie as administrators of the estate.[1]

[5] Wiremu married three times. Firstly to Gazala Flavell, secondly to Allison Ross and finally to Dawn Pohe. With Gazala Flavell he had one child, Deborah Nolan. With Allison Ross he had two further children Cherie Wilkie and Janine Pohe. Wiremu did not have any children with Dawn. Dawn had two children from a previous relationship Chantal Pohe and Julie-Ann Nissen. Wiremu is not Julie-Ann or Chantal's biological father.

[6] Clause 3 of Wiremu's will provides that his interests are to go to Dawn, for life, and then to Deborah, Cherie, Janine, Julie-Ann and Chantal on remainder as tenants in common in equal shares.

[7] There is no dispute that Dawn is entitled to a life interest, or that Deborah, Cherie and Janine are entitled on remainder. Rather, the issue in this case is whether Chantal and Julie-Ann should be recognised as Wiremu's whāngai, and whether they should also be entitled to succeed.

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1 Probate CIV-2012-488-742

The Law

[8] Section 108 of Te Ture Whenua Māori Act 1993 ("the Act") restricts those who are entitled to succeed to interests in Māori freehold land by will. One of those classes entitled to succeed are whāngai of the testator.

[9] Whāngai is defined in s 4 of the Act as "a person adopted in accordance with tikanga Maori." Tikanga Māori is defined as "Māori customary values and practices".

[10] Section 115 of the Act empowers the Court to make provision for whāngai. Section 115 provides a two step approach. The first step is to determine whether or not a person is to be recognised as having been a whāngai of the deceased owner. If that person is recognised as a whāngai, the second step is to then determine whether he or she shall be entitled to succeed, and if so, whether to the same or any lesser extent as that person would have been entitled if he or she had been a child of the deceased owner.

[11] Different approaches have been taken in this Court as to whether this two step approach applies in relation to testate estates, or only on intestacy.

[12] In *Smith-Williams – Estate of Joseph Tukaki*,[2] Chief Judge Isaac adopted a report by Judge Clark which considered that the two step approach provided for in s 115 applies where a person left a will.

[13] This is in contrast to earlier decisions in *Karauti*,[3] *Kake*,[4] and *Johnson v Stone*,[5] where it was held that if the Court finds that a person is a whāngai, then the Court must give effect to the provisions of the will absolutely, without restriction or limitation.

[14] Ultimately, these differing approaches need to be resolved by the Māori Appellate Court. Despite that, I must determine which approach to follow in this case.

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2 *Smith-Williams – Estate of Joseph Tukaki* [2011] Chief Judge's MB 90 (2011 CJ 90).
3 *Karauti – Estate of George or Hori Kiwa Tukua* (2000) 116 Otorohanga MB 81 (116 OT 81).
4 *Kake – Estate of Kiriwai Ihaia (Ruka) or Kiriwai Tai Hikuwai* (2007) 118 Whangarei MB 256 (118 WH 256).
5 *Johnson v Stone – Estate of Tamati (Poppy) Johnson* (2011) 13 Tairawhiti MB 251 (13 TRW 251).

[15] I prefer the approach taken in *Smith-Williams – Estate of Joseph Tukaki*,[6] and I consider that the two step approach as set out in s 115 of the Act applies in the present case.[7]

Should Chantal and Julie-Ann be recognised as whāngai?

[16] There are a number of decisions which have considered the issue of whāngai succession, including *Hohua – Estate of Tangi Biddle* and *Milner v Milner – Estate of Warihi Te Keu Faenza Milner*.[8]

[17] I adopt the principles set out in those decisions.

[18] In *Milner,* Dr Hirini Mead identified four main questions to determine whether a person is a whāngai:[9]

(a) Did the person grow up within the whānau?

(b) Was this well known among the whānau?

(c) Was this an accepted thing among the whānau?

(d) Did the person become integrated into the whānau?

[19] In the present case, an affidavit was sworn by Pereri Mahanga on the tikanga concerning whāngai in relation to the Rahuikuri blocks. Unfortunately Mr Mahanga was not available to present his evidence in person, or to answer questions. In response to questions from the Court, Dawn took issue with Mr Mahanga's statement that Te Waiariki associates with the Rahuikuri blocks, however, she did not dispute his evidence on whāngai.

[20] Mr Mahanga's evidence is as follows:

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6 *Smith-Williams – Estate of Joseph Tukaki* [2011] Chief Judge's MB 90 (2011 CJ 90).

7 See the discussion in *Retemeyer v Loloa – Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288).

8 *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Waiariki Appellate MB 43 (10 APRO 43); *Milner v Milner – Estate of Warihi Te Keu Faenza Milner* (2008) 83 Ruatoria MB 108 (83 RUA 108).

9 83 Ruatoria MB 114-115 (83 RUA 114-115).

(a) Te Waiariki Hapū determines 'whāngai' as been a customary practice mai rāno, a practice which still continues today to take a child from birth as their own;

(b) Whanaungatanga would be the main factor in tikanga to be carried out, this being by way of whakapapa. Whāngai then having an affinity to the whānau and the whenua;

(c) Sometimes the 'whāngai' would be entitled to inherit the mātua/whaea whāngai whenua especially if a 'whāngai' was whāngai at birth and remained with the mātua/whaea whāngai through to adulthood and looked after mātua/whaea whāngai in their old age. So therefore the whāngai would share the interests with any natural children;

(d) The rights of a whāngai could be by way of an ōhākī by the mātua/whaea whāngai. In most cases tamariki whāngai always knew who their natural parents were as well;

(e) In our family we have six tamariki whāngai brought up from babies, two of whom are direct uri of our whakapapa, four who have absolutely no whakapapa connections at all. Today the two who are direct uri of our whakapapa have inherited whenua from that tikanga 'whāngai'. This 'atawhai' I suppose came from the generosity bestowed upon by the Mātua/whaea whāngai in the caring sharing the love to claim tamariki whāngai as if they were the biological children who were given absolute love and kind attention.

[21] Mr Mahanga's evidence is consistent with evidence given by expert witnesses in other cases including *Hohua*.[10]

[22] The evidence on Chantal and Julie-Ann's relationship with Wiremu is largely uncontested. On this point, I accept Dawn's evidence as to the sequence and timing of events which occurred.

[23] Dawn gave evidence that she met Wiremu when she was pregnant with Chantal. Julie-Ann was 7 years old at that time. Dawn and Wiremu started seeing each other in 1979 when Chantal was three months old.

[24] When Chantal was six months old, Wiremu moved in with Dawn in her home at First Avenue. In 1980, Dawn, Chantal and Julie-Ann moved in with Wiremu in his home at Parua Bay. This occurred shortly after Chantal's first birthday. This property in Parua Bay is the family homestead located on Rahuikuri C1Q which is one of the blocks that is

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[10] *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Waiariki Appellate MB 43 (10 APRO 43).

the subject of this proceeding. Wiremu and Dawn got married in 1984. Dawn advised that she has continued to live in the property at Parua Bay to the present day.

[25] Chantal also filed a written statement which she confirmed under oath. Chantal's evidence demonstrates that Wiremu raised her throughout her childhood, and that she cared for him prior to his death. Chantal was not questioned on her evidence, and Janine accepted this evidence when questioned by the Court.

[26] Chantal accepted that she called Wiremu "Uncle" and not "Dad". However, she said that this was the term she had always used, and this did not affect the nature of their relationship, which she says was that of father and daughter.

[27] I also note that on 10 May 2002, Wiremu signed a deed which was prepared and witnessed by a solicitor. Clause 2 of this deed states:

> In respect of all matters in relation to Māori custom including in respect of succession to Māori land interests Chantal is to be regarded as whāngai of Mr Pohe.

[28] Janine, Cherie and Deborah also gave evidence on this issue. They accept that Chantal and Julie-Ann had a close relationship with their father. However, they consider that Chantal and Julie-Ann were Wiremu's step-children, not whāngai.

[29] In weighing the evidence as a whole, I consider that Chantal was raised by Wiremu as his whāngai daughter.

[30] Chantal was raised by Wiremu from the time she was an infant. The evidence demonstrates that the nature of their relationship was that of father and daughter. This relationship continued throughout their lives, including Chantal caring for Wiremu prior to his death. Although Chantal called Wiremu "Uncle", in the circumstances of this case, I accept her explanation that this was a term that she had always used, and that this did not affect the nature of her relationship with Wiremu.

[31] This finding is also supported by the deed that Wiremu signed in 2002. While this deed is not determinative of whether Chantal is a whāngai, it is clear evidence of how Wiremu viewed his relationship with Chantal. Wiremu felt so strongly about the matter, he

took the exceptional step of instructing a solicitor to prepare and witness a deed recording his views.

[32] I note that in closing submissions, counsel for the applicant, Ms Thomas, forcefully argued that Chantal and Julie-Ann are not whāngai as they have not demonstrated a whakapapa link to the land.

[33] While I have taken this into account, I do not accept Ms Thomas' argument. I accept that a whakapapa link is relevant in terms of whether any whāngai should be entitled to succeed. However, I do not accept that such a connection is necessary in this case in order to recognise a person as a whāngai.

[34] In particular I refer to the evidence of Mr Mahanga where he states:

> …
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> (e) In our family we have six tamariki whāngai brought up from babies, two of whom are direct uri of our whakapapa, four who have absolutely no whakapapa connections at all. Today the two who are direct uri of our whakapapa have inherited whenua from that tikanga 'whāngai'. This 'atawhai' I suppose came from the generosity bestowed upon by the Mātua/whaea whāngai in the caring sharing the love to claim tamariki whāngai as if they were the biological children who were given absolute love and kind (affection) attention.

[35] Mr Mahanga is the expert witness relied on by Ms Thomas and her clients. In his evidence, he has given an example of four people within his family, who he has described as "tamariki whāngai", who have no whakapapa connections at all. While those people did not succeed to the land, Mr Mahanga still referred to them as "tamariki whāngai".

[36] As such, I consider that Chantal should be recognised as Wiremu's whāngai. The situation is different, however, with respect to Julie-Ann.

[37] Julie-Ann was seven years old when her mother first started going out with Wiremu. Mr Mahanga's evidence is that the practice of whāngai involves someone taking a child from birth as their own. This is consistent with the evidence from Professor

Wharehuia Milroy in *Hohua,*[11] where he states that the process of whāngai involves taking a child at birth or in early infancy.

[38] That occurred with respect to Chantal. It did not with respect to Julie-Ann.

[39] I do not discount the possibility that in a certain case, a child raised from the age of seven may nevertheless be recognised as a whāngai. However, there is insufficient evidence to make such a finding in this case.

[40] The evidence also demonstrates that while Julie-Ann had a close relationship with Wiremu, it was not the same as the relationship he had with Chantal. Julie-Ann accepted this herself in response to questions from the Court. Although Julie-Ann grew up with Wiremu, she still maintained a close relationship with her biological father. It is also significant that while Wiremu signed a deed recognising Chantal as a whāngai, he did not do so with respect to Julie-Ann.

[41] As such, while Julie-Ann undoubtedly had a close relationship with Wiremu, the evidence does not demonstrate that she was raised as his whāngai daughter.

Should Chantal be entitled to succeed?

[42] Having found that Chantal should be recognised as Wiremu's whāngai, I must now consider whether she should be entitled to succeed, and if so, to what extent.

[43] Mr Mahanga's evidence is that in order for whāngai to succeed, they must be able to whakapapa to the whānau and the whenua. This position was strongly supported by Janine and her sisters, who assert that Mr Mahanga's evidence reflects well known principles of tikanga that apply to all of the lands in this case.

[44] This evidence is also consistent with general principles of tikanga concerning land, and with expert evidence on whāngai, given in other proceedings such as by Professor Milroy in *Hohua.*[12]

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11 *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Waiariki Appellate MB 43 (10 APRO 43).
12 Ibid.

[45] Wiremu holds interests in:

(a) Various Rahuikuri blocks, located at Parua Bay;

(b) The Mohinui Topu block, south of Kawakawa;

(c) Kaurinui 3B2, north of Karetu; and

(d) Tokanui 1D2A2A near Waikeria in the Waikato district.

[46] Mr Mahanga's evidence is that Te Waiariki, Ngati Kahu, Te Parawhau and Ngati Pukenga are the hapū that associate with the Rahuikuri blocks.

[47] Dawn accepts that Ngati Kahu and Te Parawhau have interests at Rahuikuri. However, she considers that Te Waiariki is an outlying hapū of Whangarei located in the north-east. As set out below, this case does not turn on whether Te Waiariki is associated with the Rahuikuri blocks or not.

[48] Dawn also gave evidence that Ngati Hine associates with the Mohinui Topu block. Ms Thomas appears to have accepted this in closing submissions.

[49] There is no evidence before me as to the hapū that associate with Kaurinui 3B2 and Tokanui 1D2A2A.

[50] In her statement of evidence, Dawn advised that she would present evidence demonstrating that she and her daughters whakapapa to the whenua and the relevant hapū. Dawn also filed various whakapapa in support of this. However, in cross-examination, Dawn accepted that the whakapapa she filed shows her connections through her parents to the Mangakahia, Hokianga and Kaikohe regions. That whakapapa does not demonstrate a connection to these lands which are the subject of this proceeding.

[51] The onus is on Dawn, and her daughters, to demonstrate in evidence that they are entitled to succeed.[13]

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[13] See *Bennett – Estate of Ronald Clifford Bennett* (2014) 101 Waiariki MB 290 (101 WAR 290).

[52] Although I have found that Chantal should be recognised as Wiremu's whāngai, there is no evidence before me which demonstrates that Chantal has a whakapapa connection to these lands. As such, there is no proper basis upon which I can determine that Chantal should succeed as if a natural child. To do so would contravene the tikanga that applies to these lands.

[53] The question remains as to whether I should exercise my discretion to award a lesser interest such as a life interest.

[54] Janine, Cherie and Deborah oppose any award, including a life interest. Mr Mahanga does not refer to the possibility of granting a life interest in his evidence. He simply refers to the requirement that a whāngai must whakapapa to the land. As Mr Mahanga did not present evidence in person, I was unable to question him on this matter.

[55] I consider that the grant of a life interest to Chantal does provide an appropriate balance in this case. It recognises Chantal's position as Wiremu's whāngai, and also gives effect to his intentions that she should succeed to his Māori land interests as provided for in his will, and as expressed in the deed.

[56] The grant of a life interest also recognises the tikanga that applies to these lands. As Chantal does not whakapapa to the land, upon her death, those interests shall revert back to Janine, Cherie and Deborah (or their successors) ensuring that the whakapapa connection to these lands is maintained.[14]

Decision

[57] I grant the following orders pursuant to Te Ture Whenua Māori Act 1993:

(a) Section 115 determining that Chantal Rose Williams Pohe is recognised as a whāngai of Wiremu Eruera Pohe and is entitled to succeed to a life interest only.

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[14] Also see *Kake – Estate of Kiriwai Ihaia(Ruka) or Kiriwai Tai Hikuwai* (2007) 118 Whangarei MB 256 (118 WH 256).

(b) Section 115 determining that Julie-Ann Nissen is not recognised as a whāngai of Wiremu Eruera Pohe and is not entitled to succeed.

(c) Section 113 determining that those entitled to succeed are Deborah Iris Nolan, Cherie Annette Wilkie, Janine Rochelle Pohe, and Chantal Rose Williams Pohe equally, subject to a life interest in favour of Dawn Kaa Pohe. Upon the death of Chantal Rose Williams Pohe, her share of these interests shall revert back to Deborah Iris Nolan, Cherie Annette Wilkie and Janine Rochelle Pohe equally on remainder.

(d) Section 117 vesting Wiremu Pohe's interests in those determined entitled.

(e) Section 242 determining that any funds held with respect to these interests are to be paid to Dawn Kaa Pohe.

[58] These orders are to issue forthwith pursuant to rule 7.5(2)(b) of the Maori Land Court Rules 2011.

Pronounced at Whangarei at 12:00pm on the 13th day of October 2016.

M P Armstrong
JUDGE