

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

**A20130003863
CJ 2013/20**

UNDER Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF Thomas Henry Dick and a succession order made
at 1 Auckland Succession MB 17 on 25
November 1985

ADAM MARK SNEDDON
Applicant

Hearing: 19 September 2018, 2018 Chief Judge's MB 692-705
(Heard at Whangarei)

Judgment: 17 December 2018

DECISION OF DEPUTY CHIEF JUDGE C L FOX

Introduction

[1] Adam Mark Sneddon (the applicant) seeks an order under s 45 of Te Ture Whenua Māori Act 1993 (the Act) to amend the succession order made at 1 Auckland Succession MB 17 on 25 November 1985 regarding the interests of Thomas Henry Dick (the deceased).

[2] The applicant claims that the said order is incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court because at the hearing Lavinia Grace Wilkinson (niece of deceased) stated that the deceased died leaving no issue.

[3] The applicant claims that he and his whānau are adversely affected as they were omitted from the succession to the deceased.

Background

[4] The Registrar's Preliminary Report and Recommendation dated 27 July 2018 sets out the background to the application. The report is reproduced in full as follows:

PRELIMINARY REPORT AND RECOMMENDATION

Introduction

1. This application is filed by Adam Mark Sneddon pursuant to s 45 of Te Ture Whenua Māori Act 1993 seeking to amend the succession order made at 1 AT(S) MB 17 on 23 November 1985 relating to the estate of Thomas Henry Dick (the deceased).
2. The applicant, Adam Mark Sneddon claims the order is incorrect due to a mistake, error or omission in the presentation of facts of the case before the Court as it was alleged that the deceased died without any issue.
3. The applicant is the maternal grandson of the deceased. He claims that the deceased had two marriages. The first marriage was with Huhana Taimona with whom he had one child. The second marriage was with Huhana Kauhoa (Susan Nicholson [nee] Dick) with whom he had six children.
4. The applicant claims that he and his whānau are adversely affected as they were omitted from the succession to the deceased. He now seeks to amend the succession order to include the children of the deceased as successors to his estate.

Concise history of Orders sought to be cancelled

5. On 13 September 1985, Lavinia Grace Wilkinson, filed an application for succession pursuant to ss 135 and 136 of the Maori Affairs Act 1953 with the Māori Land Court over the land interests of the deceased. The matter was heard on 25 November 1985 where Ms Wilkinson gave the following evidence:
- a) The deceased was her father's half-brother. The deceased died at Pakanae on 24 August 1981, with no issue and without a will. The deceased was married to Susan Dick who had then passed away.
 - b) The deceased's land interests were through his mother, Kereihi Tame Mare. Kereihi Tame Mare had four other children, these were:
 - (1) Kereihi Mare II – deceased, no issue
 - (2) Kahu Mare – deceased, no issue
 - (3) Karauna Mare – deceased with issue
 - (4) Nukutawhiti Mare – deceased with issue
6. Lavinia Grace Wilkinson is the daughter of Nukutawhiti Mare.
7. The Court, after considering the evidence presented, made an order vesting the Māori land interests of the deceased to the following successors pursuant to sections 135 and 136, Māori Affairs Act 1953 at 1 AT(S) MB 17:

Blocks	Successors	Proportion
Pakanae 201C	Karauna Mare	1/2
Pakanae 2U	Lavinia Grace Elizabeth Wilkinson	1/14
Putoetoe 8	Joyce Ngarona Thornton	1/14
Whirinaki 6I3	Molly Mary Murray	1/14
Pakanae 2AA2	Frances Marsich	1/14
	Georgina Matika	1/14
	Lynda Baine Pollit	1/14
	Tajone Murray	1/14

8. The above land interests were vested in the deceased on 20 June 1985 at 1985 CJ MB 164-165 when the succession of Kereihi Tame Mare was finally determined following an application brought under s 452 of the Māori Affairs Act 1953. The Court ordered that Henare Topa-Topa or Henry Dick was to get one-third (1/3) of each of the land interests of Kereihi Tame Mare.

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

9. In support of his application, the applicant provided the following documents:
- a) Statutory Declaration of Susan Nicholas (nee Dick) dated 5 April 2013 confirming the biological father of her children to be Henry Toi Dick aka Thomas Henry Dick or Henare Topatopa or Hare Hemara. She confirmed that they lived at Pakanae at 12 Miro Street, New Lynn, Auckland.

Below are Susan's children as listed in her declaration:

Names	Date of Birth
Tamati Dick (md, no issue)	13 February 1950
Hilda Sneddon (nee Dick)	7 October 1951
Peter Graham Nicholson	10 September 1953
Miriam Anne Apiata (nee Dick)	20 March 1955
Jane Martin (nee Dick) died 8 January 2005	13 April 1956

Subsequent to the filing of the application, the applicant informed the Registry that a sixth child was born to the deceased and Susan. The child's name is Wayne Michael Dick.

- b) Statutory Declaration of Hilda Joyce Sneddon dated 4 April 2013 declaring her date of birth to be 7 October 1951 and that Henry Toi Dick was her father. Henry Dick was born on 16 August 1896, he died on 24 August 1981. The deceased used the names Henry Topatopa, Thomas Henry Dick and Hare Hemara.

Attached to the declaration is Hilda's certificate of date of birth and a certificate of baptism showing John Dick, the eldest son of the deceased from his union with Huhana Taimona, as Hilda's godfather.

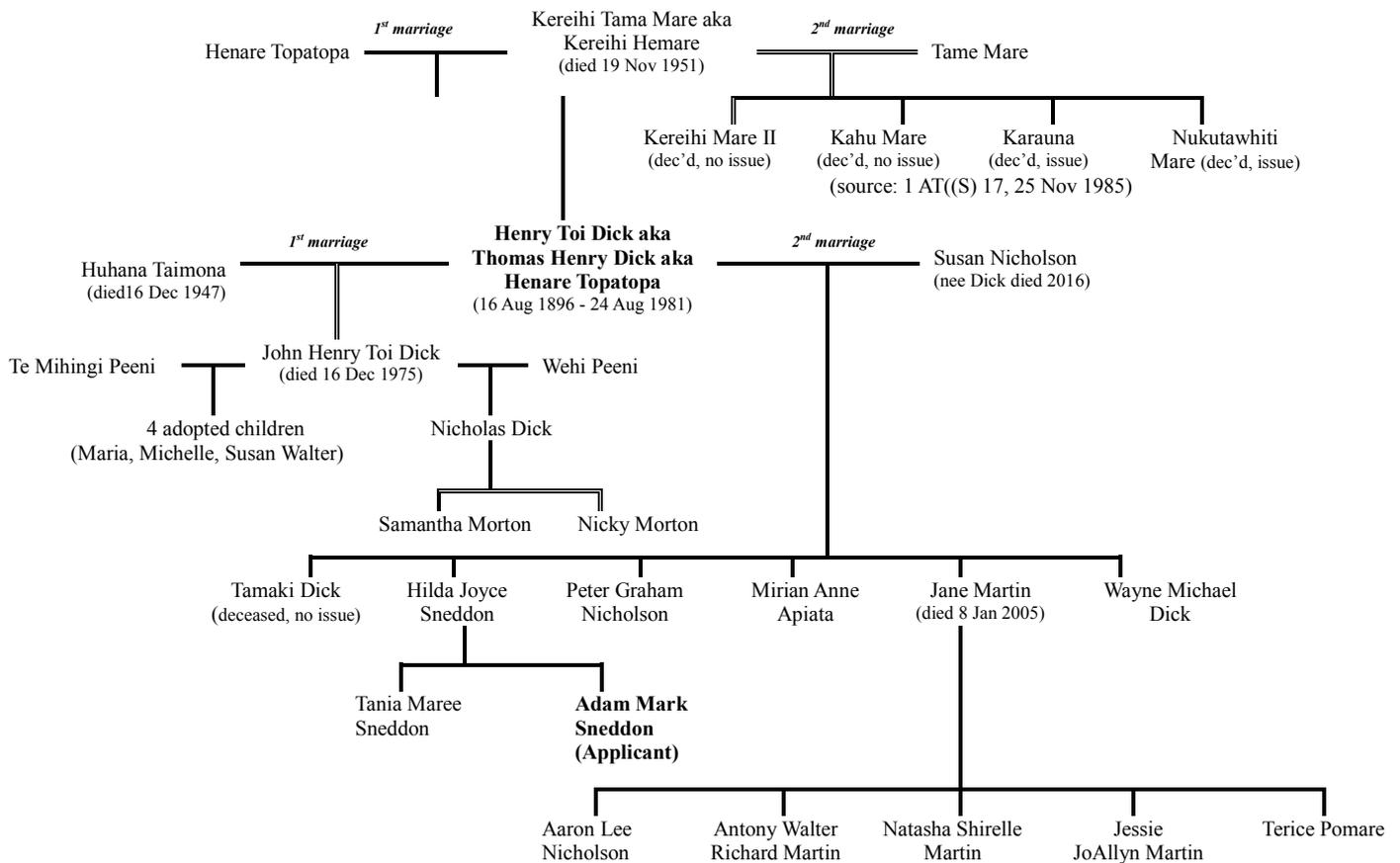
- c) Declaration of Miriam Anne Apiata dated 27 September 2016 stating that:
- (1) The deceased was her father. She was present at the time of her father's death on 24 August 1981 at Rawene Hospital along with her brother Peter Graham Nicholson, and husband.
 - (2) After her father's death, she learned that the deceased left a will. The will was read by the deceased's financial accountants, Graeme O'Neil and Mahmood Khan at Whangarei on Vine Street. In his will, the deceased left the sole possession of his estate to his children Miriam, Hilda, Jane and Peter.
- d) Copies of Certificates of birth for Miriam Anne Dick, Peter Graham Nicholson, and Jane Dick.
- (1) These certificates record the address of Susan Dick as 12 Miro Street, Auckland, the residence of the deceased.
 - (2) In his email dated 2 April 2016, the applicant stated that Hilda, Peter, Miriam and Jane were all born in Auckland and resided at the deceased's residence at 12 Miro Street, Auckland where they were raised by their father until 1960.
 - (3) It is noted that the certificates do not record the name of the deceased as their father.

(4) In a letter to the Registrar filed on 26 July 2013, the applicant explained that the name Henry Dick was struck off from the records sometime in the early 1960s after Susan Dick's marriage to Ian Nicholson.

e) Whakapapa of the deceased showing that:

(1) The deceased was the son of Kereihi Tama Mare from her first marriage to Henare Topatopa. Kereihi Tama then married Tame Mare and had four children.

(2) The deceased had two marriages. The first marriage was with Huhana Taimona with whom he had John Toi Dick. After the death of Huhana Taimona in 1947, the deceased married Susan Nicholson (Nee Dick). Their union produced six children.



Details of subsequent Orders affecting lands to which this application relates

10. On 2 September 1998 at 3 KH(S) 7, the interests of Tajone Murray, child of Nukutawhiti Mare were vested in his minor children namely:

- (a) Allan Tawhiti Murray
- (b) Tyrone Nuku Murray
- (c) Shayne Chyrstle Mere Murray
- (d) Santana Mariah May Murray
- (e) Malinda Bainey Murray

11. Pursuant to s 219 of Te Ture Whenua Māori Act, Cindy Murray, Lavinia Wilkinson, Joyce Thornton, Molly Murray and Georgina Matika were appointed as kaitiaki trustees of the children of Tajone Murray.

Details of payments made as a result of the order

12. Not applicable.

Reference to area of difficulty

13. The Court's approach with an application of this nature is:
 - (a) To weigh the evidence provided by the applicant against the evidence provided at the original hearing;
 - (b) A challenge to original evidence must be balanced against the presumption that everything has been done lawfully unless there is evidence to the contrary; and
 - (c) That the 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.

Insufficient evidence

14. There is insufficient evidence to prove that an error was made by the Court as the applicant has not presented sufficient evidence to prove his filiation to the deceased.
 - (a) As noted in para 7(e)(3), the certificates of birth provided in support of the application do not record the name of the father. As such, the birth certificates could not be taken as proof of filiation.
 - (b) The certificates of birth of John Henry Toi Dick and Wayne Michael Dick were not given in evidence.
 - (c) A copy of the will referred to in the Declaration of Miriam Apiata was not presented to support the acknowledgement of the deceased that Miriam, Hilda, Jane and Peter were his children.

Consideration of whether matter needs to go to full hearing

15. There is insufficient evidence to support the applicant's claim. The onus is on the applicant to prove that an error was made.

Recommendation of course of action to be taken

16. If the Deputy Chief Judge is of a mind to exercise her jurisdiction, then it would be my recommendation that:
 - a) A copy of this report be sent to those affected parties, for whom we have contact details for, giving them an opportunity to comment or respond, in writing, by 24 August 2018.

17. The matter be set for hearing at Whangarei on 19 September 2018.

Procedural History

[5] On 27 July 2018 and 10 August 2018, the Registrar's Preliminary Report and Recommendation was distributed to all affected parties, for whom addresses were known.

[6] The application was heard before me in Whangarei on 19 September 2018, where evidence was given by the parties. The applicant claims his mother was Hilda Dick, the eldest daughter of Thomas Henry Dick and Susan Dick. As noted by the Registrar attached to his application was:

- (a) a statutory declaration of Susan Nicolas (nee Dick) dated 5 April 2013 confirming the biological father of her children to be Henry Toi Dick aka Thomas Henry Dick or Henare Topatopa or Hare Hemara.
- (b) a statutory declaration from Hilda Joyce Sneddon who was born Hilda Joyce Dick. She claims her father was Thomas Henry Dick also known as Henry Topatopa or Hare Hemara. Her birth certificate filed demonstrates her name at birth was Hilda Joyce Dick.

[7] The evidence given by the applicant was that Thomas Henry Dick married twice and that his first wife was Huhana Taimona and together they had John Toi Dick. He is now deceased but has left adopted children and grandchildren. He was the god father of the applicant's mother.

[8] Thomas Henry Dick then entered into a relationship with Susan Kauhou. It has not been established whether they were legally married. There is some suggestion that she was a whāngai to Thomas Henry Dick and his first wife Huhana Taimona, but no substantial proof on this point has been provided.

[9] The evidence of the applicant is that Thomas and Susan had:

- Tamati (m. d) no issue

- Hilda Dick (f. a) issue
- Peter Dick (m. a) no issue
- Miriam Dick (f. a) issue
- Jane Dick (f. d) issue
- Wayne Michael Dick or Melhuish (m. a) issue and fostered out

[10] In response to the Registrar's report the applicant pointed to the statutory declaration from Jane McCabe (nee Hemara), the last living family member that knew Susan Dick and Thomas Henry Dick at the time the applicant's mother and her siblings were born. Jane was a first cousin to Thomas Henry Dick. Jane stated that she is the paternal aunt to Hilda Sneddon (nee Dick), Peter Nicolson (nee Dick), Miriam Apiata (nee Dick) and Jane Martin (nee Dick). She knew these siblings from the time they were babies.

[11] The evidence demonstrates that at one time Susan and Thomas Henry Dick lived at 12 Miro Street, Auckland. There the children were raised until 1960. The eldest children were then raised by their mother Susan Kauhou who remarried Ian Nicolson (Poroti 1961). Miriam and Jane continued to be raised by Thomas Henry Dick when he returned to Pakanae and they attended Pakanae Native School for 2-3 years.

[12] Also produced were a number of photos that depict the deceased with various members of the whānau. Of note was a statement from Miriam Anne Apiata (nee Dick) who states that she was present at the reading of her father's will. During that reading of the will, all Thomas Henry Dick's children were named as successors to his estate. However, the will cannot be located through the firm responsible for its administration, namely a small accountant's firm operated by Graeme O'Neill and Mahmood Khan called BDO. An e-mail from Mr Khan indicates that in the mid-1980s his firm closed its Kawakawa office and returned important documents to various clients, including Miriam but he was unable to remember what that document was. He is now retired.

[13] After Thomas Henry Dick's death, Miriam advised that she and her siblings removed some of the furniture, photos and war medals, a coin collection, some tools and various other items. Miriam remembers returning to Pakanae and the deceased's home was locked up. It was later destroyed.

[14] On the file was the affidavit of Lavinia Grace Wilkinson filed with respect to seeking a grant of administration in the High Court dated 11 March 1986 for the estate of Kereihi Tame Mare, the mother of Thomas Henry Dick. In that affidavit she deposed that Thomas Dick Henry was not survived by any child. There were also military records demonstrating that the deceased was a child of Kereihi Tame Hemara or Mare and Henare Hemara. They also indicate that while in service during World War 1, he was not married. A headstone photo of his grave states the deceased's name as PTE Henry Dick, Māori Pioneer and loved husband of the late Susan. He died in 1981 at the age of 83.

[15] Lavinia Grace Wilkinson claims that she did not know who the applicant and his whānau were until he visited with his wife. She was unaware of them until that visit. She also raised a number of other matters in response to issues raised by the applicant. She claimed that the house that was destroyed was on her cousin's land. The deceased had, she claimed "squatted" there.

[16] The applicant in response reiterated that the purpose of the application was to put right the "hara" that they believed Lavinia was responsible for as she was the person who gave evidence to the Court that Thomas Henry Dick died without issue. I reserved my decision.¹

The Law

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

¹ [2018] Chief Judge's MB 692-705 (2018 CJ 692)

of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[18] The principles that are applied to s 45 decisions have been previously set out in numerous decisions made by the Chief Judge and I. These are to be found in the judgments *Ashwell - Rawinia or Lavinia Ashwell (nee Russell)*² and in *Tau v Nga Whanau O Morven & Glenavy - Waihao 903 Section IX Block*.³ I do not propose to repeat those principles again in this judgment.

[19] However, for the benefit of the parties, I note that s 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 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.

[20] I further note that the Registrar's opinion at paragraph 14 is that there is "insufficient evidence to prove that an error was made by the Court as the applicant has not presented sufficient evidence to prove filiation to the deceased." I disagree, and I discuss the reasons below.

Issues

[21] The issues to determine in this case are:

- (a) Did the deceased Thomas Henry Dick die with issue?; and if so
- (b) Was an error of law or fact made by the Māori Land Court when it made the succession order recorded at 1 AT(S) MB 17 on 23 November 1985?: and if so
- (c) Is it necessary in the interests of justice to remedy the mistake or omission?

² [2009] Chief Judge's MB 209-225 (2009 CJ 209)

³ [2010] Maori Appellate Court MB 167 (2010 APPEAL 167)

Did the deceased Thomas Henry Dick die with issue?

[22] I consider that on the balance of probabilities that the applicant has established that the deceased, Thomas Henry Dick, was the father of 5 of the children identified in the evidence. The standard of proof required is not one that demands the case is proven beyond reasonable doubt.

[23] In this case there is a statutory declaration from Susan Nicholson or Dick indicating that Thomas Henry Dick was the father of her children. She stated that they lived at Pakanae and at 12 Miro Street in Auckland and there is evidence supporting that statement. There is a witness Jane McCabe (nee Hemara) who had knowledge of the birth of at least four of the children and their place of residence in Auckland.

[24] The other child was Wayne who was fostered out, and I note that Susan Nicholson did not acknowledge him as a child of the deceased. Thus, I do not think that it can be established that Wayne is a child of the deceased without more proof.

[25] The birth certificates produced for some of the children unfortunately do not demonstrate who the father of the children was. The applicant considers that is because fathers in circumstances such as those of his grandparents were not recorded on birth certificates. I am going to require more research on this point.

[26] In addition, the applicant's attempts through his family members to access a will of the deceased have not been successful. I consider that the Registrar can undertake the required research to clarify whether there was a will of the deceased that received a grant of probate.

Was an error of law or fact made by the Māori Land Court when it made the succession order recorded at 1 AT(S) MB 17 on 23 November 1985?

[27] I consider an error was made when the succession order relating to the estate of Thomas Henry Dick as recorded at 1 AT(S) MB 17 was declared on 23 November 1985. This error was due to the presentation of facts to the Court. The evidence of Lavinia Grace Wilkinson was that the deceased died without issue and that is clearly not the case. She

claims she did not know that the applicant's whānau existed, but that cannot be true either. She has lived at Pakanae for most of her life. She must have known about their existence, even if she was not sure of their status. I am not persuaded by her evidence at all and I consider it unsafe to leave the situation as it stands.

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

[28] I have had regard to the implications of the Preamble, ss 2 and 17 of Te Ture Whenua Māori Act 1993 requiring that I promote the fact that land is a taonga tuku iho to be retained in the hands of the owners, their whānau and their hapū. It is not in the interests of justice for the applicant and his whānau to be denied the right to challenge for their birth right.

[29] Thus I find that the interests of justice will be served if the succession order made at 1 AT(S) MB 17 on 23 November 1985 is cancelled.

Decision

[30] Having regard to the above, I exercise my jurisdiction pursuant to s 44 of Te Ture Whenua Māori Act 1993 to cancel the order made at 1 AT(S) MB 17 on 23 November 1985, conditional upon the research below being completed.

[31] I direct the Registrar to complete further research and answer the following questions:

- (a) whether it can be established that the manner in which births were recorded did not require the registration of the natural fathers for children of unwedded mothers; and
- (b) whether it can be established that there was a will made for Thomas Henry Dick and whether it received a Grant of Probate; and
- (c) whether the birth certificate for Wayne Wayne Michael Dick or Melhuish demonstrates that Susan Dick is his mother and there is further evidence establishing that the deceased Thomas Henry Dick was his father.

[32] The Registrar is to complete the research into these three matters and file a report no later than 3 months from the date of this decision. The applicant should assist as far as possible.

[33] At that point I will determine what the detail of the new succession order and any consequential orders should be and issue the relevant orders.

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

Pronounced at 10 am in Gisborne on Monday, this 17th day of December 2018.

C L Fox
DEPUTY CHIEF JUDGE