

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

**A20160002199**

UNDER Sections 113 and 118, Te Ture Whenua  
Māori Act 1993

IN THE MATTER OF Te Autu Nick Tawhi (deceased)

BETWEEN BELLA TAWHI  
Applicant

Hearing: 7 June 2016, 141 Waiariki MB 263-267  
(Heard at Whakatāne)

Appearances: B Tawhi, in person

Judgment: 29 June 2016

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**RESERVED JUDGMENT OF JUDGE C T COXHEAD**

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## Introduction

[1] Te Autu Nick Tawhi died, intestate. He is survived by three children from his marriage to Bella Tawhi. Bella has applied for succession. Bella asked that her and Te Autu's children receive his Māori freehold land interests and that the Court grant her a life interest in her husband's estate.

[2] Pareraututu Tawhi (Mr Tawhi's sister) objects to Bella receiving a life interest. Pareraututu argues that Te Autu was separated from Bella and had been separated for over ten years at the time of his death. Further, Te Autu had entered into a subsequent de facto relationship with Maria Henry.

[3] Bella Tawhi confirmed that while her and Te Autu were separated, and had been for over ten years, they were not legally divorced and were still married.

## Issue

[4] The issue in this case is whether Bella Tawhi is entitled to a life interests in Te Autu Tawhi's Māori freehold land interests.

## The Law

[5] Section 109 of Te Ture Whenua Māori Act 1993 sets out the entitlement to succeed to Māori freehold land on intestacy:

### **109 Succession to Maori freehold land on intestacy**

(1) Subject to subsection (2), on the death intestate of the owner of any beneficial interest in Maori freehold land, the persons primarily entitled to succeed to that interest, and the proportions in which they are so entitled, shall be determined in accordance with the following provisions:

(a) where the deceased leaves issue, the persons entitled shall be the child or children of the deceased living at his or her death, in equal portions if more than 1, together with the issue living at the death of the deceased of any child of the deceased who died before the deceased, that issue to take through all degrees, according to their stocks, in equal portions if more than 1, the portion to which their parent would have been entitled if living at the death of the deceased:

...

(2) Where the owner of a beneficial interest in any Maori freehold land dies intestate **leaving a person who is the owner's surviving spouse or civil union partner**, that person is, subject to subsection (4), entitled as of right to an interest in that interest for life, or until he or she remarries or enters into a civil union or a de facto relationship.

(3) Such a surviving spouse or civil union partner may, on the death of the deceased or at any time thereafter, surrender in writing his or her entitlement under subsection (2), whereupon the court shall vest the interest absolutely in the persons entitled to succeed to the interest.

(4) **A surviving spouse or civil union partner shall not be entitled under subsection (2) if, at the date of the death of the owner, a separation order, or a separation agreement made by deed or other writing, is in force** in respect of the marriage or civil union between the surviving spouse or civil union partner and the owner.

(emphasis added)

## Discussion

[6] Te Autu Nick Tawhi died, intestate on 11 December 2013 at Whakatāne.

[7] There is no denying that Bella and Te Autu were separated at the time of his death and had been for some time. Despite the fact that Bella and Te Autu were separated, Bella maintains that there was no formal separation order or separation agreement in place between them. Bella submits that she should receive a life interest. Her children support her receiving a life interest.

[8] Pareraututu Tawhi submits that Te Autu was in another relationship at the time of his death. This appears to be confirmed by Te Autu's death certificate which records his marriage to Bella Tawhi as well as his de facto relationship with Maria Henry.

[9] Pursuant to s 109(2) of the Act Bella Tawhi is prima facie entitled to a life interest. Section 109(4) provides that a surviving spouse is not entitled to a life interest if, at the date of the death of the owner, a separation order, or a separation agreement made by deed or other writing, is in force.

[10] In *Tahuparae - Marino Henare Pumipi Rangitihi Tahuparae* Judge Ambler expressed concern about the drafting of s 109(4) of the Act.<sup>1</sup> In that case Judge Ambler

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<sup>1</sup> *Tahuparae - Marino Henare Pumipi Rangitihi Tahuparae* (2013) 60 Taitokerau MB 46 (60 TTK 46).

had before him a similar situation to the present. In that case, the deceased - Marino Tahuparae was legally married to Cynthia Tahuparae at the time of his death however the evidence was that within two months of their marriage they had separated and remained separated at the time of Marino's death. Cynthia nonetheless sought to succeed to Marino's estate. Her application was strongly opposed by Marino's children. Judge Ambler made the following obiter comments about s 109(4):<sup>2</sup>

[11] In my respectful view, s 109(4) as currently drafted does not reflect the practical realities of separation amongst Māori and nor does it set an appropriate threshold for separation to trigger the loss of entitlement to the spousal life interest. Furthermore, the provision tends to promote applications under the Family Protection Act 1955 – being the primary method by which to challenge a spousal life interest – which necessitates proceedings in another forum. The fact that such proceedings cannot be brought in this Court is an added hurdle for the parties. Section 109(4) and this Court's lack of jurisdiction to hear claims under the Family Protection Act 1955 in respect of Māori land need to be considered by the law reformers.

[12] Nevertheless, I must leave matters of law reform for others to pursue. I am required to act in accordance with s 109 as it presently stands. Accordingly, under s 109(2) Cynthia is prima facie entitled to a life interest irrespective of the separation and the short duration of the marriage.

[11] The clear wording of s 109(4) is that the entitlement of a spouse to a life interest can only be lost if there is a separation order or agreement in place at the time of the deceased's death.

[12] Bella has confirmed there was no separation order or agreement in place at the time of Te Autu's death. In the absence of such an order or agreement Bella is entitled to a life interest.

*What effect if any does the informal separation of Bella and Te Autu have on Bella's prima facie entitlement?*

[13] There is no denying that Bella and Te Autu were informally separated. Does this informal separation effect Bella's entitlement to a life interest?

[14] Under the Family Proceedings Act 1980 the Family Court has the jurisdiction to dissolve a marriage.<sup>3</sup> Where an order dissolving a marriage has taken effect as a final

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<sup>2</sup> Ibid at [11].

<sup>3</sup> Family Proceedings Act 1980 ss 37 & 38.

order, the parties to the marriage may marry again and may enter into a civil union.<sup>4</sup> There is no evidence before me that the marriage between Bella and Te Autu has been dissolved.

[15] In addition the Family Court has the power to grant a separation order. The effect of a separation order is that while it remains in force, neither party to the marriage or civil union shall be under an obligation to cohabit with the other party, but, except as provided by that Act or any other enactment, the order does not otherwise affect the marriage rights, and obligations of the parties to the marriage.<sup>5</sup>

[16] Section 26 of the Family Proceedings Act 1980 provides that if, while a separation order is in force, either spouse or civil union partner dies intestate as to any property, that property shall devolve as if the survivor had predeceased the intestate.

[17] The Family Court has found that periods of separation during a marriage do not necessarily represent the end of a marriage.<sup>6</sup> Rather, the marriage continues in existence until either one of the parties dies or the marriage is dissolved by an order of the Family Court.<sup>7</sup>

[18] As noted there is no separation order in place for Bella and Te Autu. In the absence of such an order the informal separation has no effect on their marriage status in terms of Bella's life interest entitlement pursuant to the Te Ture Whenua Maori Act.

[19] I note however that for the purposes of the Property (Relationships) Act 1976 the marriage of two people ends if they cease to live together as a married couple or their marriage is dissolved or one of them dies.<sup>8</sup>

[20] This is not a situation where I am called to consider the division of relationship property. While there is clear evidence that the parties were separated for a lengthy time

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<sup>4</sup> Ibid, s 43.

<sup>5</sup> Ibid s 23.

<sup>6</sup> *Richmond v Richmond* [2013] NZFC 6022.

<sup>7</sup> *Drummond v Townsend* [2011] NZFLR 867.

<sup>8</sup> Property (Relationships) Act 1976 s 2A.

period neither took steps to enter into a formal separation agreement or order or dissolve the marriage.

[21] As Judge Ambler opined the law as currently framed does not reflect the practical realities of separation amongst Māori. However in the absence of a separation order or agreement the fact that there was an informal separation does not disrupt Bella's prima facie entitlement to a life interest.

*What effect if any does the de facto relationship between Te Autu and Maria have on Bella's prima facie entitlement?*

[22] I also consider whether Bella's entitlement to a life interest is disrupted by the de facto relationship between Te Autu and Maria.

[23] At general law, section 77C of the Administration Act 1969 explicitly recognises that a person may have a spouse and a de facto partner – or more than one de facto partner – at the same time. If the deceased leaves a spouse or civil union partner (in respect of whom no separation order exists) and one or more surviving de facto partners who were living with the deceased as a couple for 3 or more years when the deceased died both the separated spouse or civil union partner and the surviving de facto partner will be eligible to succeed under the intestacy rules.<sup>9</sup>

[24] However succession to Māori freehold land interests is dealt with specifically under Te Ture Whenua Māori Act 1993. Pursuant to s 109(2) a de facto partner is not entitled to a life interest on intestacy.

[25] In the circumstances the de facto relationship does not disrupt the status of the marriage as such Bella's prima facie entitlement to a life interest remains.

## **Decision**

[26] Bella's children support her obtaining a life interest in Te Autu's Māori freehold land interest. Bella's entitlement to a life interest is not disrupted or extinguished because of the fact that her and Te Autu had been separated.

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<sup>9</sup> [Chapman v P](#) HC Wellington CIV-2007-485-1372, 2 July 2009.

[27] Further her entitlement to a life interest is not extinguished because Te Autu had been in a de facto relationship at the time of his death.

[28] Those entitled to Te Autu's Māori freehold land interests, his children, RakauJo-anne Tawhi, Oripa Junior Tawhi and Te Kaumatarere Carey Tawhi, do not object to their mother taking a life interest.

[29] Bella Tawhi is entitled to a life interest.

**The Court makes orders pursuant to Te Ture Whenua Maori Act 1993:**

- (a) **section 113 determining that the persons entitled to succeed to the deceased's interests are Rakau Jo-anne Tawhi, Oripa Junior Tawhi and Te Kaumatarere Carey Tawhi equally, subject to an interest for life or until remarriage or entry into a civil union or de facto relationship in favour of Bella Tawhi; and**
- (b) **section 118 vesting the Maori land interests of the deceased in the person entitled.**

Pronounced in open Court at 2.35 pm in Rotorua on the 29<sup>th</sup> day of June 2016

C T Coxhead  
**JUDGE**