

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

**A20160002211  
A20160002212**

UNDER Sections 239 and 244 of Te Ture Whenua  
Māori Act 1993

IN THE MATTER OF Komene 4A2 and other blocks

BETWEEN TERENCE TE REI HIKAKA AND KEREN  
HIKAKA  
Applicants

AND RAUNA NGAWHARE  
Respondent

Hearing: 355 Aotea MB 81-96 dated 14 June 2016  
(Heard at Te Hāwera)

Appearances: Paul Ritson for the applicants  
Rauna Ngawhare in person

Judgment: 22 July 2016

---

**JUDGMENT OF JUDGE L R HARVEY**

---

## **Introduction**

[1] Terence and Keren Hikaka are the father and sister respectively of the late Julie Hikaka who died on 17 September 2012. They seek appointment as replacement trustees for the Taneroa Cunningham Whānau Trust. Ms Hikaka was the sole trustee. In addition, the applicants seek to vary the trust order by changing the name of the trust to the Bernadette Hinerangi Hikaka Whānau Trust – the wife of Terence and therefore mother of Julie and Keren; that the tipuna of the trust should be Bernadette Hinerangi Hikaka; and that the beneficiaries of the trust are to be the descendants of Bernadette Hinerangi Hikaka.

[2] The application is opposed by Rauna Ngawhare who argues that the trust should remain for all the descendants of Taneroa Cunningham and not be restricted to the descendants of Bernadette Hikaka.

[3] The application was set down before me on 14 June 2016.<sup>1</sup> Rauna Ngawhare also appeared. She raised concerns about whether there had been sufficient notice of the application to the beneficiaries of the trust, matters concerning the lease monies held by the trust and possible errors with previous succession orders relating to Taneroa Cunningham. After hearing from the applicants I accepted that Keren and Terance should be appointed as replacement trustees.

## **Issue**

[4] The issues for determination are whether the variations as sought should be made and whether replacement trustees should now be appointed. As the previous succession orders to the interests of Taneroa Cunningham have been raised during these proceedings that point is also considered in this judgment.

## **Background**

[5] The Taneroa Cunningham Whānau Trust was established on 12 December 2001 for the descendants of Taneroa Nita Cunningham and Bernadette Hinerangi Teresa Hikaka nee

---

<sup>1</sup> 355 Aotea MB 81-96 (355 AOT 81-96)

Ngawhare.<sup>2</sup> Taneroa Cunningham is the mother of Bernadette Hikaka. Julie Hikaka was appointed sole trustee.

[6] The application to establish the trust was heard concurrently with an application to succeed to the interests of Bernadette Hikaka. At that hearing evidence was presented that Bernadette was married to Terence Hikaka. They had two children, Julie Hikaka and Keren Hikaka. On constitution of the trust all the interests held by Bernadette were vested in the trust. Those shares remain the only shares vested in the trust.

### **Applicants' submissions**

[7] The applicants submit that when the whānau trust was created it was envisaged that *all* of Taneroa's six children would place their Māori land interests into the trust. The applicants confirm that this has not occurred and that Bernadette's land interests remain the only shares in the trust.

[8] The applicants say that given the failure of Taneroa's other children to place their interests in the trust, the trust order should be varied so that it is for the sole benefit of the descendants of Bernadette Hikaka.

### **Respondent's submissions**

[9] Rauna Ngawhare acknowledges that the trust was set up for the benefit of all the descendants of Taneroa Cunningham and that it was agreed that all of Taneroa's children would vest their interests in the trust. Rauna accepts that her whānau have not done so but maintains that the trust should not be varied.

[10] Rauna argues that all the descendants of the trust should have been consulted in relation to the application and the orders now sought by the applicant. She says that the whānau were unaware of the applications and have had little time to consider it.

[11] In addition, Rauna argues that there are funds held by the trust that belong to all the descendants of Taneroa Cunningham and if the variations are granted Bernadette's whānau would have complete control over the monies. Rauna argues that even if the funds were

---

<sup>2</sup> 112 Aotea MB 115-116 (112 AOT 115-116)

distributed amongst the six children of Taneroa that would be contrary to the intention of the trust which was to hold the funds collectively.

[12] Rauna also submits the trust was originally set up in an attempt to resolve “historic damage” as between whānau members over disputed successions. Rauna says that when the original succession orders were made to Taneroa Cunningham they omitted three of her six children. Rauna submits that when Julie created the trust it was done to try to resolve some of the conflict for those children who were excluded from the original succession orders.

### **Applicants’ submissions in reply**

[13] The applicants submit that the lease monies received by the trust continue to be held in trust and have not been used. They say they are content for the money to be apportioned amongst Taneroa’s six children.

[14] In terms of the succession orders relating to Taneroa the applicants acknowledge that three of the children were omitted and say they have no objection to those original orders being amended to include all six children.

[15] The applicants maintain that in any event the variations should be made to the trust order and submit that if and when the rest of the whānau are ready to vest their lands in a whānau trust they will reconsider their options.

### **The Law**

[16] Section 244 of the Act provides:

#### **244 Variation of trust**

- (1) The trustees of a trust to which this Part applies may apply to the court to vary the trust.
- (2) The court may vary the trust by varying or replacing the order constituting the trust, or in any other manner the court considers appropriate.
- (3) The court may not exercise its powers under this section unless it is satisfied—
  - (a) that the beneficiaries of the trust have had sufficient notice of the application by the trustees to vary the trust and sufficient opportunity to discuss and consider it; and
  - (b) that there is a sufficient degree of support for the variation among the beneficiaries.

## Discussion

[17] There is no dispute that Bernadette Hikaka's shares are the only interests vested in the trust. It is also accepted that the original intention of the trust was for each of Taneroa Cunningham's children to vest their interests in the trust. This has not occurred. It has been 15 years since the trust was first established. It is hardly surprising therefore that the applicants are seeking to vary the trust order.

[18] The application is opposed on the basis that there are members of the whānau who still wish the trust to remain in place for all the descendants of Taneroa Cunningham. Three principal concerns were raised:

- (a) Was there sufficient notice of the application to all the beneficiaries of the trust?
- (b) Will the variations as sought impact on the monies currently held by the trust?
- (c) Were there errors in the succession orders to Taneroa Cunningham?

[19] It is necessary to consider each of these matters in turn before determining whether to make the orders as sought by the applicants.

*Was there sufficient notice of the application to all the beneficiaries of the trust?*

[20] The applicants' say that despite the trust being for all the descendants of both Taneroa Cunningham and Bernadette Hikaka the reality is that only Bernadette Hikaka's shares were vested. The applicants submit that given the fact only Bernadette's interests are held by the trust only her descendants required notice of the application for variation of trust and replacement of trustees.

[21] The respondent argues that notice should have been given to all the descendants of Taneroa Cunningham and Bernadette Hikaka as *they* are the beneficiaries of the trust. The respondent says that no notice was received in respect of the application and the whānau have had little time to consider the application. As currently recorded the beneficiaries of the whānau trust are "all the descendants of Taneroa Cunningham and Bernadette Hikaka". Accordingly, I apprehend, the logical argument to flow from that fact is that strictly speaking, notice should be issued to those beneficiaries. As that did not occur then, the argument would follow, the Court could not be satisfied that s 244 had been complied with.

[22] While there is much force in that argument, equally persuasive is the notion that the trust carries the name of Taneroa for an obvious reason - that the interests of all of her descendants were to have been included in the trust. Arguably that intended inclusion can also be seen as a condition on the creation of the trust that needed to be satisfied within a reasonable period of time. Otherwise, successors to Taneroa who received their interests but did not include them in the trust, whatever the reasons, could then be seen to be 'double dipping' by seeking a benefit from the shares of Bernadette as well as from their own. That would be quite an iniquitous outcome in the present circumstances. It might even amount to a form of unjust enrichment. The only other viable alternative would be for the trust to be terminated, partly or wholly, and for the Bernadette Hikaka whānau trust to be re-established.

[23] Moreover, it is evident that the facts here are unique. As foreshadowed, the whānau trust was constituted upon the understanding that all of Taneroa's children would vest their interests in the trust. As Bernadette was the only uri of Taneroa to do so it is only Bernadette's Māori land interests that will be affected by the orders sought, notwithstanding the current beneficiary definition in the trust order as it stands now. A further point to consider would be who would qualify as owners of the shares should the trust be terminated? In any event, that question need not be answered at this point. In light of the circumstances, I am satisfied that the changes sought to the trust order are appropriate.

[24] That said, I intend to allow any of the uri of Taneroa the opportunity to file any further submissions within 1 month from the date of this judgment on the application as part of any proposed application for rehearing. For completeness, I note that urgency is required due to the health concerns that were outlined during the hearing.

*Will the variations as sought impact on the lease monies current being received by the trust?*

[25] As foreshadowed, the respondent argues that the trust currently holds funds from leases over blocks wholly owned by the children of Taneroa Cunningham. The respondent is concerned that if the variations as sought are granted Bernadette's whānau would have sole control over the lease monies.

[26] The applicants gave me their assurances at the hearing that the lease monies remain intact and that the funds can be held by their lawyer and distributed amongst the six children equally if so ordered by the Court.

[27] At the hearing there was some confusion over this issue. I confirmed that if the variations are granted I would direct the trustees to file statements recording the income derived from the lease. The proceeds would then be divided amongst the six children of Taneroa equally if that is their wish.<sup>3</sup>

[28] After careful reflection, I do not see how the proposed variations will impact on the lease monies, their ownership and distribution. The trustees will be required to account for the monies and distribute the funds equally to each of the Taneroa's six children in due course. There will not be any prejudice to any of those persons entitled to receive payment of these funds.

*Were there errors in the succession orders to Taneroa Cunningham?*

[29] The respondent raised the issue of possible errors in the succession orders relating to Taneroa Cunningham. She submits that only three of the six children succeeded to Taneroa Cunningham's interests and this has caused a rift in the family. The respondent says that the intention of the trust was to heal the rift and allow the three excluded children to be included.

[30] The applicants acknowledge that such an omission did occur and agree that there should be recognition of all six children. However they maintain that even if the orders are corrected they are still the only whānau who has vested their shares in the trust and until such time as the other whānau do the same they would like to have control of their own interests.

[31] At the hearing I observed that this issue could be resolved by way of a Chief Judge application or alternatively a rehearing by consent of the succession orders. I also pointed out that the flow on effect of correcting such orders would be that the interests would be divided into six thereby reducing Bernadette's interest. The applicants were not opposed to this. The respondent also seemed to accept this proposal.<sup>4</sup>

[32] I have reviewed the previous succession orders relating to Taneroa Ngawhare. It would appear that there are five relevant orders. Of those five orders three appear to be correct. I briefly summarise them before proceeding to consider the remaining orders.

---

<sup>3</sup> 355 Aotea MB 81-96 (355 AOT 81-96) at MB 87-88

<sup>4</sup> Ibid at MB 92-95

*Succession orders issued on 26 January 1962 at 72 Taranaki MB 96*

[33] The first succession application to Taneroa Ngawhare was heard on 26 January 1962.<sup>5</sup> The applicant was Leslie Komene, Taneroa Cunningham's husband. He gave evidence that Taneroa had nine children. Three were deceased. The remaining six were determined entitled to succeed per s 136 of the Māori Affairs Act 1953. Leslie was appointed as the trustee for the six children. The six named children were Bernadette (20), Leslie (18), Eileen (16), Barry (15), Dennis (11) and Glen (9).

[34] A further succession application was heard on 29 May 1973.<sup>6</sup> Leslie Ngawha (child of Taneroa) was the applicant. He sought to succeed to Taneroa's adopted fathers' interests. The evidence was that Taneroa had six children. The application was adjourned pending further information. The matter came back for hearing on 5 September 1973 where it was determined that the six children were entitled to succeed to Taneroa's interests.<sup>7</sup>

[35] More recently on 24 January 2006 an order for vesting further interests in the name of Taneroa Cunningham was granted in line with the earlier orders made on 26 January 1962 in favour of all six children.<sup>8</sup> As foreshadowed the orders outlined above do not appear to contain any error.

*Succession orders issued on 8 August 1972 at 4 Auckland MB 186*

[36] On 8 August 1972 the Court heard an application to succeed to Taneroa Cunningham filed by Eileen Ngawhare (Taneroa's daughter).<sup>9</sup> Eileen gave evidence that Taneroa had three children – Eileen, Leslie and Bernadette. The Court made the orders as sought per s 136 of the Māori Affairs Act 1953.

[37] On 27 August 1985 a hearing was held in respect of further interests held by Taneroa Cunningham. The Court noted the previous evidence given at 4 Auckland MB 186 and

---

<sup>5</sup> 72 Taranaki MB 96 (72 TAR 96)

<sup>6</sup> 79 Taranaki MB 363 (79 TAR 363)

<sup>7</sup> 80 Taranaki MB 25 (80 TAR 25)

<sup>8</sup> 164 Aotea MB 19 (164 Aot 19)

<sup>9</sup> 4 Auckland MB 186 (4 AT 186)

adjourned the matter there was no appearance by the applicant.<sup>10</sup> At the subsequent hearing held on 14 January 1986 orders were made in favour of Eileen, Leslie and Bernadette.<sup>11</sup>

[38] A further succession order was granted on 4 September 1989 relating to the estate of Haimona Rzoska – Taneroa Cunningham’s great-great grandparent.<sup>12</sup> The Court determined that Taneroa’s children were entitled to a portion of the interests. The order was made in accordance with the evidence given at 4 Auckland MB 186 in favour of Eileen, Leslie and Bernadette.

[39] It is unclear from the minutes why Barry, Dennis and Glen were excluded from some of the succession orders. The effect is that they have been excluded from receiving interests in Parininihi Ki Waitotara, Minarapa 1A, Punagereere 1, North Island Tenths, Komene 12E, Oakura Town Belt section 7, Parihaka Papakainga, Part Town Belt Ohawe Township and Punehu Fishing Reserve.

[40] In considering whether it is appropriate to change the orders mentioned by way of rehearing by consent or per s 45 of the Act, I am mindful that Eileen and Leslie (and their whānau) are unaware of the potential impact on their current shareholdings if the orders are amended. I consider that they should have the opportunity to make submissions before final orders are made. In the circumstances therefore, a preferable approach would be for an application to be made to the Chief Judge per s 45 to correct the affected orders.

*Should the trust order be varied?*

[41] Having considered each of the issues raised by the respondent I can see no reason why the variations to the trust order as sought should not be made. There will be no detriment to the respondent or the other descendants of Taneroa Cunningham if the trust order is varied to be in the name of Bernadette Hikaka for the benefit of her descendants.

[42] The variations will not change the ability of the whānau to seek amendment of the orders per s 45 and I will issue directions concerning the lease monies. Bernadette’s whānau agree that Bernadette’s shares should be managed by them and granting the variations as sought will allow this to occur.

---

<sup>10</sup> 89 Ōtaki MB 103 (89 OTI 103)

<sup>11</sup> 89 Ōtaki MB 320 (89 OTI 320)

<sup>12</sup> 10 Aotea MB 1 (10 AOT 1)

**Decision**

[43] The trust order of Taneroa Cunningham Whānau Trust is varied per s 244 of Te Ture Whenua Māori Act 1993 to change the name of the trust to the Bernadette Hinerangi Hikaka Whānau Trust, to record that the tipuna of the trust is Bernadette Hinerangi Hikaka and that the beneficiaries of the trust are the descendants of Bernadette Hinerangi Hikaka.

[44] There is an order per s 239 of Te Ture Whenua Māori Act 1993 replacing Julie Hikaka as sole trustee and appointing Terence Te Rei Hikaka and Keren Hikaka as trustees of the Bernadette Hinerangi Hikaka Whānau Trust.

[45] These orders are to remain unsealed for 1 month from the date of this judgment during which time the uri of Taneroa Cunningham are invited to make submissions on the orders set out above.

[46] The trustees are directed to prepare a report confirming the receipt of lease monies received by the trust and the amount currently held. Once the report has been filed further directions may then issue.

Pronounced at 10.05 am in Whanganui on Friday this 22<sup>nd</sup> day of July 2016

L R Harvey  
**JUDGE**