IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20150002556
A20160004194

UNDER	Sections 117 and 118, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Succession to Carol Ngawhira Tanui Fleet
BETWEEN	MAUREEN VINCENT and JOHN FLEET Applicants
AND	NATHAN KENNEDY Respondent

Hearing: 22 October 2015, 117 Taitokerau MB 76-85
25 – 26 July 2016, 136 Taitokerau MB 141-269
21 March 2018, 171 Taitokerau MB 151-179
(Heard at Auckland)

Appearances: C Hockly, for Applicants
P Majurey, for Respondent
D Abbot, for Estate of Carol Ngawhira Tanui Fleet

Judgment: 31 January 2019

JUDGMENT OF JUDGE M P ARMSTRONG

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Introduction

[1] Applications have been filed to succeed to the interests of the late Carol Ngawhira Tainui Fleet. Through various provisions in her will, Ms Fleet left her interests to Nathan Kennedy. The issue in this case is whether Mr Kennedy can succeed to those interests or whether they pass to those entitled on intestacy.

Background

[2] Ms Fleet passed away on 19 April 2014. She was not married and had no children. She had three siblings John Fleet, Maureen Vincent and Norma Clarke. Mrs Clarke passed away before Ms Fleet, she did not leave any children.

[3] Ms Fleet left a will dated 19 November 1999. Probate was granted on 17 July 2015. The will appoints David Abbott as the executor and trustee of the estate (a former Associate Judge of the High Court now retired). Clause 4 of the will states:

> 4. I GIVE the balance of my estate, the significant aspects of which comprise my interests and shares in Ngaati Hei lands, motu, taonga and resources (wherever located and whatever the ownership structure controlling them), to my trustee ON TRUST:
>
> (a) To pay my debts, funeral and administrative expenses and any duties payable;
>
> (b) To transfer my interests and shares (existing at the date of my death or which might accrue subsequently to my estate by descent or otherwise) in Ngaati Hei lands, motu, taonga and resources to my nephew **NATHAN KENNEDY** (to hold and administer as kaitiaki) or at my said nephew's election to such legal entity as he shall establish in consultation with my trustee to protect those holdings in perpetuity for the Māori people generally and Ngaati Hei iwi (in the widest sense of that expression) particularly;
>
> (c) To give anything remaining to **NATHAN KENNEDY** absolutely in recognition of his willingness to carry out my wishes for my whenua.

[4] Ngāti Hei is an iwi based on the eastern seaboard of the Coromandel. The issues in this case are:

(a) What is the effect the will?

(b) Has Mr Kennedy exercised the right of election per clause 4(b) of the will?

(c) Is Mr Kennedy entitled to succeed per s 108 of Te Ture Whenua Māori Act 1993 ("the Act")?

What is the effect of the will?

[5] Clause 4(b) of the will directs Mr Abbott to transfer Ms Fleet's Ngāti Hei lands, motu, taonga and resources to Mr Kennedy, to hold and administer as kaitiaki, or at Mr Kennedy's election, to such legal entity as he shall establish in consultation with Mr Abbott, to protect those holdings in perpetuity for the Māori people generally and the Ngāti Hei iwi.

[6] This provision in the will has two parts:

(a) The first part directs that these interests are to be transferred to Mr Kennedy "to hold and administer as kaitiaki";

(b) The second part refers to the establishment of a legal entity "for the Māori people generally and the Ngaati Hei iwi."

[7] Concerning the second part, it is clear this provision does not compel Mr Kennedy to establish that legal entity. It is only if he elects to do so. That is the plain and ordinary meaning of the language used.

[8] The first part provides that those interests are to go to Mr Kennedy. Ambiguity arises because of the phrase "to hold and administer as kaitiaki". According to the holistic Māori world view, Māori did not consider they owned land in a western sense. Rather, they saw themselves as kaitiaki or caretakers. They were intrinsically linked with the land and had an obligation to care for and look after the land before passing it on to future generations. In other contexts, the term kaitiaki has been used to refer to a trustee and denotes fiduciary obligations.

[9] I consider cl 4(b) of the will uses the term kaitiaki in the holistic sense. I do not consider this provision requires Mr Kennedy to receive the land on trust or in some fiduciary capacity. When reading cl 4(b) as a whole, the second part allows Mr Kennedy to elect that these interests go to a legal entity for the benefit of the Māori people generally

and Ngāti Hei iwi. It would be a strange result if the first part of cl 4(b) required Mr Kennedy to hold the land on trust while the second part gave him a discretion for the land to go in a trust like entity. The second part of cl 4(b) must inform the application of the first part.

[10] If I am wrong on that point, to the extent the first part of cl 4(b) requires Mr Kennedy to hold the land on trust, this provision must fail for uncertainty. This provision does not set out the scope of any intended trust or its beneficiary. The second part of cl 4(b) only applies at Mr Kennedy's election. Clause 6 of the will does set out Ms Fleet's intentions for her land, and refers to her previous proposal to establish the Ngawhira Tainui Whānau Trust. However, that too lacks sufficient certainty to properly inform the first part of cl 4(b). If the transfer to Mr Kennedy under cl 4(b) fails, the interests go to Mr Kennedy absolutely per cl 4(c) of the will.

[11] I find that per cl 4(b) and/or cl 4(c) of the will, Ms Fleet's land interests are to go to Mr Kennedy personally, unless he elects that the Ngāti Hei interests are to go to the legal entity referred to in part two of cl 4(b).

Has Mr Kennedy exercised the right of election per clause 4(b) of the will?

[12] Mr Kennedy filed draft terms for a proposed trust to receive Ms Fleet's land interests. However, he has not exercised the right of election per cl 4(b) of the will.

[13] Clause 4(b) states that, if the right of election is exercised, the interests are to be held in a legal entity for the benefit of the Māori people generally and Ngāti Hei iwi. Section 108(2)(f) of the Act provides that Māori freehold land may be left by will to a trustee of a person referred to in any of paragraphs (a) to (e) of that section. The outer limit of that class are members of the hapū associated with the land.[1] Ngāti Hei is an iwi, Māori is a race of people. The class of persons referred to in cl 4(b) of the will is too wide and does not fall within s 108.

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[1] Te Ture Whenua Māori Act 1993, ss 108(2)(c) and (d). Also see *Mihinui – Maketu A100* (2007) 11 Waiariki Appellate MB 230 (11 AP 230).

[14] In closing submissions, Mr Majurey, for Mr Kennedy, accepted this. He confirmed that Mr Kennedy first seeks to succeed to Ms Fleet's interests personally, after which he intends to vest the interests in the proposed trust.

[15] I find that Mr Kennedy has not exercised the right of election per cl 4(b) of the will, and if he did, the proposed trust referred to in cl 4(b) is too wide and does not come within s 108 of the Act.

Is Mr Kennedy entitled to succeed per section 108 of the Act?

[16] Section 108 of the Act provides that an owner of a beneficial interest in Māori freehold land may only leave that interest by will to a person who belongs to one or more of the classes set out in s 108(2). The onus is on Mr Kennedy to establish that he falls within s 108. If Mr Kennedy is not entitled to succeed to all or some of Ms Fleet's interests, those interests will pass to Ms Fleet's surviving siblings, as the persons entitled on intestacy.[2]

[17] Mr Kennedy claims that he comes within s 108(2)(c) and (e). That is:

(a) He is Ms Fleet's whāngai; or

(b) He is related by blood to Ms Fleet and is a member of the hapū associated with the land.

Is Mr Kennedy a whāngai entitled to succeed?

[18] When making provision for whāngai, there is a two-step approach. The first is to determine whether or not a person is to be recognised as a whāngai of the deceased owner. If so, the second step is to determine whether he or she shall be entitled to succeed, and if so, whether to the same or any lesser extent as if that person had been a child of the deceased owner.[3]

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2 Te Ture Whenua Māori Act 1993, ss 108(5) and 109(1)(b).

3 Te Ture Whenua Māori Act 1993, s 115. Also see my discussion on this approach in *Retemeyer v Loloa* (2016) 129 Taitokerau MB 288 (129 TTK 288).

[19] In *Hohua – Estate of Tangi Biddle*,[4] Professor Wharehuia Milroy gave evidence on the tikanga of Ngāi Tuhoe in relation to whāngai succession. According to Professor Milroy:[5]

> Tuhoe iwi determines "whangai" as any customary and optional procedure for taking as [one's] own, a child of other parents. The main principle in "whangai" is kinship. Tuhoe regarded as important in the "whangai" of a child that there has to be a whakapapa link which is readily established and that the taking the point of relationship in the "whangai" situation outside the fourth cousin status is too far removed to allow a "whangai" to have rights in the use of family land. Thus, a close blood relationship is a pre-requisite to the "whangai" eventually assuming rights in family land.
>
> I list the following characteristics of Tuhoe tikanga that would apply to tamariki "whangai".
>
> (1) The "whangai" would be invariably a blood relative of the adopting parent.
>
> (2) The hapu, and perhaps to a lesser exten[t], the iwi, would need to give consent in some situations and providing that "whangai" remains with the adopted hapu that "whangai" would be entitled to share the hapu lands. If there were other relatives, the "whangai" would share in the succession to whanau/hapu lands.
>
> (3) The process of "whangai" normally involved taking a child at birth or in early infancy and raising it with its "whangai" parents or parent until the "whangai" marries.
>
> (4) If there were no close relatives and the "whangai" had assumed the responsibilities of caring for the adoptive parents till old age then the "whangai" would receive the whole of the interest of the (matua whangai).
>
> (5) If there were circumstances falling outside these principles, then those will be taken into account to decide whether the "whangai" had any rights or not.
>
> It is unlikely that Tuhoe tikanga would be considerably different from other tribal areas prior to the Maori Land Court coming into existence. Outside of the above conditions there would be "whangai" situations intra-hapu; intra-iwi; extra-hapu; extra-iwi that would serve most of the cultural dictates that prevail except where land, food gathering rights and property are involved. In those instances other principles are then invoked.
>
> It must be pointed out that the term "whangai" differs from the term "atawhai" in that the delineation is that "atawhai" tends to equate more with "fostered child" and "whangai" with adopted child." Other synonyms which are used to describe an "atawhai" child as used by Joan Metge are tiaki (look after) and taurima (to treat with care) and whakatipu (to make grow). These terms are used by Tuhoe as well to establish the difference between a "whangai" and an "atawhai."

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

5 At 49-50.

[20] In *Milner v Milner – Estate of Warihi Te Keu Faenza Milner*, Dr Hirini Mead explained the term whāngai in the following way: [6]

> … a [tamaiti] whangai is somebody who has been taken into another family and raised by that family as though that person was one of their own. This person lives with them for many years, grows up with that whanau – not only the whanau whaiti, that is the household but within the greater whanau so that the matter is open – everybody knows that so-and-so is a tamaiti whangai of so-and-so, because they see the evidence right before their eyes.

[21] Dr Mead went on to identify four main questions to determine whether a person was a whāngai:[7]

(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?

[22] The unusual feature in this case is that Mr Kennedy was not raised by Ms Fleet. He says he was "whangai'd" by Ms Fleet when he was an adult. There is little evidence to demonstrate this relationship was that of whāngai mother and whāngai son.

[23] In her will, Ms Fleet referred to Mr Kennedy as her nephew. She did not call him her whāngai, her son, or any other type of relationship which would indicate she viewed him as a whāngai in a traditional sense. Mr Kennedy was also equivocal about the nature of his relationship with Ms Fleet. He was hesitant to say it was a relationship of mother and son but instead said it was a distinct relationship to that he had with his other aunties.

[24] Garrick Cooper gave evidence in support of Mr Kennedy. Mr Cooper is a senior lecturer in Māori Studies at the University of Canterbury. According to Mr Cooper, Ms Fleet often referred to Mr Kennedy as her whāngai. He said:

> As far as I am aware there was no elaborate ritual, nor any formal public proclamations to this effect. It was so, by virtue of her calling him a whāngai, and

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6 *Milner v Milner – Succession to Warihi Te Keu Faenza Milner* (2008) 83 Ruatoria MB 108 (83 RUA 108) at 114.

7 At 115.

> this was reaffirmed by both Aunty' sharing of her knowledge with Nathan, and how Nathan reciprocated by supporting her with tasks ranging from doing simple chores for her, taking her to different hui, to carrying out administrative duties and research.

[25] I do not accept that simply because someone is referred to as a whāngai, they should be recognised as a whāngai per ss 108 and 115 of the Act. The approach in *Hohua* and *Milner* is clear that the Court is guided by the tikanga of the relevant hapū or iwi when deciding whether to recognise someone as a whangai. There is little evidence in this case on the tikanga of Ngāti Hei concerning whangai succession.

[26] Mr Cooper did give evidence around 'the social institution of whāngai' though he relied largely on academic literature rather than the tikanga of Ngāti Hei. Interestingly, he referred to literature from Dr Mead, calling this "perhaps the most comprehensive analysis in the literature of whangai". In *Milner,* Dr Mead said the practice of whāngai involves being taken into another family and being raised by that family as though that person was one of their own.

[27] Joseph Davis also gave evidence in support of Mr Kennedy. As discussed further below, Mr Davis is a kaumātua of Ngāti Hei. Mr Davis said he never heard Mr Kennedy being referred to as Ms Fleet's whāngai. He considered Mr Kennedy was her nephew.

[28] I am not satisfied that Mr Kennedy should be recognised as Ms Fleet's whāngai per ss 108 and 115 of the Act. Ms Fleet did not take Mr Kennedy from a young age and raise him as her own son. While they were undoubtedly close, Mr Kennedy has not established that he was her whāngai for the purpose of succession under the Act.

Is Mr Kennedy related by blood to Ms Fleet and a member of the hapū associated with the land?

[29] The application of s 108(2)(c) of the Act was considered by the Court of Appeal in *Kameta v Nicholas*.[8] The Court of Appeal found:

> [31] The Māori Appellate Court, correctly in our judgment, adopted a conjunctive approach to the construction of s 108(2)(c) in finding that a blood relationship will be established where the parties can show a whakapapa connection to the testator, even if distant, providing that that connection satisfies what it called

[8] *Kameta v Nicholas* [2012] 3 NZLR 573 (CA).

> "the associational relationship" of shared bloodlines and being part of the same hapū which once held collective ownership of the land. Notably, a hapū consists of a number of whānau bound by strong kinship ties and the whakapapa principle, where particular importance is attached to "being born into the group". It was not enough in this case that Mr Kameta and the Nicholas children shared a common ancestor; what was decisive was the devolution through a whakapapa link or relationship by blood within a hapū which was relevant to the land in question. That conclusion is reinforced by the Māori Appellate Court's finding, not challenged on appeal, that the Nicholas children were in fact members of the same functioning hapū as Mr Kameta.

[30] Patricia MacDonald gave evidence in support of Mrs Vincent and Mr Fleet. She set out whakapapa showing that Mr Kennedy and Ms Fleet are related by blood descending from the common tupuna Mere Kaimanu Patene. Ms MacDonald referred to Mere Patene as Ngāti Whanaunga. In cross-examination, she accepted Mere Patene was not only Ngāti Whanaunga.

[31] Mr Kennedy also gave evidence showing his descent from Mere Patene. This whakapapa shows that Mere descends from the tupuna Karaua who is the common ancestor for Ngāti Karaua.

[32] Mr Hockly, for Ms Vincent, does not dispute this whakapapa or the common descent lines from Mere Patene. Rather, he argues the lands in question are associated with Ngāti Hei, and Ngāti Karaua is a hapū of Ngāti Whanaunga not Ngāti Hei. Mr Hockly contends while Mr Kennedy can demonstrate he is related by blood to Ms Fleet, he cannot demonstrate this whakapapa link within a hapū associated with the land in question.

[33] In response, Mr Majurey argues Ngāti Karaua is a shared hapū of both Ngāti Whanaunga and Ngāti Hei and it is associated with the lands in question.

[34] There was differing evidence given on this issue by a number of witnesses. Ms Vincent agreed that Mr Kennedy is a member of Ngāti Karaua and that Ngāti Karaua is a hapū of Ngāti Hei. Ms MacDonald said Ngāti Karaua is part of Ngāti Whanaunga not Ngāti Hei. Despite that, she was unable to articulate the names of the various Ngāti Hei hapū. Ms MacDonald did not dispute Mr Davis' evidence or his expertise.

[35] Te Warena Taua gave evidence that Ngāti Karaua is a hapū of Ngāti Maru. He does not agree that Mr Kennedy is Ngāti Hei but said that is for Ngāti Hei to decide. Mr Taua

was not familiar with which hapū associates with the lands in question. He also accepted that Mr Davis has expertise on Ngāti Hei hapū.

[36] Mr Cooper also gave evidence about Ngāti Hei and Ngāti Karaua. Similar to other witnesses, he was unable to identify which hapū associates with the various blocks in question in this case.

[37] Mr Davis holds a number of senior positions with Ngāti Hei. This includes:

(a) Sitting on the paepae for Ngāti Hei;

(b) The Ngāti Hei representative on the Hauraki Māori Trust Board;

(c) The Ngāti Hei representative on the Pare Hauraki Fisheries Trust;

(d) A trustee of the Ngāti Hei Charitable Trust;

(e) A trustee on the Hei o Wharekaho Trust; and

(f) One of two Ngāti Hei negotiators for the Pare Hauraki Collective Treaty Settlement Negotiations.

[38] Mr Davis gave the most comprehensive evidence on this issue. Mr Davis considers Ngāti Karaua is a shared hapū of Ngāti Hei and Ngāti Whanaunga. According to Mr Davis, Mr Kennedy is Ngāti Hei and is a member of the following Ngāti Hei hapū:

(a) Ngāti Karaua;

(b) Ngāti Piri;

(c) Rapupo;

(d) Ngāti Koheru;

(e) Ngāti Ramuri; and

(f) Ngāti Tinirau.

[39] Mr Davis also gave evidence about the specific blocks that Ms Fleet has interests in and which hapū or iwi associate with those blocks. His evidence is as follows:

(a) Kuaotunu 7B1E and Kuaotunu 7B2: Ngāti Karaua and Ngāti Koheru. Mr Davis considers Mr Kennedy is a member of Ngāti Karaua and so is a member of the hapū associated with this land.

(b) Pungapunga Island: Ngāti Karaua and Ngāti Huarere. Mr Davis considers Mr Kennedy is a member of Ngāti Karaua and so associates with this island;

(c) Motu Koranga and Motu Koruenga: Mr Davis did not specify the Ngāti Hei hapū associated with these islands but rather referred to Ngāti Manukarere, Ngāti Tamatera and Ngāti Hei generally. Mr Davis considered that all hapū of Ngāti Hei associate with these islands. Despite that, he considered Mr Kennedy was not associated with the islands;

(d) Motuhoa: Ngāti Whanaunga, Ngāti Hei and Ngāti Maru. These are references to iwi not hapū. Mr Davis considers Mr Kennedy does associate with this island through Hori Kerei Tuokioki;

(e) Te Tii C: Ngāti Manukarere, Ngāti Tinirau and Ngāti Tamatera. Mr Davis earlier said that Mr Kennedy is a member of Ngāti Tinirau. Despite that, he considers Mr Kennedy does not associate with Te Tii C;

(f) Orotu No 1: Ngāti Whanaunga, Ngāti Karaua. Mr Davis considers Mr Kennedy does associate with this land.

[40] I accept Mr Davis' evidence. I consider he was an honest and reliable witness and that he has the necessary expertise to identify the various iwi and hapū who associate with the lands in this case. In fact, he was the only witness who was able to give this evidence.

[41] I am satisfied that Mr Kennedy and Ms Fleet share a common whakapapa to Ngāti Karaua. I am also satisfied, based on Mr Davis' evidence, that Ngāti Karaua is a hapū associated with Kuaotunu 7B1E, Kuaotunu 7B2, Pungapunga Island and Orotu No. 1, and that Mr Kennedy is entitled to succeed to those interests.

[42] I am not satisfied that Mr Kennedy is entitled to succeed to the other interests in the Coromandel. Mr Davis gave evidence that all hapū of Ngāti Hei associate with Motu Koranga and Motu Koruenga. Despite that, he considered Mr Kennedy does not associate with those islands. This evidence is somewhat ambiguous given that Mr Davis considered that Ngāti Karaua is a shared hapū of Ngāti Whanaunga and Ngāti Hei. However, the onus is on Mr Kennedy to demonstrate that he is entitled to succeed. This ambiguity must be construed against him and I am not satisfied that the evidence sufficiently demonstrates he is associated with these islands.

[43] Mr Davis gave evidence that Ngāti Whanaunga, Ngāti Hei and Ngāti Maru are associated with Motuhoa. These are references to iwi not hapū. According to Mr Davis, Ngāti Karaua is a shared hapū of both Ngāti Whanaunga and Ngāti Hei. On the face of it this indicates that Mr Kennedy does associate with Motuhoa. However, Mr Davis gave evidence that Mr Kennedy's association with this island is through the tupuna Hori Kerei Tuokioki. That tupuna is not in the whakapapa presented by Mr Kennedy showing his whakapapa to Ms Fleet through descent from the common ancestor Mere Kaimanu Patene. It may be that his association with this land through Hori Tuokioki is a different whakapapa line. Mr Kennedy has not shown a sufficient whakapapa connection within the hapū associated with the land as set out in *Kameta*.

[44] Finally, Mr Davis considers that the hapū associated with Te Tii C is Ngāti Manukarere, Ngāti Tinirau and Ngāti Tamatera. Mr Davis earlier gave evidence that Mr Kennedy is a member of Ngāti Tinirau which is a hapū of Ngāti Hei. Despite that, Mr Davis considered Mr Kennedy does not associate with the Te Tii C block. There is also no evidence showing a common whakapapa between Mr Kennedy and Ms Fleet within the Ngāti Tinirau hapū. Again, Mr Kennedy has not demonstrated that he meets the test set out in *Kameta* concerning this land.

[45] Ms Fleet also has interests in Lot 2 Deposited Plan South Auckland 11561, Turoto C2B2B4B1 and Turoto C2B2B4B2. These lands are located in Otorohanga. Ms Fleet has further interests in Tikapa A6 near Tikitiki on the East Coast. It is accepted that these lands associate with Ngāti Maniapoto and Ngāti Porou and that Mr Kennedy does not associate with those lands.

[46] I find that Mr Kennedy is related by blood to Ms Fleet and is a member of the hapū associated with Kuaotunu 7B1E, Kuaotunu 7B2, Pungapunga Island and Orotu No. 1. As such, he is entitled to succeed to those interests.

[47] Mr Kennedy has not demonstrated that he comes within one of the classes referred to under s 108 of the Act concerning Ms Fleet's remaining land interests. Those interests shall go to her siblings on intestacy.

Decision

[48] I grant the following orders:

(a) Mr Kennedy is entitled to succeed to Ms Fleet's interests in Kuaotunu 7B1E, Kuaotunu 7B2, Pungapunga Island and Orotu No. 1;

(b) John James Fleet and Maureen Joyce Hinemaru Vincent are entitled to succeed in equal shares to Ms Fleet's interests in Motu Koranga, Motu Koruenga, Motuhoa, Te Tii C, Lot 2 Deposited Plan South Auckland 11561, Turoto C2B2B4B1, Turoto C2B2B4B2 and Tikapa A6;

(c) Vesting those interests in the persons entitled.

[49] As both parties have been partly successful my preliminary view is that costs should lie where they fall. If any party seeks an order for costs they are to file and serve submissions within three weeks of this judgment with any response to be filed and served three weeks thereafter and I will issue a further decision on the papers.

Pronounced at 12:30pm in Whangārei on Thursday this 31st day of January 2019.

M P Armstrong
JUDGE