

IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT

Place: Wellington
Present: C M Wainwright, Judge
Claire Mason, Clerk of the Court
Date: 9 February 2005
Application No: A19990005454
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Subject: Wilhelmina Floate (or Fisher or Newton)
Section: 118/93
Hearing: 3 November 2004
Applicant: Theona Mina Heaslip

RESERVED DECISION

Introduction

Theona Heaslip has filed an application seeking an order vesting the interests of James Newton, Charles Newton and Robert Hart in her mother Wilhelmina Fisher.

Background

On 22 July 1996, Glyn Newton made an application under section 45 of Te Ture Whenua Māori Act 1993 seeking the cancellation of a succession order made on 27 February 1956 at 35 SIMB 333 relating to James Newton.

The order at issue vested James Newton's interests in his daughter, Wilhelmina Fisher. However, Mr Newton claimed that the order was incorrect because James Newton died, leaving no children to succeed to him. Mr Newton contended that, because James Newton died intestate and without issue, the rightful successors to his interests are his siblings.

On considering Mr Newton's application, Deputy Chief Judge Smith decided that due to conflicting evidence, he was unable to determine whether the vesting was correct or not. However, instead of dismissing the application, Deputy Chief Judge Smith cancelled the order. He also cancelled another two succession orders relating to the estate of Charles Newton at 39 SIMB 217 and the estate of Robert Hart at 58 SIMB 92. Mrs Fisher had also succeeded to land interests under these orders on the basis that James Newton was her father.

As a result of these cancellations, the interests previously vested under these orders reverted to the three deceased. Deputy Chief Judge Smith then directed the parties to file fresh succession applications.

Theona Heaslip filed a new succession application as the daughter of Mrs Fisher. Mrs Heaslip claims that her mother is entitled to succeed to the interests of James Newton, Charles Newton and Robert Hart because she was the whāngai of James Newton. James Newton had no other issue alive at the time of his death.

When Mrs Heaslip's applications came before Chief Judge Williams on 7 March 2000, he adjourned her application and directed that counsel file submissions on the issue of legal adoption. Regrettably, no minutes were recorded from this hearing, as the tapes were lost. However, it can be gleaned from counsel's memorandum that Chief Judge Williams had advised Mrs Heaslip that she might be better served making an application under section 45/93 rather than filing a new succession application. He also noted that the court might be barred from considering her application under section 100(2)(b)/93.

The matter then came before me on 1 September 2003. I directed that Mrs Heaslip indicate whether she wanted to pursue her succession applications or file a section 45 application, as suggested by the Chief Judge. Mrs Heaslip elected to proceed with her succession applications.

I then called for submissions on (a) the whāngai/legal adoption issue as it related to Wilhelmina's entitlement to succeed; and (b) whether the court has jurisdiction to determine this application given the wording of section 100(2)(b)/93.

Submissions were received from counsel for the applicant. On 3 November 2004, I advised that I would consider the submissions in chambers and produce a decision on the jurisdiction question and the whāngai status of Wilhelmina Fisher.

I will only form a view as to the jurisdiction question. In relation to the whāngai status of Wilhelmina Fisher, I have decided to fixtore another hearing on the question of Ngai Tahu tikanga relating to whāngai succession. Please see below for my directions on this issue.

Section 100(2)(b)/93 and jurisdiction

Under section 115/93, the Court can make an order that a whāngai is entitled to succeed to an interest in Māori freehold land as if that person had been the child of the deceased owner. However, the Court's power to do so is restricted by section 100(2)/93.

Under section 100(2)/93, the Court cannot make an order under section 115/93 if, prior to the commencement of Te Ture Whenua Māori Act 1993, (a) the administration of the deceased's estate had been granted, (b) if the deceased's interest in Māori freehold land had already been vested, or (c) if the deceased left a will executed before the commencement of the Act.

In this case, the administration of the estates of the three deceased was not granted prior to the commencement of the Act. Additionally, all three died leaving no will, therefore section 100(2)(c) does not apply.

However, the interests of the three deceased were previously vested prior to the commencement of the Act. The orders vesting their interests are the orders at issue in this application. Counsel for the applicant has submitted that because Deputy Chief Judge Smith cancelled these orders, and the vested interests reverted to the deceased, section 100(2)(b) does not apply to the present facts.

I agree. The effect of cancelling these orders is that the previous vestings are erased from the record of the Court. Therefore, the Court must act as if these orders and vestings were never made. The result is that the interests of the three deceased were not vested prior to the commencement of the Act.

Therefore, the Court's jurisdiction to make orders under section 115/93 is not removed by section 100(2)/93.

Whāngai status of Wilhelmina Fisher

There is evidence before the court that suggests Wilhelmina Fisher was the whāngai of James Newton.

Counsel for the applicant has submitted that Mrs Fisher should be considered the whāngai of James Newton for the following reasons:

- (a) Mrs Fisher was adopted by James and Mary Newton in accordance with tikanga Māori;
- (b) Mrs Fisher alone carried out the obligations of whanaungatanga to her mother and father until they died;
- (c) When Mrs Fisher died, she was buried in a communal plot with her father; and
- (d) The death certificate records her father as James Newton.

However before I reach a decision on this issue, and determine who is entitled to succeed to the interests of James Newton, Charles Newton and Robert Hart, I would like to hear further evidence on local tikanga relating to whāngai succession.

I therefore direct counsel for the applicant to commission evidence on this issue. I suggest that counsel contact Dr Terry Ryan to undertake this task. This evidence should address these questions:

- (a) What factors would need to be present to recognise a whāngai relationship under Ngāi Tahu tikanga?;
- (b) Can a person not from the same bloodline or whānau as their matua whāngai be considered a whāngai under Ngāi Tahu tikanga?; and
- (c) Does Ngāi Tahu tikanga permit a whāngai, without a blood relationship to their matua whāngai, to take interests in land?

This application has been set down for further hearing at the July sitting of the Invercargill Court, where I will hear from parties on the whāngai issue.

Dated at Wellington 9 February 2005

C M Wainwright
JUDGE