

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

**A20100012361  
2014 Chief Judge's MB 127  
2014 CJ 127**

UNDER Section 45 of Te Ture Whenua Māori Act 1993

IN THE MATTER OF K & T MacFarlane Whānau Trust and  
succession orders made at 181 Napier MB 148-  
150 and at 181 Napier MB 151-152 dated 4  
August 2005

BETWEEN Cara Verena MacFarlane  
Applicant

AND Trustees of the K & T MacFarland Whanau  
Trust  
Respondent

Judgment: 25 March 2014

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**DECISION OF DEPUTY CHIEF JUDGE C L FOX**

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## **Introduction**

[1] This application filed by Cara Verena MacFarlane (“the Applicant”) pursuant to s 45 of Te Ture Whenua Māori Act 1993 seeks to amend the following succession orders dated 4 August 2005 relating to the paternal grandparents of the Applicant:

- (a) At 181 Napier MB 148-150 relating to Tira Kahurangi MacFarlane also known as Tira Wairama or Tira Kahurangi; and
- (b) At 181 Napier MB 151-152 relating to Ken MacFarlane.

[2] The Applicant claims that she has been adversely affected by the order to which the application relates because she and her siblings were excluded from the succession due to an error in fact or omission in the presentation of the facts of the case because their father, Thomas England MacFarlane, was not included in the succession to both his parents therefore the Applicant and her siblings have not received their entitlements.

## **Background**

[3] The Case Manager’s Report and Recommendation dated 2 July 2013 sets out the background to the application. The report is produced in full as follows:

### **REPORT AND RECOMMENDATION**

#### **Introduction**

1. This application filed by Cara Verena MacFarlane (“the Applicant”) pursuant to section 45 of Te Ture Whenua Māori Act 1993 (“the Act”), seeks to amend two succession orders made on 4 August 2005 –
  - a. At 181 Napier MB 148-150 in respect of Tira Kahurangi MacFarlane also known as Tira Wairama or Tira Kahurangi and;
  - b. At 181 Napier MB 151-152 in respect of Ken MacFarlane, the applicant’s paternal grandparents.
2. The Applicant claims that the orders are incorrect by reason of a mistake, error or omission in the presentation of the facts of the case to the Court because Thomas England MacFarlane (the Applicant’s father, who died in 1992) was not included in the succession to his parents, Tira Kahurangi MacFarlane and Ken MacFarlane.

3. The Applicant claims she and her siblings have been adversely affected by the orders complained of because their father, Thomas England MacFarlane was not included in the succession to both his parents therefore, the Applicant and her siblings have not received their entitlements.

**Concise history of Order sought to be amended/cancelled**

4. On 4 August 2005 at 181 Napier MB 148-150 the Court heard an application filed by Barbara Evelyn MacFarlane:
- a. To succeed to the Māori land interests of her late mother, Tira Kahurangi MacFarlane also known as Tira Wairama or Tira Kahurangi; and
  - b. To constitute the MacFarlane Whānau Trust.
5. On the same day at 181 Napier MB 151-152 the Court also heard an application for succession to the interests held by her late father, Ken MacFarlane and to include those interests in the MacFarlane Whānau Trust.
6. The land interests of Tira and Ken MacFarlane were recorded as follows:

Tairawhiti District

<u>Blocks</u>	<u>Current Owner</u>	<u>Shares</u>
Te Kopani 30	Tira Wairama	0.178
Te Kopani 27	Tira Wairama	0.178
Te Kopani 36	Tira Wairama	803.500
Heiotahoka 2B	Tira Wairama	804.000
Te Kopani 29	Tira Wairama	0.178
Te Kopani 28	Tira Wairama	0.178

Waiariki District

<u>Blocks</u>	<u>Current Owner</u>	<u>Shares</u>
Waipapa 9	Tira Kahurangi MacFarlane	109.79854
Whangamata 3	Tira Kahurangi MacFarlane	0.3375
Tuaropaki E	Tira Kahurangi MacFarlane	15.18331
Omataroa Rangitaiki 2	Tira Kahurangi MacFarlane	4.500
Pouakani B 6B 6F 2A 2	Tira Kahurangi MacFarlane	6.18333

Tairawhiti District

<u>Blocks</u>	<u>Current Owner</u>	<u>Shares</u>
Tumunui	Ken MacFarlane	27.426785
Tumunui 1	Ken MacFarlane	27.426785
Tatua Survey District Section 16 Block XI	Ken MacFarlane	0.088886
Tahorakuri A 1 Sec 7A	Ken MacFarlane	1.30546

Tahorakuri A 1 Sec 7B 1	Ken MacFarlane	1.305463
Tauhara North 2A	Ken MacFarlane	0.1111132
Tauhara North 2B	Ken MacFarlane	0.111113
Tauhara North 2C	Ken MacFarlane	0.1111133
Tahorakuri 2	Ken MacFarlane	0.088887
Tahorakuri A1 Sec 35	Ken MacFarlane	41.6666667
Peka	Ken MacFarlane	0.376955
Tauhara North 3B	Ken MacFarlane	0.0090267
Tahorakuri A 1 Sec 1 (Ohaki Papakainga)	Ken MacFarlane	8.7670832
Tarawera Survey District Sections 6 & 18 Block V	Ken MacFarlane	0.2513032
Paeroa South B 2B 1	Ken MacFarlane	12.0851733
Waotu South 18	Ken MacFarlane	331.6518
Tutukau East Z	Ken MacFarlane	5.579853

7. The Court made orders determining the following persons as beneficially entitled to succeed to the interests of Tira and Ken MacFarlane:

Successors/Beneficiaries

	<u>Name</u>	<u>Sex</u>	<u>Proportion</u>
1.	Lyola Kahurangi Tokone	F	1/5
2.	Margaret Makarena Ohlson	F	1/5
3.	Wayne MacFarlane	M	1/5
4.	Hewa Joseph MacFarlane	M	1/5
5.	Barbara Evelyn MacFarlane	F	1/5

8. The beneficiaries consented to the creation of the MacFarlane Whānau Trust and the Court vested their shares into the following persons as the Trustees of the Whānau Trust:

<u>Trustees</u>
1. Barbara Evelyn MacFarlane
2. Barbara Kahurangi Tokone
3. Wayne MacFarlane
4. Jackson MacFarlane

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

9. The applicant has provided the following documents in support of her application:
- a) A copy of the Birth and Death Certificate for Thomas England MacFarlane which records that he is a child of Ken and Tira MacFarlane;
  - b) Copies of Birth Certificates for the children of Thomas England MacFarlane:
    - i. Lisa Irene MacFarlane;

- ii. Cara Verena MacFarlane;
  - iii. Mandy Tira MacFarlane; and
  - iv. Thomas James MacFarlane.
- c) Copies of Bank Statements for the K & T MacFarlane Whānau Trust for the following periods:
- i. 23 March 2010 – 23 September 2010;
  - ii. 23 September 2009 – 23 March 2010;
  - iii. 23 September 2008 – 23 March 2009;
  - iv. 21 September 2007 – 20 March 2008;
  - v. 22 September 2006 – 23 March 2007; and
  - vi. 23 March 2006- 22 September 2006.
- d) Copies of the minutes and orders complained of at 181 Napier MB 148-150 and 181 Napier MB 151-152;
- e) A copy of the Management Structure Report for the K & T MacFarlane Whānau Trust;
- f) A copy of the application for succession to Tira MacFarlane, filed by Barbara MacFarlane which includes:
- i. A copy of the Death Certificate for Tira Kahurangi MacFarlane;
- g) A copy of the application for succession to Ken MacFarlane, filed by Barbara MacFarlane, which includes:
- i. A copy of the Death Certificate for Kenneth MacFarlane;
  - ii. A copy of the Probate dated 1 March 2005; and
  - iii. A copy of the Will dated 2 December 2004

**Details of subsequent Orders affecting lands to which application relates**

10. On 3 November 2005 at 182 Napier MB 161-162, succession was made to the interests of Makaria Tokena also known as Makaria Hamiera Tokena or Makaria Matenga (mother of Ken MacFarlane).
11. Ken was a 1/3<sup>rd</sup> successor to his mother's interests and his shares were then vested into the trustees of the K & T MacFarlane Whānau Trust.
12. At the same minute, the Court made an order amending the name of the trust from the MacFarlane Whānau Trust to the K & T MacFarlane Whānau Trust.
13. Should the Court determine that Thomas is not entitled to succeed to Ken, then these orders will not be consequentially affected.

**Details of payments made as a result of the Order**

14. A letter dated 18 September 2012 from Omataroa Rangitaiki No 2 Trust advised that \$7.98 was paid to the K & T MacFarlane Whānau Trust on 28 February 2011. A hold has been placed on current funds pending the outcome of this application.

15. On the 12 September 2012 an email was received from Strettons Chartered Accountants who manage the financial distribution of the funds for Tuaropaki Trust and Waipapa 9 Trust. They confirmed the following payments have been made to the K & T MacFarlane Whānau Trust:
  - a. \$13,992.06 from the Tuaropaki Trust; and
  - b. \$6,862.39 from the Waipapa 9 Trust.
16. A hold has been placed on the current funds held by Strettons Chartered Accountants pending the outcome of this application.
17. On the 13 September 2012 an email was received from Lake Taupo Forest Trust who managed the financial distribution of funds for various land blocks around the Taupo area. They confirmed payments were made totalling \$6998.06.
18. A hold has been placed on the current funds held by Lake Taupo Forest Trust pending the outcome of this application.
19. On 25 March 2013 an email was received from the Māori Trustee Office in Gisborne advising that they have referred my letter to the Māori Trustee Office in Wellington for a response. At the time of compiling this Report, no response has been received from the Māori Trustee.

**Reference to areas of difficulty**

20. On the lower Court application to succeed to Ken MacFarlane, the information provided by the applicant (Barbara MacFarlane) had noted that (as a child of Ken) Thomas England MacFarlane had died with issue, but Thomas's children were not listed.
21. A similar situation also occurred on the lower Court application upon succession to Tira MacFarlane, where it was noted that (as a child of Tira), Thomas had died, but without any issue.
22. Ken made a specific clause in his Will leaving his Māori land interests and Incorporation shares to his children namely, Lyola Kahurangi Tokone, Barabara Evelyn MacFarlane, Margaret Maakaria MacFarlane, Wayne Kenneth MacFarlane and Hewa Joseph MacFarlane.
23. When dealing with succession to a testate estate the Court needs to determine if that Will meets the requirements of section 108 of the Act. An extract of that section has been provided as follows:
  - a. Section 108 - Disposition by will

An owner of a beneficial interest in Māori Freehold land may leave that interest by will to any person who is a child of the testator or a remoter issue of the testator.
24. Thomas was not named in Ken's Will, and in accordance with section 108 of the Act, he was not recognised by the Court as a successor to Ken's Māori Land interests.
25. As a result, the Court then made orders determining that the five children succeed to the interests of Ken MacFarlane.

26. When succession was made to both Ken and Tira MacFarlane, the Court failed to record Thomas England MacFarlane as being a child of both the deceased.
27. An amendment is required to correct the Court minute and to record Thomas as a child of both the deceased. The minute should also record that Thomas died leaving issue and to list the names of the Applicant and her three siblings as his natural issue.

**Consideration of whether matter needs to go to full hearing**

28. There is sufficient evidence on file to show that an error has been made in the presentation of the facts of the case to the Court.
29. Thomas's father died testate and because Thomas was not included as a beneficiary in Ken's Will he was not entitled to succeed to his father's interests.
30. When succession was made to Tira MacFarlane, the Court minute stated that she died without a Will.
31. When dealing with succession to an intestate estate the Court needs to determine who is entitled to succeed pursuant to section 109 of the Act. The section has been reproduced as follows:
  - a. Section 109 – Succession to Māori freehold land on intestacy

On the death intestate of the owner of any beneficial interest in Māori 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;

- i. 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 partitions if more than one, together with the issue living at the death of the deceased, that issue to take through all degrees, according to their stocks, in equal portions if more than one, the portion to which their parent would have been entitled if living at the death of the deceased.
32. Therefore, pursuant to section 109 of the Act, Thomas should have been recognised as being a natural child of Tira MacFarlane, and should have succeeded to her interests upon intestacy equally with his siblings, with substitution of issue.
33. The Applicant has provided a copy of the Birth Certificate for Thomas England MacFarlane as evidence to show that he is a son of Tira Wairama and Kenneth McFarlane.
34. The Applicant has also provided copies of birth certificates for herself and her three siblings as evidence to prove that they are the natural issue of Thomas England MacFarlane.
35. This matter does not require a hearing and can be dealt with on the evidence provided by the applicant.

**Recommendation of course of action to be taken**

36. If the Chief Judge is of a mind to exercise his jurisdiction, then it would be my recommendation that:

- a) A copy of this report be sent to **all affected parties to give them an opportunity to comment or respond, in writing, within 28 days of the date of this Report**
- b) If no objections are received, then the following orders be made pursuant to Te Ture Whenua Māori Act 1993:
  - i). An order pursuant to section 44(1) amending the Court record dated 4 August 2005 at 181 Napier MB 148-150 as follows:
    - a. By including Thomas England MacFarlane as a person beneficially entitled to succeed to Tira Kahurangi MacFarlane also known as Tira Waimarama or Tira Kahurangi and adjusting the proportional share of the successors at this minute from 1/5<sup>th</sup> to 1/6<sup>th</sup> share;
    - b. Re-vest 5/6<sup>th</sup> shares back into the K & T MacFarlane Whānau Trust;
    - c. The 1/6<sup>th</sup> share to remain in the name of Thomas England MacFarlane;
    - d. To insert the names of the Applicant and her three siblings as the issue of Thomas England MacFarlane.
  - ii). An order amending the Court record dated 4 August 2005 at 181 Napier MB 151-152 as follows:
    - a. by inserting Thomas England MacFarlane as being a natural child of Ken MacFarlane, who died with issue and to insert the names of the Applicant and her three siblings as the issue of Thomas England MacFarlane;
  - iii). An order to vest 5/6<sup>th</sup> shares into the K & T MacFarlane Whānau Trust and vest 1/6<sup>th</sup> share into Thomas England MacFarlane;
  - iv). And a further order pursuant to section 47(4) making all other consequential amendments.
- c) If objections are received then the matter should be set down for hearing.

**Discussion**

[4] On 3 July 2013 the Case Manager's Report and Recommendation was sent to all parties and no objections have been received to it.

[5] Pursuant to s 44 of Te Ture Whenua Māori Act 1993 the Chief Judge, or the Deputy Chief Judge acting upon delegation, may cancel or amend an order made by the Court or a

Registrar, if satisfied that the order 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. The Chief Judge, or the Deputy Chief Judge acting upon delegation, may also make such other orders as, in the opinion of the Chief Judge, or the Deputy Chief Judge acting upon delegation, is necessary in the interests of justice to remedy the mistake or omission.

[6] Having considered the Case Manager's Report and the evidence provided in support of the application, I am satisfied that an error in fact has been made in the presentation of facts of the case to the Court because Thomas England MacFarlane was a child of both Ken MacFarlane and Tira Kahurangi MacFarlane also known as Tira Wairama or Tira Kahurangi and should have been recorded as such.

[7] In terms of Thomas's entitlement to succeed to his parents interests:

- (a) Pursuant to s 108 of the Act, Thomas is not entitled to succeed to his father's interests as he did not name Thomas as a beneficiary in his Will.
- (b) Pursuant to s 109 of the Act, Thomas is entitled to succeed to his mother's interests as she died without a Will, and where the deceased leaves issue, the persons entitled shall be the children of the deceased or any child who died before the deceased.

[8] As a result the order dated 4 August 2005 at 181 Napier MB 148-150 relating to Tira Kahurangi MacFarlane also known as Tira Wairama or Tira Kahurangi, the order should be amended to include Thomas England MacFarlane.

### **Orders**

[9] Accordingly I make the following orders pursuant to Te Ture Whenua Māori Act 1993:

- (a) Amending the Court record dated 4 August 2005 at 181 Napier MB 148-150 to include Thomas England MacFarlane as a successor to Tira Kahurangi MacFarland also known as Tira Wairama or Tira Kahurangi as to a 1/6<sup>th</sup>

proportion and amending the other beneficially entitled persons interests accordingly;

- (b) Re-vesting 5/6<sup>th</sup> share back into the K & T MacFarlane Whānau Trust;
- (c) Vesting the entitlement of Thomas England MacFarlane as to a 1/6<sup>th</sup> share in the children of Thomas England MacFarlane namely; Lisa Irene MacFarlane, Cara Verena MacFarlane, Mandy Tina MacFarlane and Thomas James MacFarlane, equally; and
- (d) Amending the Court record dated 4 August 2005 at 181 Napier MB 151 MB -152 by inserting Thomas England MacFarlane (deceased) as a natural child of Ken MacFarlane and naming the applicant and her three siblings as the issue of Thomas England MacFarlane.

[10] And a further order pursuant to s47(4) that all consequential amendments are made where necessary.

[11] A copy of this decision is to go to all parties.

Dated at Wellington this 25<sup>th</sup> day of March 2014.

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C L Fox  
**DEPUTY CHIEF JUDGE**