

Place: Gisborne
Present: C L Wickliffe
F McClutchie, Clerk of the Court
Date: 23 October 2001
Application No: A20000058577
Subject: Estate of Akutini Kereti Henare Wawatai
Section: 113 & 118/93

DECISION

Background

The deceased, Mr Akutini Wawatai died on 25 September 2000 from heart failure. He was 77 years of age. The deceased married Mere Wawatai (nee Babbington) but in 1975 or thereabouts the couple were legally separated. This became important during the hearing of this application, a matter I will return to. The deceased and Mere had 8 children all of whom have survived the deceased. They are:

1. Phillip Wayne Wawatai
2. Toko Edward Wawatai
3. Bernadine Wawatai (the applicant)
4. Hine Marcia Johnson
5. Mihaka Tupanapana James Wawatai
6. Theresa Leeanne Smith
7. Beverly June Wawatai
8. Tearaiwini Wawatai

The deceased has interests in several Maori land blocks and 3 incorporations.

The Application

Bernadine Wawatai filed an application under section 118/93 on 8 December 2000. She also filed consents for inclusion of the deceased interests into a whanau trust from four of her siblings and herself. As is the usual practice in this Court a Part IV search was completed and a beneficiary rent search from the Maori Trustee's Office was requested. Based on this information a submission was prepared for the Court dated 8 February 2001. Prior to the hearing the submission was annotated indicating that the information provided by the applicant that the deceased and his wife were separated was not correct as by the time of his death the parties had reconciled.

Maori Land Court Hearings

The matter came before the Court for the first time on 8 February 2001. Only the applicant and a friend appeared that day, but because of the annotation on the submission prepared for the Court and the indication thereto that the evidence provided by the applicant was not correct, the matter was adjourned to enable Mere and all the children of the deceased to be advised of the application.



On 26 February 2001, the Maori Land Court received Notice of an Intention to Appear on the application from Mere Wawatai, the widow of the deceased and filed by Mr Ron Barber, Solicitor Gisborne. In that notice she indicated opposition to the application on the basis that she was legally married to Mr Wawatai at the date of his death and although they were separated by Court order in 1975, they were reconciled in the mid 1980s and that they were living together at the date of his death at her home at Waihirere. She pointed out that the death certificate of the deceased showed his place of residence at the date of death as 24 Waihirere Domain Road, Waihirere. The house is a joint family home and is subject to a mortgage to Westpac Trust dated 20 December 1989, after the date of reconciliation. The mortgage was signed by both the deceased and his widow and was later filed with the Court.

On 4 March 2001, a letter was received in the Maori Land Court from Teraiwini Wawatai who resides in Western Australia indicating that she supported her mother. Another letter was sent via e-mail to the Court from Theresa Wawatai-Smith acknowledging the status of her parents relationship as that of a married couple and supporting her mother's right to a life-interest. On 5 March 2001, a letter was faxed to the Court from Marcie Johnson (nee Wawatai) who resides in New South Wales Australia. In that letter she supported her mother's evidence that the couple has been reconciled.

The matter next came before the Court on 6 March 2001. At that hearing it became apparent that four daughters supported their mother. There has been no evidence led regarding the views of the sons.

During the hearing the applicant continued to maintain her position that her mother and father had been separated and that he lived with her only going to her mother's home occasionally, including just before his death. She denied that they cohabited as man and wife. She also stated that her father did not want her mother to have the income from his shares. I was not persuaded by her evidence as it lacked corroboration and the applicant at all times appeared to be motivated by her own animosity towards her mother.

Evidence was then taken from Mere Wawatai and evidence was also called in support from the following people:

Beverly Wawatai
Te Araiwini Cribb
Bernadine Tiepa
Deanna Bennett

Their evidence was that the deceased and his wife has resumed living together in their matrimonial home for which they had both accepted financial responsibility for. They had children and grandchildren and shared that responsibility. Mere explained that her husband's visits to Bernadine's house were initially to care for their mokopuna and later both Mere and Bernadine shared the responsibility of caring for him during his illness. The couple shared leisure and recreation activities together. The deceased told other important members of his whanau that he and Mere had reconciled. The couple acted in all respects as husband and wife introducing each other as such and portraying this state of affairs to friends, whanau and acquaintances.

Law

The relevant sections of Te Ture Whenua Maori Act 1993 are listed below for convenience.



109 Succession to Maori freehold land on intestacy

- (1) Subject to subsection (2) of this section, 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 one, 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 one, the portion to which their parent would have been entitled if living at the death of the deceased:
 - (b) Where the deceased leaves no issue, but leaves brothers and sisters, the persons entitled shall be the deceased's brothers and sisters living at the death of the deceased (including brothers and sisters of the half blood descended from the parent or other ascendant through whom the deceased received his or her entitlement to that interest), in equal portions if more than one, together with the issue living at the death of the deceased of any such brother or sister 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 one, the portion to which their parent would have been entitled if living at the death of the deceased:
 - (c) Where the deceased leaves no issue and no brothers and sisters, the persons entitled to succeed shall be ascertained always by reference to the derivation of entitlement by the deceased and shall be the issue, living at the deceased's death, of the person nearest in the chain of title to the deceased who has issue living at the deceased's death, that issue to take through all degrees, according to their stocks, in equal shares if more than one.
- (2) Where the owner of a beneficial interest in any Maori freehold land dies intestate leaving a surviving spouse, that spouse shall, subject to subsection (4) of this section, be entitled as of right to an interest for life or until remarriage in that interest.
- (3) Such a surviving spouse may, on the death of the deceased or at any time thereafter, surrender in writing his or her entitlement under subsection (2) of this section, whereupon the Court shall vest the interest absolutely in the persons entitled to succeed to the interest.
- (4) A surviving spouse shall not be entitled under subsection (2) of this section 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 between the surviving spouse and the owner.

A spouse is therefore entitled as of right to an interest for life or until remarriage. In this case there has been no surrender of that interest, the only issue is whether the separation order is in force. If it is then I have no jurisdiction to grant the life interest. Section 24 of the Family Proceedings Act 1980 indicates that a separation order will cease to have any force or effect if the husband and wife resume cohabitation as husband and wife. Section 24 provides:

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Discharge of separation order on resumption of cohabitation

- (1) Subject to section 40 of this Act, a separation order shall cease to have any force or effect if—
 - (a) The husband and the wife, with the free consent of both parties, have resumed cohabitation as husband and wife; or
 - (b) The order is discharged by the Court under section 25 of this Act.
- (2) Without limiting the provisions of paragraph (a) of subsection (1) of this section, the husband or wife may apply to a Family Court for the discharge of the separation order on the ground that it has ceased to have effect under that paragraph, and, on proof that the order has ceased to have effect as aforesaid, the Court shall discharge the order.

In order to ascertain the meaning of this provision I have referred to and adopted Justice Fisher's summary in *Excell v Department of Social Welfare* [1991] NZFLR 241 at 248 where he summarised the case law on the definition of cohabitation as follows:

- "(a) Cohabitation for legal purposes normally requires both some form of mental commitment to live together as husband and wife and a manifestation of that commitment by conduct. No minimum period is involved. In cases of doubt an inference as to intention will usually need to be drawn from conduct.
- (b) The conduct in question is concerned not with any single factor but with an aggregation of many. No single factor is enough nor will its absence be fatal. It is the cumulative quality, quantity, continuity and duration of these factors that matters.
- (c) No list could ever be exhaustive but the indicia include the extent to which there is a sharing of one dwelling as each party's principal place of residence, emotional dependence and support, the pooling of labour and financial resources, the sharing of household activities, the provision of domestic services, the provision of financial assistance, the sharing of one bedroom, the sharing of a sexual relationship, the sharing of companionship, leisure and social activities, the sharing of parental obligations, presentation to outsiders as a couple and the exclusion of emotional and sexual relationships with third persons.
- (d) A distinction is to be drawn between legal and de facto marriage. A legally married husband and wife have a legal duty to cohabit. Cohabitation ceases only while there is an intention by either spouse to repudiate the obligations inherent in the matrimonial relationship and a manifestation of that intention by conduct. In a legal marriage it is therefore a very short step from physical proximity to an assumption of continued or renewed cohabitation, especially if the alleged cohabitation has not been preceded by any lengthy separation and where there are other ties such as children in common. The position is different where the couple in question are not legally married, especially if they have not cohabited previously or in recent times. In those circumstances the duration of the relationship to date, and signs of permanence for the future, will assume special importance."



I have also found it useful to refer to other decisions of the Family Court and the superior Courts concerning the issue of what constitutes resumption of cohabitation or the synonymous term "living together". See for example *Grefstad v Grefstad* (1984) 3 NZFLR 124 on the synonymous nature of the terms. Indicia of "cohabitation" or "living together" have been discussed in *F v F* (1982) 1 NZFLR 449; *Urlic v Urlic* [1985] NZ Recent Law 399; *Re an Application by Chapman* (1987) 3 FRNZ 239; *Sullivan v Sullivan* [1958] NZLR 912 (CA); *Stoneham v Stoneham* (1988) 4 FRNZ 487; *Williams v Williams* (1988) 3 FRNZ 589 or (1988) 4 NZFLR 769; and *Dorf v Dorf* [1982] 1 NZLR 494 or (1982) 1 NZFLR 331 (CA).

While exploring different indicia the Family Court has also stressed that each case must be considered on its own facts and with "a realistic application of common sense and human experience." (See *Wright v Wright* (1997) 15 FRNZ 474)

In *Ruka v DSW* (1996) 14 FRNZ 633 or [1996] NZFLR 921, Sir Ivor Richardson P and Blanchard J identified as "key positive features" of a legal marriage "cohabitation and a degree of companionship demonstrating an emotional commitment", and at p 655; p 944, where Thomas J spoke of an "underlying commitment to the relationship", "mutual commitment and assumption of responsibility", and "merging their lives" in a way that indicates acceptance of responsibility for each other as hallmarks of a relationship in the nature of marriage.

The evidence I heard for Mere Wawatai was convincing in terms of Justice Fisher's summary and it also indicated that cohabitation, companionship, emotional and mutual commitment and assumption of responsibility was shared between Mere and her husband. All of the material presented indicated an intention on the part of the couple to reconcile. I, therefore, find that the deceased and Mere had resumed cohabitation as man and wife by the time of his death. As a result I find that the separation order had ceased to have any force or effect and that I have, therefore, jurisdiction to make orders under Te Ture Whenua Maori Act 1993 in favour of Mrs Wawatai.

Orders

For the aforementioned reasons and being satisfied of all matters I am required to be satisfied of under Te Ture Whenua Maori Act 1993, I make the following orders:

1. Order under section 113/93 determining that the children of the deceased are entitled to succeed to the Maori land block and incorporation interests of the deceased;
2. Order under section 118/93 in favour of Mere Wawatai for life with remainder to the 8 children of the deceased in equal shares;
3. Order under section 242/93 in favour of Mere Wawatai for the payment of funds held in Trust by the Maori Trustee on the deceased beneficiary account and held by any Maori Incorporation in the name of the deceased.



JUDGE