

**IN THE MAORI LAND COURT OF NEW ZEALAND
TAKITIMU DISTRICT**

A19990007367

UNDER Section 117, Te Ture Whenua Maori Act 1993

IN THE MATTER OF Kahui Pepi Carroll

ARTHUR CARROLL
Applicant

Hearing: 8 October 2000
6 December 2000
31 January 2005
(Heard at Hastings)

Judgment: 8 February 2007

DECISION OF DEPUTY CHIEF JUDGE W W ISAAC

Introduction

[1] This decision relates to a rehearing of an application by Arthur Carroll made pursuant to section 117 of Te Ture Whenua Māori Act 1993 to vest the interests of Kahui Pepi Carroll (deceased) in terms of her Will.

[2] This decision also addresses an error made in previous orders at 161 Napier MB 282 (161 NA 282) concerning Kahui's interests in Lake Rotoaira.

Background

[3] The will of Kahui Carroll dated 16 July 1993 states:

"3. I GIVE AND BEQUEATH the following bequests free of all duties and subject hereinafter provided :-

...(b) To my said daughter KATHLEEN MOURU KIREKA and my sons ARTHUR PATUHOE CARROLL and RAYMOND CARROLL that share

inherited by me from the estate of my late sister MOKOPUNA PETI NOHINOHI in the block of Māori freehold land known as Ohiti Waitio.

... 4. I FURTHER GIVE AND BEQUEATH the following bequests free of all duties and subject to hereinafter provided:

... (d) To my nephew KENNETH TAMATEKAPU APATU my original shareholding in the block of Māori freehold land known as Ohiti Waitio excluding that share inherited by me from the estate of my late sister MOKOPUNA PETI NOHINOHI.'

[4] On 12 January 1999 at 155 Napier MB 239-243 (155 NA 239-243) this Court determined under section 108 that Kahui's nephew, Kenneth Apatu, is entitled to be a beneficiary of Kahui's estate in terms of clause 4(d) of her Will. The order under section 117 followed, as set out below.

"... IT IS HEREBY ORDERED pursuant to Section 117 of Te Ture Whenua Māori Act 1993 that the interests held by Arthur Patuhoe Carroll and Kathleen Mouru Kireka as administrators of the Estate of the abovenamed deceased in the lands listed in the schedule hereto be and the same are hereby vested in the persons shown in the said Schedule as successors to the said deceased in the shares set out, alongside the name thereof pursuant to the Will of the deceased."

[5] The schedule to the order under section 117 listed the names Kenneth Apatu, Katerina Kireka, Arthur Carroll and Raymond Carroll.

[1] The Family Court heard a related application under the Family Protection Act, and issued its judgment on 10 June 1999. That Court held that Kahui's estate was to be equally distributed between all of her 10 children, not just the three named in the Will. This was contrary to the provisions of her will and therefore contrary to the Māori Land Court orders at 155 Napier MB 239.

[7] Kingi Carroll filed an application pursuant to section 45 concerning the orders made on 12 January 1999 in respect to the vesting of Kahui Carroll's interests in Ohiti Waitio 1E3A and X3 blocks to Katerina Kireka, Arthur Carroll and Raymond Carroll. Kingi's application was on the basis that the whole of the estate should be divided equally between the late Kahui Carroll's surviving children. On 29 October 2004 at 2004 Chief Judge's MB 521 (2004 CJ 521) Chief Judge Williams set aside the orders at 155 NA 239 and directed a rehearing. The Chief Judge noted a problem regarding the transfer by Arthur Carroll of his interests in Ohiti Waitio 1E3A to his three daughters, which occurred after that vesting at 155 NA 239. Because the Family Court had reassigned the amount to be succeeded to by each of Kahui's children,

Arthur's shares would have been reduced. A further problem noted was that Kahui's estate had not yet succeeded to Mokopuna Keepa's interests in Ohiti Waitio X3.

Rehearing

[8] I reheard the application on 31 January 2005 at 179 Napier MB 66 (179 NA 66). Arthur Carroll now claims that his interests which have been transferred to his three daughters are protected. The applicant claims that section 48(1) and/or section 88 protects these interests from any order of the Chief Judge, and also from any order made by this Court.

[9] I note that the Chief Judge's section 45 decision set aside the orders made, effectively resetting the situation in relation to Kahui's interests. Section 47(4) provides that the consequential amendments required to be made because of an order made by the Chief Judge under section 44 may be made by any Judge of this Court. In my view, by setting aside the 1999 orders such 'consequential amendments required' could include the cancellation of the transfer of interests from Arthur to his daughters. The fact that the Chief Judge noted that the shares had been transferred, and that this would cause a problem, put the parties on notice that we should consider whether section 48 provides a protection to the transfer from Arthur to his three daughters.

[10] Counsel for the applicant, Ms Bennett stated in Court that Mr Carroll was willing to forgo his interest in another block, Ohiti Waitio X3, to be used as compensation to the other parties. This is not a realistic option as the value of the interest is only \$687, where by way of comparison, Mr Carroll's interest in Ohiti Waitio 1E3A is \$40,833.33.

[1] It was agreed between the parties that the family court decision should be followed and that the main issue for this Court to determine was the effect of sections 48 and 88 of Te Ture Whenua Māori Act 1993.

[12] I adjourned the rehearing to allow counsel for both parties to make further submissions focussing on sections 48 and 88.

Effect of section 48(1) of Te Ture Whenua Māori Act 1993

[13] Section 48 states:

“48 Matters already finalised or pending

(1) *No order made by the Chief Judge under section 44 of this Act, or made by the Appellate Court on appeal from any such order, shall take away or affect any right or interest acquired for value and in good faith under any instrument of alienation registered before the making of any such order.*

(2) *No payment made in good faith pursuant to or for the purposes of the original order shall be deemed to have been made without lawful authority merely because that order has been cancelled or amended by an order made under section 44 of this Act. ...”*

[14] Ms Bennett for the application submitted that section 48(1) protects the transfer of the interests to Arthur’s daughters. No submissions were received from Mr Porteus.

[15] Some elements of section 48(1) are clearly met. Firstly, the Chief Judge had made an order. Also, rights were acquired pursuant to section 164, and, the rights were acquired for value by way of a Deed of Acknowledgement of Debt and subsequently by forgiving the debt.

[16] The issues left for determination are whether the shares were acquired in good faith, and whether “registration” has occurred in this case to attract the protection of section 48(1).

a) Good faith

[1] The issue of good faith was considered in *Estate of George Amos* (2002) Chief Judge’s MB 54 (2002 CJ 54). In that case it was noted that good faith is not defined by Te Ture Whenua Māori Act. However Lord Denning MR in *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 ALL ER 647, at 649 stated a claim was made in good faith “when it was made honestly and with no ulterior motive”.

[18] In this case Ms Bennett submitted that Mr Carroll was unaware that he did not have ownership of the shares as the application to the Chief Judge had not been filed, and no information was available to suggest otherwise. She stated that it was simply an agreement to

transfer to his daughters, which was done in good faith with no intent to remove shares to have them protected.

[19] I want to detail the chronology of the Court processes relevant to the transfer of these shares:

-) 12 January 1999 Māori Land Court vested interests in Ohiti Waitio 1E3A and X3 in Kenneth Apatu, Katerina Kireka, Arthur Carroll and Raymond Carroll (155 Napier MB 239).
- b) 10 June 1999 Judge von Dadelszen's decision in the Family Court was given. Mr Arthur Carroll was one of two defendants in the Family Court proceedings as administrator, and in that capacity was represented by Bramwell Grossman & Partners Hastings Solicitors. He was also represented in his personal capacity by Mr G Thornton of Carlisle Downling Napier Solicitors (FP 020/40/97).
- c) 5 September 2003 Arthur Carroll transfers interests to his three daughters (173 Napier MB 15).
- d) 24 October 2004 Kingi Carroll files and application pursuant to section 45. The Chief Judge set aside the orders made on 12 January 1999 and directed a rehearing.

[20] The details set out in paragraph 19(b) above demonstrate that Arthur was legally represented at the Family Court proceedings both as an administrator of the estate and in his personal capacity. One can assume from this that either one or both of his counsel would have advised him of the outcome of the Family Court's decision, namely that the shares in his name were to be distributed equally between all Kahui's children. As a result, Arthur Carroll must have been aware that he could not transfer the shares. Notwithstanding the knowledge that he was not entitled to all the shares, then in his name, he went ahead and transferred the shares to his daughters some four years later. As a result I find that Arthur did not act in good faith when he transferred the shares notwithstanding the outcome of the Family Court decision.

b) Registration

[21] Ms Bennett notes that in *Amos* the Judge considered that in terms of section 48 that the critical moment is “registration”. Once “registration” is completed, then those interests are protected from orders under section 44. This is a parallel provision to indefeasibility under the Land Transfer Act.

[22] Ms Bennett submitted that Land Transfer registration is not possible and the protection offered by the Land Transfer registration is not available. She also submitted that a trust is registered on the Certificate of Title, and that Arthur’s daughters’ interests cannot be registered because of this. Her argument therefore is that “registration” requires something less than actual registration and that section 48(1) must protect the court orders vesting their title.

[23] Paragraph 69 of the decision in *Bruce v Edwards* [2002] 1 NZLR 515 indicates that section 48(1) does require “registration” under the Land Transfer Act.

“[69] We are aware that s48 contains a saving provision relating exclusively to orders made by the Chief Judge under s44 or by the Appellate Court on appeal from any such order. Section 48 directs that no such order “shall take away or affect any right or interest acquired for value and in good faith under any instrument of alienation registered before the making of any such order”. Thus the protection applies only to registered interests. It would appear merely to confirm the position which would in any event pertain under the Land Transfer Act. The protection afforded by s48 is narrower than was given by its predecessor, s452(8) of the Maori Affairs Act 1953, to “any instrument of alienation executed before the making of any such order”. Subsection (8) specifically permitted any such instrument to be “perfected, confirmed or registered as if no order had been made” under s452. We have found no explanation for the narrowing of the protection but do not see in s48 anything supporting the view that s43(5) orders are under the 1993 Act to override intervening equitable interests, which they could not do under its predecessors. The successive sections enabling the Chief Judge to make orders have long had their separate saving provision, which is distinct from that applicable to orders made on a rehearing. The present inconsistency in the degree of protection may be curious but it is not an indication that in the case of s43(5) the previous protection of unregistered interests is no longer to apply.” (Emphasis added).

[24] “Registration” of their interests has not occurred in this case. Also, I note that equitable interests are not protected in these circumstances as in the final sentences of the paragraph quoted above.

[1] At 12.2 of Ms Bennett’s submissions she notes that beneficial owners are not registered on the Land Transfer title when an Ahu Whenua Trust exists. This supports her argument that section 48(1) requires something less than registration, however goes against *Bruce* in regards to the narrower protection of section 48(1) Te Ture Whenua Māori Act 1993.

[26] In *Ihaka Whaanga* (2000) 34 Tairāwhiti Appellate MB 12 (34 APGS 12) the Māori Appellate Court held that:

“The Act acknowledges the difference between legal ownership and beneficial ownership in its requirement for registration of Court orders in the Land Transfer Office. The effect of section 122 and 123 is to exclude from that requirement any order vesting the beneficial ownership of the land or any interest in that land in any person other than a person in whom the legal ownership is vested.”

[27] In my view, only actual “registration” under the Land Transfer Act provides the protection which is sought in this case. This view is consistent with the case law outlined above.

[28] In the present case there was no registration and therefore no protection.

Section 88/93

[29] Section 88 provides for both equitable and registered interests. The equitable interest however, referred to by Ms Bennett, would protect the interests of the parties who will receive interests in the land under the redistribution as ordered by the Family Court, as it would to Mr Carroll’s daughters.

[30] The same analysis of good faith and value apply to analysis under section 88.

Decision

[31] As a result of the above discussion, I am of the view that sections 48(1) or 88 do not protect the transfer of interests from Arthur to his three daughters.

[32] The consensus indicated at the rehearing on 31 January 2005 at 179 NA 66-73 was that the interests should be distributed as per Judge von Dadelszen in the Family Court on 10 June 1999 at FP020/40/97. As a result, the interests of Kahui Pepi Carroll's interests should be vested according to the Family Court decision.

Lake Rotoaira

[33] I note that the orders dated 6 December 2000 at 161 Napier MB 282 (161 NA 282) inadvertently vested Kahui's interests in Lake Rotoaira equally among the 12 beneficiaries.

[34] This was contrary to the Family Court decision that Kahui's small interest should be vested in Iramutu Akenihi Karaitiana solely.

Orders

[35] I note for clarity that the section 45 decision of Chief Judge Williams on 29 October 2004 at 2004 Chief Judge's MB 521 (2004 CJ 521) that orders be set aside did not relate to the interests of Kenneth Apatu. However, as the orders relating to Mr Apatu were contained within those set aside, new orders are necessary to confirm his interests.

[36] Accordingly, I now make the following orders under Te Ture Whenua Māori Act 1993.

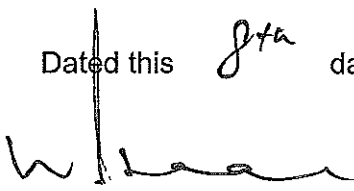
- a) An order pursuant to section 108 that Kenneth Apatu is entitled to be a beneficiary per clause 4(d) of the Will of the Kahui Pepi Carroll in Ohiti Waitio 1E3A and Ohiti Waitio X3 blocks.
- b) An order pursuant to section 117 transferring the following shares from the estate of Kahui Pepi Carroll in Kenneth Apatu.
 - i) 5294.5 shares in Ohiti Waitio 1E3A; and

- i) 5294.5 shares in Ohiti Waitio 1E3A; and
- ii) 55.375 shares in Ohiti Waitio X3.
- c) An order pursuant to section 117 vesting the remaining interests in Ohiti Waitio 1E3A and Ohiti Waitio X3 held by Arthur Patuhoe Carroll and Kathleen Mouru Kireka as administrators of the estate of Kahui Pepi Carroll in those persons listed in Schedule 1 to their respective level of entitlement.
- d) An order pursuant to section 86 amending the orders at 161 Napier MB 282 (161 NA 282) dated 6 December 2000 to exclude the Lake Rotoaira block interests.
- e) An order pursuant to section 117 vesting the interests held by Arthur Patuhoe Carroll as an administrator of the estate of Kahui Pepi Carroll in Lake Rotoaira (0.00536 shares) in Iramutu Karaitiana solely.

[37] This decision was pronounced in open Court in Hastings on 8 February 2007.

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

Dated this *8th* day of *February* 2007.



W W Isaac
DEPUTY CHIEF JUDGE

Solicitors:
Ms Bennett, Bisson Moss
Mr Porteus, D J Porteus Lawyers

SCHEDULE 1

	NAME	SEX	PROP
1	Iramutu Karaitiana	F	1/10
2	Katerina Mouru Kireka	F	1/10
3	Gloria Tongorau Parata or Tongorau Parata	F	1/10
4	Arthur Patuhoe Carroll or Arthur Patu Carroll	M	1/10
5	Rex Whiu Carroll	M	1/10
6	Raymond Raihania Rakaunui Carroll	M	1/10
7	Kingi Wattie Carroll	M	1/10
8	Materita Lovey Edwards or Matarita Edwards	F	1/10
9	Rangimarie Murphy	F	1/10
10	Leslie Pitman	M	1/30
11	Samuel Pitman	M	1/30
12	Charles Pitman	M	1/30