IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20170003094
APPEAL 2017/8

UNDER	Section 58 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	The estate of Blewett Porou Williams also known as Porou Tumahuki
	ANARU WILLIAMS Appellant

Hearing:	9 August 2017 (Heard at Whanganui)
Court:	Chief Judge W W Isaac (Presiding) Deputy Chief Judge C L Fox Judge C T Coxhead
Appearances:	R Mullins for the Appellant
Judgment:	23 February 2018

JUDGMENT OF THE COURT

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Introduction

[1] This appeal concerns the succession of Blewett Porou William. On 8 December 2016 Judge Doogan issued a provisional decision setting out those entitled to succeed to the deceased (the beneficiaries) in accordance with Mr William's Will. A final decision was issued on 9 February 2017.

[2] Anaru Williams appeals those decisions on the basis that Judge Doogan incorrectly interpreted the Will. This resulted in a finding that one of the deceased's grandchildren, Sophie Te Aroha Jacqueline Williams, was not entitled to succeed to the deceased's Māori land interests because she did not fall within the class of beneficiaries determined by Judge Doogan. Mr Williams argues that, as a consequence Sophie's entire descent line has been severed from their whakapapa connection to their Māori land.

[3] The appeal was heard before us on 9 August 2017 following which we reserved our decision.

[4] The issue for determination is whether the lower court correctly interpreted the Will.

Background

[5] Blewett Porou Williams also known as Porou Tumahuki, died on 30 October 2001. He left a Will dated 9 December 1999.Probate was granted on 9 October 2013.[1] Clauses 5 and 6 of the Will provide as follows:

> 5. I DIRECT my trustees to create a Whanau Trust pursuant to Section 214 of Te Ture Whenua Māori Act 1993 to hold all my Māori Land interests and shares in Māori Incorporations for the benefit of my grandchildren and all their descendants and the trustees of the Whanau Trust shall be my daughter TANIA NAUMAI EDWARDS and my daughter NYGENA RAWIRI. The income from the Trust shall be put towards educational purposes for my mokopuna (grandchildren) and their descendants as equally and fairly as practicable PROVIDED HOWEVER that should the Māori Land Court decline any application to create the aforementioned Trust then I GIVE my said Māori land interests and shares in Māori Incorporations to such of my grandchildren as shall survive me in equal shares upon each of the said grandchildren attaining or having attained the age of twenty (20) years to use as they see fit.
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> 6. MY trustees shall hold the remainder of my estate UPON TRUST to sell it but with power at their discretion to retain it or any part of it AND:-
>
> (a) TO pay all my debts and funeral expenses and administration expenses;

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1 *Williams - Estate of Blewett Porou Williams* (2016) 362 Aotea MB 112 (362 AOT 112).

> (b) TO give the residue to the Trustees of the Whanau Trust established pursuant to clause 5 to hold UPON TRUST for the purposes of the Whanau Trust PROVIDED HOWEVER that should the Māori Land Court decline any application to create the said Trust then I give the residue of my estate equally to those of any grandchildren as shall survive me and attain or have attained the age of twenty (20) years.

[6] Nygena Rawiri and Colleen Macleod (the surviving executors of the estate) applied to the Court, in May 2015, to establish a whānau trust and distribute the estate in accordance with the terms of the Will. In April 2015, Ali Williams and Anaru Williams filed a competing application to establish a whānau trust. Initially Judge Harvey dealt with the applications. On 22 April 2016, following numerous attempts to reach agreement on the trust, the Court declined to constitute the whānau trust pursuant to the Will.[2] Succession orders were made conditional upon the production of a list of grandchildren (beneficiaries) in order to enable a determination of those entitled and to vest the land interests in them, in their respective shares. Where there were any challenges to the names of the grandchildren tendered, birth certificates would need to be produced.

[7] There were challenges and the matter was set down for hearing. It was held on 21 October 2016 with Judge Doogan presiding and he adjourned the matter to Chambers to provide further directions to the trustees.

Decision of the Lower Court

[8] On 8 December 2016, Judge Doogan issued a provisional determination as to those entitled to succeed to the deceased's estate.[3] The learned judge addressed two central issues. Firstly, whether the list of grandchildren circulated to the parties was accurate. Secondly, what was the correct interpretation of clause five of the Will.

[9] In considering the correct interpretation of clause five of the Will, Judge Doogan found that the clause contained a fallback provision to be triggered if the testator's preferred option, the creation of a whānau trust, was declined by the Court. As such, Judge Doogan determined that the Will set up a "double event" that would lead to a gift to the grandchildren: those two events being the failure to establish the whānau trust and the grandchildren surviving the testator. Judge Doogan proceeded on the basis that the term 'survive', in this

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2 352 Aotea MB 38-47 (352 AOT 38-47).

3 *Williams - Estate of Blewett Porou Williams* (2016) 362 Aotea MB 112 (362 AOT 112).

particular case, only operated to define those entitled if the establishment of the whānau trust failed.

[10] Judge Doogan ultimately concluded that:[4]

> [26] Applying these principles, I conclude that "survive" refers to surviving the "double event", that is, the death of Porou Tumahuki in 2001 and the Court's declining of the application to establish the whānau trust (22 April 2016). On this approach I find that survive includes not only those grandchildren living at and after the death of Porou Tumahuki, but also grandchildren born after he died, so long as they were alive at the last of the two events specified, that is, 22 April 2016.

[11] A further list of those entitled in accordance with the provisional determination was prepared and circulated to the parties for comment. Following that, on 9 February 2017 Judge Doogan issued an order per s 113 of Te Ture Whenua Māori Act 1993 (the Act) determining the persons entitled to succeed to in accordance with the provisional determination at 365 Aotea MB 220.

Appeal Out Of Time

[12] Rachel Mullins, counsel for the appellant, filed a notice of appeal together with an application for leave to appeal out of time dated 24 April 2017.

[13] The application was filed two weeks out of time. Ms Mullins submits that this can be put down to the fact that the final orders were not distributed until 23 February 2017 following which preparations to file the notice of appeal commenced.

[14] We accept that the appellant originally sought to appeal the provisional determination issued on 8 December 2016 and that application was overtaken by the issuing of the final orders on 9 February 2017. We also have regard to the fact that there appears no prejudice in granting leave to appeal out of time. We therefore grant leave to appeal out of time.

The Appeal

[15] The grounds of appeal are as follows:

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4 Ibid at [26].

(a) That the lower court erred in law by failing to take into account the principles and statutory objectives of the Act as set out in the Preamble, section 2 and section 17 of the Act;

(b) That the lower court failed in law by finding that Sophie Williams, was not entitled to succeed to the deceased's Māori land interests by concluding that Sophie did not survive the deceased;

(c) That the lower court erred in law by not giving sufficient weight to the intention of the testator; and

(d) That the lower court erred in fact and in law by concluding that the term "survive" means to survive the "double event"; being the death of the deceased and the Court's declining of the application to establish the whānau trust.

Law

[16] Section 108 sets out the statutory requirements for disposition by will:

> **108 Disposition by will**
>
> (1) Except as provided by subsections (2) and (3), no owner of any beneficial interest in any Maori freehold land has the capacity to dispose of that interest by will.
>
> (2) An owner of a beneficial interest in Maori freehold land may leave that interest by will to any person who belongs to any 1 or more of the following classes:
>
> (a) children and remoter issue of the testator:
>
> (b) any other persons who would be entitled under section 109(1) to succeed to the interest if the testator died intestate:
>
> (c) any other persons who are related by blood to the testator and are members of the hapu associated with the land:
>
> (d) other owners of the land who are members of the hapu associated with the land:
>
> (e) whangai of the testator:
>
> (f) trustees of persons referred to in any of paragraphs (a) to (e).

…

(4) Any owner of a beneficial interest in Maori freehold land may by will leave that interest to the owner's spouse, civil union partner, or de facto partner for life or for any shorter period.

(5) Any provision in a will purporting to leave a beneficial interest in Maori freehold land to any person otherwise than in accordance with subsection (2) or subsection (4) shall be void and of no effect; and that interest shall, unless disposed of in accordance with either of those subsections by some other provision of the will, pass to the persons entitled on intestacy.

(6) Where any beneficial interest in Maori freehold land is left by will to any trustee, the trustee shall not have power under the will or under any Act to sell the interest; and any provision in the will purporting to confer such power shall be void and of no effect.

[17] Section 113 of the Act is also relevant:

113 Maori Land Court to determine beneficial entitlements to Maori land

(1) On an application by the administrator or by any person interested or by the Registrar, the court shall determine the persons (in this section referred to as the **beneficiaries**) who are legally entitled to succeed to any beneficial freehold interest in Maori freehold land belonging to any estate to which this Part applies, and shall define the proportions of the several beneficiaries.

(2) Every determination made for the purposes of this section shall be recorded in the minutes of the court, but it shall not be necessary for the court to draw up in writing any order with respect to its determination.

(3) Where any freehold interest in land has been devised by will to a trustee other than a bare trustee, the trustee shall be deemed for the purposes of this section to be the beneficiary.

(4) In considering any application under this section, the court may require such evidence as it thinks fit, but may, without further inquiry, accept the certificate of the administrator that the person named in the certificate is entitled to succeed to the interest to which the application relates.

(5) Until the court has made a determination under this section in respect of any beneficial freehold interest in Maori freehold land belonging to any estate, no vesting order may be made in respect of that interest under section 117 or section 118.

(6) The making of a determination under this section shall not absolve the executor or administrator from any liability incurred by the executor or administrator in respect of his or her duties.

[18] In the Appellate Court decision of *Hodgson – Estate of Ropata Wharetoetoe Rare* the Court touched on the jurisdiction of the Māori Land Court to determine a dispute over the interpretation of a Will. The Court stated:[5]

> Section 102 of the Act confirms the existing jurisdiction of the High Court to grant administration of estates which contain Māori land and to hear and determine proceedings in respect of testamentary and other matters relating to those estates. Clearly those provisions give the High Court power to rule on matters such as those which are presently before this Court.
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> Section 113 of the Act requires the Māori Land Court to determine the persons or beneficiaries who are legally entitled to succeed to any beneficial freehold interest in Māori freehold land and to define the proportions of those beneficiaries. The requirement to determine the beneficiaries means that the court has to decide between competing claims in an estate and this jurisdiction is concurrent with that of the High Court.
>
> The above must be viewed as a general statement made in the context of this case. Not all disputes over a will fall within the jurisdiction of this court. Probate of a will is granted by the High Court and this court is bound to act on that grant. If someone wishes to dispute, for example, the proper execution of a will for which probate has been granted, then that case would have to be decided by the High Court as it has sole jurisdiction on matters of probate.
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> Where there is a will affecting Māori land interests the Māori Land Court is bound to give effect to those provisions unless they are contrary to law. If, as in this case, there are disputes over the interpretation of a will, the court must decide. The principles on which the Court must make its decision are not contained in Te Ture Whenua Māori Act 1993 but are common law provisions.

The Will

[19] Clauses five and six of the Will are relevant to the identification of the intention of the testator. These clauses are set out above at paragraph [5].

[20] As Judge Doogan identified, clause five required the Executors apply to the Māori Land Court for orders constituting a whānau trust for the benefit of the testator's grandchildren and their descendants. Where the Court declines to make such orders, it devolves the Estate to those grandchildren who survive the testator and attain the age of 20 (yrs).

[21] We turn to address each of the issues that the appellants have raised in their grounds of appeal in turn.

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5 *Hodgson – Estate of Ropata Wharetoetoe Rare* (2004) 34 Gisborne Appellate MB 120 (34 APGS 120).

To what extent was Judge Doogan required to take into account the principles and statutory objectives of the Act?

[22] Counsel for the appellant submits that Judge Doogan did not turn his mind to the fundamental requirements set out in the Preamble, sections 2 and 17 of the Act and as a result, an entire whakapapa line has been excluded from succeeding to the deceased's beneficial Māori land interests.

[23] Counsel further submits that the Court has a duty under the Preamble and s 2 of the Act, when exercising the powers, duties and discretions under the Act to as far as possible promote the retention, use, development and control of Māori land as a taonga tuku iho by Māori owners. In addition, counsel states that s 17 of the Act also provides that the primary objective of the Court shall be to promote and assist in the retention of Māori land and the effective use, management and development of that land by or on behalf of the owners.

[24] As such, counsel argues that the key principle of relevance to this case is that land is a taonga tuku iho of significance to Māori and should be retained within the kin group where possible.

Discussion

[25] A similar argument was raised in the Appellate Court decision of *Tautau v Papa – Estate of Hiraina Tautau.*[6] In that case it was argued that the Judge erred in law by failing to consider tikanga Māori in the succession to the deceased. In addition it was also argued that the Preamble coupled with the provisions of s 2 of the Act required the Act to be interpreted in a manner that best furthered the principles of the Act. The Appellate Court made the following obiter comments on the application of tikanga to succession applications:[7]

> The appellant sought in reliance on the Preamble and sections 2 and 17 to introduce tikanga to influence the Court to substitute for the persons entitled under the will a wider whānau group. Section 2 of the Act states that the intention of Parliament that its provisions be interpreted in a matter that best furthers the principles set out in the Preamble. It is an interpretive guide and the Court's ability to act on it will depend largely upon the context of the sections subject of scrutiny and any discretion afforded to the Court. In the present case the entitlement of the Respondents to succeed is clear and unequivocal and no question of interpretation arises. The

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6 *Tautau v Papa – Estate of Hiraina Tautau* (1999) 33 Tairawhiti Appellate MB 228 (33 APGS 228).
7 Ibid at 230-231.

> Preamble cannot be used to amend or modify the legal entitlement of those successors.

[26] In the High Court decision of *Hastings District Council v Māori Land Court* Goddard J discussed the preamble and s 2, in relation to interpretative approaches to the Act, as follows:[8]

> …neither the Preamble nor s 2 provides any specific jurisdictional powers. Rather they are of general purport and engender the spirit of the Act. Accordingly, whilst they are to be given weight in interpreting and applying the jurisdiction of the Act, they do not provide authority for interpretations going beyond the plain statutory language used by Parliament.

[27] We also note that in *Foreman v Sanders – Estate of Rachel Ngeungeu Zister* Judge Clark, after setting out the principles of construction of wills, added that the principles set out in s 17(2)(a) – "to ascertain and give effect to the wishes of owners of any land to which the proceedings relate" applies equally to a situation involving the interpretation of a Will.[9]

[28] The Preamble and ss 2 and 17 do not provide authority for interpretations going beyond the plain statutory language used by Parliament in s 113. However, the Preamble and ss 2 and 17 may be utilised as an interpretive guide and the Court's ability to utilise these will depend largely upon the context of any particular case.

[29] We agree there is no direct reference to these provisions in Judge Doogan's provisional determination. Thus we accept that Judge Doogan failed to turn his mind to these relevant considerations. Given the primary issue before him was the interpretation of the Will, then his task was to determine the class of beneficiaries having regard to common law and the statutory scheme including the Preamble, s 2 and s 17. While Judge Doogan took a broad approach to the interpretation of the Will as contemplated in a number of common law cases, he did not refer to the statutory provisions above. That is a matter we will return to below in order to ascertain what they add to the result of the appeal.

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8 *Hastings District Council v Māori Land Court* HC Napier CP11/99, 3 September 1999 at p 16.

9 *Foreman v Sanders – Estate of Rachel Ngeungeu Zister* (2013) 63 Waikato Maniapoto MB 286 (63 WMN 286) at [38].

Did Judge Doogan give sufficient weight to the testator's intentions?

[30] Counsel for the appellant contends that the approach taken by Judge Doogan in interpreting clause five of the Will was erroneous and adds that while Judge Doogan specifically set out the intention of the deceased in the provisional determination, he then went on to cite case law as a justification for ending up at a determination that is directly opposite to the testator's express intention.

[31] Further, counsel submits that Judge Doogan should have approached the interpretation of the word "survive" in the Will in a similar manner to that undertaken in *Re Bridge,*[10] by considering first, the testator's intentions and second, the authorities to determine whether in the specific circumstances there was anything that suggested the testator's intention should be departed from.

[32] As to the testator's intention, counsel submits that this was clearly identified in paragraph [24] of the provisional determination. Further, counsel states that the deceased's Will is clear - the deceased wished his mokopuna and uri to benefit from his estate. The deceased deliberately skipped over his own children to provide for his mokopuna which speaks strongly to his intentions. Counsel also points out that a family trust was established in 2000, prior to the testator's death, the discretionary beneficiaries of which were the deceased's grandchildren and their descendants. Additionally, counsel states that correspondence from Betty Bethune (Barrister and Solicitor to Sovereign Insurance) to RMY Legal dated 22 March 2006 records the deceased's wish that the family trust would take the place of the trust referred to in clauses five and six of the Will.

[33] Counsel submits that in contrast to the established approach in *Re Bridge* Judge Doogan applied *Re Castle, Public Trustee v Floud*,[11] without reference to the unique construction of the Will. Counsel argues that the Judge superimposed that decision over the current case which resulted in an outcome contrary to the testator's intention.

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10 *Re Bridge*, HC Auckland M1250/87, 4 August 1988.
11 *Re Castle, Public Trustee v Floud* [1949] Ch 46.

[34] Further, counsel referred the Court to the decision of *McCallum v Māori Trustee – Estate of Ngapiki Waaka Hakaraia,*[12] where the Court considered the construction of a Will and a key determining factor in that case was the testator's intention.

[35] Counsel submits that to find, as Judge Doogan did, that Sophie Williams –was not entitled to succeed because of the timing of the failure of the whānau trust, is contrary to the testator's intention as expressed in the words of his Will when considered as a whole.

Discussion

[36] The canons of construction regarding interpretation of a will were described by the Appellate Court in *Hodgson – Estate of Ropata Wharetoetoe Rare* as follows:[13]

> Where there is a will affecting Māori land interests the Māori Land Court is bound to give effect to those provisions unless they are contrary to law. If, as in this case, there are disputes over the interpretation of a will, the court must decide. The principles on which the Court must make its decision are not contained in Te Ture Whenua Māori Act 1993 but are common law provisions, and Ms Brewerton has already referred to some of them. These principles are commonly known as canons of construction.
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> The primary principle is set out In *Garrow and Alston's Law of Wills and Administration*, 5th edition, at page 622 –
>
> > The Court seeks to give effect to the intentions of the testator; but those intentions must be found in the words of the Will construed as applicable to the facts of the case.
>
> At the same page the authors go on to cite the following statement:
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> > The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is what is the meaning of what he has actually written? That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator: *Roddy v Fitzgerald* [1858] 6 HLC 823, 876; 10 ER 518, 1539, per Lord Wensleydale

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12 *McCallum v Māori Trustee – Estate of Ngapiki Waaka Hakaraia* [2014] Chief Judge's MB 541 (2014 CJ 541).

13 *Hodgson – Estate of Ropata Wharetoetoe Rare* (2004) 34 Gisborne Appellate MB 120 (34 APGS 120).

[37] In *Foreman v Sanders - Estate of Rachel Ngeungeu Zister* Judge Clark set out the principles of construction as follows:[14]

> [35] The key to interpreting this Will is what is meant by the use of the word *whenua.*
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> [36] In approaching this task I bear in mind the following principles of construction:
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> a) The overriding objective is to give effect to the intentions of the testator. The testator's intentions are to be gleaned from an objective appraisal of the Will read as a whole;
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> b) The words and expressions used in the Will must be given their ordinary meaning. If the language is unambiguous and discloses no obvious error, the Court must give effect to it;
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> c) If possible the Will should be read so as to avoid intestacy;
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> d) The Court is entitled to take into account extrinsic evidence in ascertaining the facts known to the Will maker at the time he or she made their Will – "the armchair principle";
>
> e) Where the words are plain in their meaning, a Court cannot depart from that meaning even if it seems that a Will maker may have misunderstood the legal effect of the gift;

[38] Counsel also referred us to *McCallum* (cited above) where the Court concluded that the deceased's Will demonstrated that the deceased had intended her named beneficiaries and their issue to benefit from her estate. The Court found that:[15]

> [39] It is therefore difficult to accept a construction of the Will that results in a partial intestacy given Ngapiki's strong expressions of her intention. To find there is a partial intestacy in the current situation, which differs from that expressly provided for in the Will only in the timing of the life tenant's death, would be contrary to Ngapiki's intention as expressed in the words of the Will when considered as a whole.

[39] While Judge Doogan took a broad interpretation to the Will, and as a result a larger class of beneficiaries was identified, whether he gave effect to the intentions of the testator that as many grandchildren as possible should benefit, turns on the outcome of our discussion and findings below. What is clear is the testator's intention was that his grandchildren and their descendants should benefit from his Estate.

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14 *Foreman v Sanders – Estate of Rachel Ngeungeu Zister* (2013) 63 Waikato Maniapoto MB 286 (63 WMN 286) at [35] citing Nicky Richardson, *Nevill's Law of Trusts, Wills and Administration* (11th ed Lexis Nexis Wellington, 2013).

15 *McCallum v Māori Trustee – Estate of Ngapiki Waaka Hakaraia* [2014] Chief Judge's MB 541 (2014 CJ 541).

Did the Judge Doogan err in his interpretation of the term "survive"?

[40] Counsel submits that Judge Doogan adopted the well-established ordinary and natural meaning of the term "survive" as to be living at the time of the testator's death and to continue living after. The learned Judge also noted that a "secondary meaning" could be adopted if the plain and ordinary meaning would defeat the testator's intention in the context of the Will and the specific circumstances of the case.

[41] Counsel adds that Judge Doogan held that a secondary meaning of "survive" was appropriate in the present case as at the time the deceased died some grandchildren had been born, but some had not yet. This, counsel says, led Judge Doogan to a consideration as to when the term "survive" comes into effect and to the conclusion that the term "survive" means the surviving of the double event – firstly that the grandchild "survived" the death of the testator and secondly that the grandchild must be alive when the Court declined to constitute the whānau trust.

[42] In addition counsel argues that Judge Doogan was required to find an interpretation of "survive" that best upheld the intention of the deceased based on the construction of the Will and by not doing so he erred in law as was the case in *Perrin v Morgan* cited in *Re Bridge* where the importance of the textual context of the word "survive" was illustrated as was the importance of not rushing to import a requirement.

[43] Counsel further submits that in the present case Sophie Williams survived the death of the testator, she was alive for 8 years after his death and was 31 years old when he died as such she met the required contingency age. As such, counsel maintains that there is no question that Sophie Williams "survived" him as per the primary meaning of the word.

[44] Counsel states that the Court should take into account the fact that the whānau trust application was not filed until almost 14 years after the deceased passed away. She says this is an extraordinary and unacceptable amount of time to administer the estate. Had the executors fulfilled their obligation the estate would have been administered well before Sophie died in 2009. There are also a number of key dates, counsel says, that are important in demonstrating, that over the 15 years since the deceased died to the decision of the Court not to constitute the whānau trust, a number of attempts have been made to progress the distribution of the deceased's estate.

[45] In summary counsel submits that to import a requirement that a beneficiary survive the failure of the whānau trust is fundamentally unjust, in circumstances where the timing of the failure of the whānau trust was solely the result of poor performance of the executors. The outcome being that one member is cut out of the class of intended beneficiaries but the flow on effect is greater, an entire whakapapa whānau line is severed from their land.

Case-law concerning the interpretation of "survive"

[46] In *Re Dawes' Trust* concerning a gift to children in remainder, after the death of the tenant for life, the Court held that the words "should there be none of them surviving" referred to the testator's death, and that the children of B. who survived the testator took vested interests. Thus the date of the deceased's death was taken as the point at which the term "survived" was given effect.[16]

[47] In *Bridge,* referred to by Judge Doogan, the Court was called upon to consider the proper interpretation of the words "as shall survive me". In doing so Barker J started by declining to admit extrinsic evidence. He then considered that the proper approach to interpreting the term was to consider the circumstances of the particular case and to try to discover the testator's intention without reference to authority, and thereafter to see whether a study of the reported decisions suggests any reasons for modifying whatever conclusion one may have reached. He concluded that:[17]

> I have no doubt that the plain and ordinary meaning of the expressed words of the testator was the normal meaning of "surviving", namely, living at and after the date of the particular event, i.e. date of death of the testator.
>
> Authority suggests that there can be this secondary meaning of "surviving", that is living after the event but not necessarily being alive at the date of happening of the event.

[48] Barker J then set out the summaries of the law in propositions distilled from the cases cited in *James's case*:[18]

> "1. There is no particular rule prescribing when such words as "survive" or "survivor" should be construed strictly and when in a secondary sense, or, when such words as "survive" or "survivor" should be construed strictly and when in a secondary sense,

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16 *Re Dawes' Trust* (1876) 4 ChD 210.
17 *Re Bridge (deceased)* HC Auckland M1250/87, 4 August 1988.
18 Ibid citing *Re James's Will Trust* [1960] 3 All ER 744.

> or, where they are not to be construed strictly, what secondary sense should be adopted; *Inderwick v Tatchell*.
>
> 2. The question must in every case be answered by applying ordinary principles of construction to the particular language used and having regard to any relevant surrounding circumstances.
>
> 3. The language used must be construed in its natural sense unless the context shows that this would defeat the testator's intention; *Gilmour v MacPhillamy*.
>
> 4. The mere fact that, so construed, the will might in certain possible, or even probable, circumstances produce results that seem fanciful or even harsh is not a sufficient ground for adopting another interpretation; for, although this fact may raise doubts whether this construction fulfils the testator's intention, doubts are not enough; you must be able to discover from the language used what the intention was, that is to say, that the testator intended to use the word "survive" in some secondary sense; Wake v Varah; Auger v Beaudry; Gilmour v MacPhillamy.
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> 5. There mere fact that a fund is initially given in shares which are settled on stirpital trusts and that, on failure of the trusts in favour of one stirps, the share of that stirps is directed to accrue to the shares of the survivors of the original life tenants to be held upon the trusts of their original shares is an insufficient ground for holding that the testator intended the word "survive' or 'survivor" to bear a secondary meaning; Wake v Varah; In Re Berm; Gilmour v MacPhillamy.
>
> 6. Where it is proper to adopt a secondary meaning, a meaning which imports some kind or element of survivorship (e.g. survival by issue) is to be preferred to construing "survivors" as equivalent to "others": Waite v Littlewood."

[49] Applying those principles Barker J considered that the language used in its natural sense did not defeat the testator's intention. He noted the fact that such a construction might have the harsh consequence of excluding subsequent grandchildren is not a ground for adopting another interpretation. He found that the unborn children of the grandchildren of the testator, not conceived as at the date of his death, were not members of the class in terms of the Will.

[50] In *Re Hollywood (Deceased), Hollywood v Public Trustee* the Court stated that:[19]

> ...*Knight v. Knight* decides that the primary signification of the word "survive" is "outlive," and "survivor," therefore, is a person who is living at the same time as the person whom he is to "survive." It has a secondary meaning that has been applied in some of the cases, and particularly in *Re Clark's Estate*, as meaning a person who comes into existence after the death of the person whom he is said to survive. Whether the word should bear the primary meaning or the secondary meaning depends on the context of the will, and the circumstances to which its provisions apply. That summarizes what has been stated in practically all the cases. The whole question here, in connection with this short will, is whether either the context or the

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19 *Re Hollywood (Deceased), Hollywood v Public Trustee* [1935] NZLR 70 at 71.

> circumstances attach some meaning other than the primary meaning to the word "survive."

[51] The Court, in that case, went on to contemplate the testator's intention noting that the law leans against a will being construed in a way that will result in an intestacy; and a Court will, when two alternatives are open to it, favour an interpretation that will be more likely to avoid an intestacy. If the children born after the death are included, there is less probability of an intestacy under this will than if they were excluded. The Judge concluded that, that on the true construction of the will he was obliged to hold that the words "who survive me" include those children who may come into existence after the death of the testator, as well as those who might have been in existence at the time of his death.

[52] In *Re Laird* Moller J was required to determine whether a grandchild born after the death of the testator was entitled to a share in the residue of the estate. The will provided that from and after the death of each child of the testator, his or her share was to be held "for such of his or her child or children as shall survive me" and who were living at the date of death of the testator's child and had attained 21 years. The Court in that case held that:[20]

> The only proper inference to be drawn from the circumstances was that the testator intended that grandchildren born after his death should participate in his estate provided that they met the other requirements.

[53] Moller J started with setting out what is ordinarily meant by the word "survive". That is that the person who is to survive must be living both at, and after, the nominated point of time. The Judge then went on to note that in certain circumstances the word "survive" attracts a secondary meaning namely living after. The Judge determined that in that case given the ambiguity over the two possible meanings of the word "survive" that he was entitled to look not only at the context of the Will but also at the surrounding circumstances. Moller J considered that this was a proper case for interpreting "survive" in its secondary meaning. And further considered that given there were two contingencies that had to be survive – the death of the deceased and the death of the father or mother of any grandchildren that might come into existence. Moller J held that on the death of either of the deceased's children, any child or children of that deceased child, born after the date of death of the deceased was entitled to share in the residue provided he or she attained the age of 21.

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20 *Re Laird* [1982] 2 NZLR 325 at 328.

[54] In *Re Castle (deceased); Public Trustee v Floud;*[21] Jenkins J was required to consider the meaning of the expression "surviving" in the construction of a will. In that case the will provided that the residue of the estate should be held on trust for the deceased's nephew. If the nephew predeceased him or died before 22 November 1947 (being the date of the death of the survivor of the two daughters of the testator) leaving issue of his own surviving the deceased and the happening of the aforesaid event, then such issue shall take. Jenkins J began by considering the prima facie meaning to the word "surviving" as being living at and after the event. Then he considered the requirement that the issue should survive not a single but a "double event." Jenkins J considered that this made a material difference to the meaning of the word "surviving." He found that the proper construction of the word "surviving" was that the gift operates in favour of all issue of the nephew who were living at the relevant date including those not born until after the death of the testator.

Discussion

[55] In the Lower Court proceedings, Judge Doogan found that the term 'survive' as used in the Will of Blewett Porou Williams, operated to define those entitled if the establishment of the whānau trust failed. Judge Doogan noted that the plain and ordinary meaning of the term "survive" refers to the date of death and that this date is generally taken to be the point at which survival is determined.

[56] Judge Doogan relied on *Re Castle, Public Trustee v Floud* to conclude that "survive" in clause five could also be referred to surviving a "double event", namely: the death of the testator in 2001 and the Court's declining of the application to establish the whānau trust on 22 April 2016.

[57] The issue for him was whether to apply this secondary meaning of the term "survive." He found he should apply the principles associated with this approach to the interpretation of the word "survive" in clause 5 of the Will. We agree with his approach to this point. What he then did not do is proceed to the next step which would have been to also have regard to the Preamble, s 2 and s 17.

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21 *Re Castle (deceased); Public Trustee v Floud* [1949] Ch 46.

[58] On a plain reading of clause five of the Will it seems obvious that the testator contemplated first the establishment of a whānau trust for his grandchildren and their descendants. Failing that, the testator contemplated that his grandchildren who survived him and attained the age of (20) should be entitled to the interests. Clause 6 reinforces that interpretation. Applying the secondary meaning of "survive" and the "double event" principles of the common law that would mean the class includes those grandchildren born before the date of his death in 2001 who survived the testator. This class can all succeed whether they survived or not until the second event – that being the Māori Land Court declining to constitute the whanau trust in April 2016. It would also include those grandchildren born after that date of death before the date the Māori Land Court declines to constitute the whanau trust. When combined with the recognition of the land as a taonga tuku iho in the Preamble of the 1993 Act, and the retention principle in ss 2 and 17, there is an even stronger case to import this intention and overall result.

Conclusion Orders & Directions

[59] The testator's intention was to provide for his grandchildren and their descendants. That is an intention consistent with the thrust of the Preamble, s 2 and s 17 of the 1993 Act. Consequently, we consider that the Will should be interpreted in a manner that applies the "double event" principles but in a flexible manner to prevent the exclusion of a grandchild that survived the death of the testator in 2001, but who did not survive to the date when the Court declined to establish a whānau trust some 15 years later.

[60] The appeal is allowed and pursuant to s 56(c) the orders made by the Lower Court, pursuant on 9 February 2017 at 365 Aotea MB 220 are varied as follows:

(a) The successors (beneficiaries) are all grandchildren born before the date of death of the testator in 2001 and who survived the testator. This class can all succeed whether they survived or not until the second event – that being the Māori Land Court declining to constitute the whanau trust in April 2016. The class of successors (beneficiaries) will also include those grandchildren born after that date of death of the testator and before the date the Māori Land Court declined to constitute the whanau trust. The Registrar is to note that the closing of the class of those entitled, and the date of distribution, becomes 22 April 2016. Grandchildren born after 22 April 2016 are not entitled to succeed.

(b) Any grandchild alive on 22 April 2016 and who has not yet reached (20) years of age, has a vested interest in their share, distributable to them when they turn (20), or their personal representative(s), in the case of death.

(c) Any back-dated income or dividends that have accrued since the testator's death should be divided equally between all members of the class, each receiving their share when they turn (20), or immediately if they are already (20).

Pronounced at 9 am in Gisborne on 23rd this day of February 2018.

W W Isaac (Presiding)	C L Fox	C T Coxhead
Chief Judge	**Deputy Chief Judge**	**Judge**