

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O WAIKATO MANIAPOTO**

*In the Māori Land Court of New Zealand
Waikato Maniapoto District*

**AP-20230000026907
A20210012782
CJ 2021/48**

WĀHANGA <i>Under</i>	Section 45, Te Ture Whenua Maori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Donald Te Whetu McLeod
I WAENGA I A <i>Between</i>	KIM ROMANA PAEA Te kaitono <i>Applicant</i>
ME <i>And</i>	JACINTA MARY PUHIWAHINE MCLEOD Te kaiurupare <i>Respondent</i>

Nohoanga:
Hearing

26 September 2023, 2023 Chief Judge's MB 810-902
(Heard at Hamilton)
23 March 2023, 2023 Chief Judge's MB 304-315
23 September 2022, 2022 Chief Judge's MB 722-732
(Heard at Wellington via Zoom)

Kanohi kitea:
Appearances

L Farquhar for the Applicant
M Insley for the Respondent

Whakataunga:
Judgment date

18 December 2024

TE WHAKATAUNGA Ā KAIWHAKAWĀ MATUA C L FOX
Judgment of Chief Judge C L Fox

Copies to:

L M S Farquhar, Harris Tate, DX HP40005 Tauranga, leone@harristate.co.nz
M Insley, Rotorua District Community Law Centre, PO Box 879 Rotorua 3040,
marcia.insley@rdclc.co.nz

Hei tīmatanga kōrero

Introduction

[1] Kim Romana Paea (the applicant) filed this application pursuant to s 45 of Te Ture Whenua Māori Act 1993 (the Act). The applicant seeks to cancel vesting orders made at 57 Waiariki MB 31-33 dated 2 July 2012, 174 Waiariki MB 48-50 dated 2 November 2017 and 205 Waiariki MB 173-174 dated 1 February 2019 in relation to the transfer of land shares from Donald Te Whetu McLeod (the deceased) to Jacinta Mary Puhiwahine McLeod (the respondent).

[2] The applicant claims that she is the biological child of the deceased and submits that the said orders are incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court as the deceased gave evidence that he did not have children. The applicant submits that she was not notified of the hearings that resulted in the vesting of the deceased's Māori land interests in the respondent and that, in 2012, the deceased was put under extreme pressure by the respondent to transfer his land interests to her. Ms Paea contends that she has been adversely affected by this.

[3] In support of her application, Ms Paea filed an uncertified copy of her birth certificate under the name Kim Romana Taane. That certificate recorded that her mother is Gladys Wihiria Taane, and her father is Donald McLeod. She also filed non-notarised affidavits, signed by the deceased dated 13 October 2021, stating that the applicant was his biological child and that in 2012 he was put under extreme pressure by the respondent to transfer his land interests to the respondent.

Kōrero whānui

Background

[4] The Registrar's Preliminary Report and Recommendation (the Registrar's Report), dated 8 April 2022, sets out the background to this application and is reproduced in full as follows:

APPLICATION UNDER SECTION 45 OF TE TURE WHENUA MĀORI ACT 1993 PRELIMINARY REPORT AND RECOMMENDATION

Introduction

1. This application, filed by Kim Romana Paea (the applicant), seeks to cancel the following orders:
 - (a) 57 Waiariki MB 31-33 dated 2 July 2012 in respect of Donald Te Whetu or Whitu McLeod (Donald McLeod) and the vesting of shares in Jacinta Mary Puhiwahine McLeod (Jacinta McLeod) by way of gift;
 - (b) 174 Waiariki MB 48-50 dated 2 November 2017 in respect of Donald McLeod and the vesting of shares in Jacinta McLeod by way of gift; and
 - (c) 205 Waiariki MB 173-174 dated 1 February 2019 in respect of an amendment to 174 Waiariki MB 48-50 and the vesting of further shares of Donald McLeod in Jacinta McLeod by way of gift.
2. The applicant claims the orders are incorrect due to a mistake, error or omission in the presentation of the facts of the case to the Court because:
 - (a) At order (a) Donald McLeod claims he was put under “extreme pressure” by Jacinta McLeod to attend the Māori Land Court and deny that he had children;
 - (b) At order (b) Donald McLeod stated that he did not have children; and
 - (c) At order (c) the amendment was based on the incorrect evidence given at order (b).
3. The applicant is the biological child of Donald McLeod.
4. The applicant claims that she has been adversely affected by the orders complained of as her whakapapa connection has been denied.

Concise history of Orders sought to be cancelled.

57 Waiariki MB 31-33 dated 2 July 2012

5. On 19 April 2012 Donald McLeod filed an application to vest his shares in Tahorakuri A No. 1 Sec 33A2 to his grandniece, Jacinta McLeod, by way of gift.
6. Donald McLeod is a brother to Jacinta McLeod's grandfather, Richard McLeod. Donald and Richard have the same mother and siblings, from whom the lands were derived.
7. At the hearing the following evidence was given:

TRANSCRIPTION OF RECORDED HEARING:

Court: Morena

Donald McLeod: Morena

Court: Now as I understand it Mr McLeod, Jacinta is your grand niece?

D McLeod: That's right

Court: Okay, what about your children? Do you have children?

D McLeod: No

Court: You have got no children?

D McLeod: No

Court: Why do you want to make this transfer?

D McLeod: Because I brought her up.

Court: Okay, so she is not just your grand niece, she is your whāngai too?

D McLeod: Yes

Court: I understand. There is no argument in the family about this?

D McLeod: No. I wanted to make a change.

Court: Yes.

D McLeod: I wanted to keep Section C No.2 Section 3D No. 2.

Court: The Ohura block?

D McLeod: Yes, keep that one until I go and then have it transferred to her.

Court: You will have to make a will for or something like that.

D McLeod: Yes I already have.

Court: But Tahorakuri goes to her?

D McLeod: I will give Tahorakuri to her please.

8. The Court made an order, pursuant to section 164 of Te Ture Whenua Māori Act 1993, vesting the Tahorakuri A No.1 Sec 33A2 shares of Donald McLeod in Jacinta McLeod by way of gift.

174 Waiariki MB 48-50 dated 2 November 2017

9. On 18 August 2017 Donald McLeod filed an application to vest various Māori land shares to his grandniece, Jacinta McLeod, by way of gift.
10. At the hearing the following evidence was given:

For the benefit of the Court:

1. By email dated 11 September 2017, Luke Rainford on behalf of Donald McLeod makes the following statement:

“As discussed on the phone earlier today. Donald McLeod would only like to gift half of the shares to Jacinta McLeod for the Pukawa blocks listed in the application...”

2. The applicant at question 4 of the application states that the reason for the gift is:

“Jacinta is the only child I raised from an infant”

TRANSCRIPTION OF RECORDED HEARING:

The Court: Mōrena matua, are you Donald McLeod?

Donald McLeod: Yes, kia ora.

The Court: Kia ora. And this application is on the basis that you would like to transfer half of your shares, is that correct? Half of the shares in the blocks that are on the schedule?

D McLeod: Yes, correct.

The Court: And who do you want to gift those to?

D McLeod: Jacinta Puhiwahine McLeod.

The Court: Okay. And Jacinta is your daughter, is that right?

D McLeod: Whāngai.

The Court: Whāngai and is she whāngai from your side?

D McLeod: Yes.

The Court: So, she has whakapapa to these land interests-

D McLeod: Yes.

The Court: Through your side of the whanau?

D McLeod: Yes.

The Court: Okay. And you've discussed this with – do you have any other children?

D McLeod: No.

The Court: Just Jacinta, okay. Anything else you wish to say?

11. The Court made an order, pursuant to section 164 of Te Ture Whenua Maori Act 1993, vesting part of the shares of Donald McLeod, in the blocks listed below, in Jacinta McLeod by way of gift.

Aotea District

<u>Blocks</u>	<u>Shares owned</u>	<u>Shares being transferred</u>	<u>Value of shares being transferred</u>	<u>As at</u>
Lot 53 Deposited Plan 34608 and Lot 54 Deposited Plan 34608	0.0021	0.00105	No Valuations	
Pukawa 2G2	0.006291	0.0031455	\$295.50	01/07/2007
Pukawa B	0.01213	0.006065	\$0.64	01/07/2005
Pukawa B	0.07198	0.03599	\$0.38	01/07/2005

...

Aotea District

<u>Blocks</u>	<u>Shares owned</u>	<u>Shares being transferred</u>	<u>Value of shares being transferred</u>	<u>As at</u>
Pukawa No 2F	0.000021	0.0000105	\$1.45	01/07/2007
Pukawa No. 5B	0.04256	0.02128	\$0.51	01/07/2007

205 Waiariki MB 173-174 dated 1 February 2019

12. On 23 August 2018 the Deputy Registrar filed an application to amend the order at 174 Waiariki MB 48-50 dated 2 November 2017
13. The matter did not go to hearing. The minute states that at 174 Waiariki MB 48-50:

Donald Te Whetu McLeod wished to transfer all of his shares to Jacinta Mary Puhuwahine McLeod but retain half of his shares in all the Pukawa blocks. Half the shares from the Pukawa blocks occurred, however the following blocks were not included.

Aotea District

Blocks	CT Ref	Current Owner	Shares
Maraekowhai A No 1	459088	Donald Te Whetu McLeod	0.0166
Maraekowhai A No 3 A No 3 B	TN90/70	Donald Te Whetu McLeod	0.3333
Maraekowhai A No 5 E	TN87/160	Donald Te Whetu McLeod	0.0166
Maraekowhai A No.3 D	366384	Donald Te Whetu McLeod	3.8882
Ohura South C No.2 Sec 3D No.2	SA366/246	Donald Te Whetu McLeod	0.8267
Otari A5	WN19C/1300	Donald Te Whetu McLeod	0.696
Section 96 Okato Township and Section 100 Okato Township	TN10/118	Donald Te Whetu McLeod	0.0003

Aotea District

Blocks	CT Ref	Current Owner	Shares
Tawata No. 1 (Poumaanu Urupa)	451877	Donald Te Whetu McLeod	1.1667
Tawata No. 3	451492	Donald Te Whetu McLeod	0.3889
Waimarino 5 B No. 8	468394	Donald Te Whetu McLeod	0.3889
Waimarino 5 No B No 7	464831	Donald Te Whetu McLeod	0.5791
Waimarino 5 No B No 7	464831	Donald Te Whetu McLeod	0.8544
Waituhi-Kuratau No. 3	SA388/75	Donald Te Whetu McLeod	0.000106
Whakaihuwaka C 13A	495364	Donald Te Whetu McLeod	0.41
Whitianga 2B 16B 8B	426322	Donald Te Whetu McLeod	0.520573
Whitianga No 2 B Sec 8	465748	Donald Te Whetu McLeod	0.6821

To reflect the true intention of the Court, an order is sought amending the Court record accordingly

14. The Court made an order, pursuant to section 86 of Te Ture Whenua Māori Act 1993, amending the order and minute at 174 Waiariki MB 48-50 as sought. The shares of Donald McLeod, referred to above, were vested in Jacinta McLeod by way of gift.

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

15. The applicant has provided the following documents in support of her application:

- (a) Uncertified copy of the birth certificate for Kim Romana Taane recording.

Date of Birth: 22 July 1973

Place of Birth: Taupo

Mother: Gladys Whiria Taane

Father: Donald McLeod (Date of birth 31 October 1944)

- (b) Signed (non-notarised) copy of Affidavit/Affirmation of Donald McLeod dated 13 October 2021 recording.

I Donald Te Whetu McLeod, Mansell St, Taupo want to affirm put 'solemnly and sincerely affirm that Kim Romana Paea is my biological child born 22 July 1973 in Taupo.

I also confirm that in the year 2012 I was put under extreme pressure by My Grand Niece Jacinta McLeod to have all land & assets owned/shared by Me transferred to Her during a court hearing in the Maori Land Court in Rotorua.

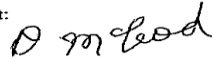
I am very sorry that I was put under this pressure and denied that I had biological children I met my only child Kim Romana McLeod (Nee Paea) in 2005 in Taupo surrounded by many extended whanau members who were also present this day.

When my grand niece Jacinta McLeod became aware that I had a daughter She became very angry and at the time she was living in Australia upon her return to NZ she put Myself under extreme pressure to even escort Me to court to have Me stand in front of a Judge to deny I had a child.

Tonight My daughter has arrived at my address present with Us is my sister Kate McLeod, Kim's Partner Donald McCorkindale, Myself Donald McLeod and My daughter Kim to discuss with Me documents that had been sent to Her by extended family in Australia.

They are the court documents No: Application No: A20120005182 Kim asked if we could discuss this matter with Myself Kate & Donald being witness to this conversation. Kim disclosed that she felt somewhat angered and disheartened to learn that I had denied her not once but twice in front of a Judge I replied I'm sorry but it's done Kim replied Dad you have a child and that's Me. Kim also asked Me as she noted Jacinta was present with Me in court that day if Jacinta had forced Me to deny her, I replied Yes Kim asked Dad this needs to be corrected do You want Me to have this corrected I nodded my head and said yes Kim explained this affidavit to Me that I needed to sign it to have this process corrected.

Signature of the deponent:



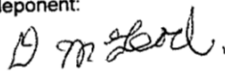
Sworn/Affirmed* at 1/7 Mansell St, this 13th day of October 2021

Before me: Kim McLeod, Donald McCorkindale, Kate McLeod

- (c) Signed (non-notarised) copy of Affidavit/Affirmation of Donald McLeod dated 13 October 2021 recording.

I Donald Te Whetu McLeod, Mansell St, Taupo want to affirm put 'solemnly and sincerely affirm that Kim Romana Paea is my biological child born 22 July 1973 in Taupo.

Signature of the deponent:



Sworn/Affirmed* at 1/7 Mansell St, this 13th day of October 2021

Before me:

16. Research of the court record identified further vesting orders at 174 Waiariki MB 48-50 and 205 Waiariki MB 173-174 (refer paragraph 1(b-c)). By email dated 4 April 2022 the applicant confirmed that she wanted these orders included in this section 45 application.

Details of subsequent Orders affecting lands to which this application relates

17. An order at 205 Waiariki MB 173-174 dated 1 February 2019 in respect of an amendment to 174 Waiariki MB 48-50 and the vesting of further shares of Donald McLeod in Jacinta McLeod by way of gift.

Details of payments made as a result of the Order

18. No payments were made as a result of the order.

Reference to areas of difficulty

19. The Affidavit/Affirmation documents of Donald McLeod have not been notarised.
20. The section 86/93 order at 205 WAR 173-174 was distributed to Luke Rainford. There is no evidence on file that a copy of the order was sent to Donald McLeod or that he was aware of the application. The section 86/93 order did not record the value of each block that was to be transferred.
21. Donald McLeod refers to Jacinta McLeod as a whāngai and states that he “brought her up”. This is the reason why Donald wanted to gift his Māori land shares to her.

Consideration of whether matter needs to go to hearing

22. Based on the information above there are sufficient grounds to support the claim that there was an error, in fact or law, in the presentation of the facts of the case to the Court because:
 - (a) In 2012 and 2017 Donald McLeod gave evidence to the Court that he did not have children. However, the signed (non-notarised) Affidavit/Affirmation of Donald McLeod states that:
 - i) Kim Romana Paea is his biological child born 22 July 1973;
 - ii) He met Kim Romana McLeod (nee Paea) in 2005 surrounded by the extended whānau; and
 - iii) In 2012 he was put under “extreme pressure” by Jacinta McLeod to transfer his Māori shares to her.
 - (b) The above statements were made in the presence of Kim McLeod (daughter) Donald McCorkindale (partner of Kim) and Kate McLeod (Donald’s sister).
 - (c) The birth certificate of Kim Romana Taane records that Donald McLeod is her father.
23. A Court hearing is not necessary and the matter can be decided on the papers.

Recommendation of course of action to be taken

24. If the Chief Judge is of a mind to exercise his jurisdiction then it would be my recommendation that:
- (a) A copy of the Preliminary Report and Recommendation (the Report) be sent to the applicant and those affected parties for whom we have contact details for, giving them an opportunity to respond in writing within 28 days of the date of the Report.
 - (b) If no objections are received then an order be made, pursuant to section 44(1) of Te Ture Whenua Māori Act 1993, cancelling the orders at 57 Waiariki MB 31-33 dated 2 July 2012 and 174 Waiariki MB 48-50 dated 2 November 2017 and revesting all the shares vested in Jacinta Mary Puhīwahine McLeod, back to the donor, Donald Te Whetu or Whitu McLeod.
 - (c) And a further order be made pursuant to section 47(4) of Te Ture Whenua Māori Act 1993 making all other consequential amendments necessary to full give effect to the above orders, including cancelling the order made at 205 Waiariki MB 173-174 dated 1 February 2019 and revesting all the shares vested in Jacinta Mary Puhīwahine McLeod, back to the donor, Donald Te Whetu McLeod.
 - (d) If objections are received the matter be set down for hearing in June 2022 to give parties an opportunity to be heard. The date and time of the hearing to be advised in due course.

Ko te hātepe ture o te tono nei

Procedural History

[5] The Registrar's Report was distributed to parties on 8 April 2022, and they were notified that responses should be filed in writing within 28 days of receiving the Report.

[6] The matter was set down for hearing on 20 June 2022 before former Chief Judge Isaac. On 14 June 2022, the mother of the respondent, Robyn Barnes, sought an adjournment in order to engage legal counsel. The adjournment was granted on 15 June 2022.¹

[7] On 30 August 2022, an objection to the Registrar's Report was received from Walter Rika, acting on behalf of the respondent. The Affidavit and Brief of Evidence of the respondent sets out her objections as:

¹ 2022 Chief Judge's MB 223 (2022 CJ 223).

- (a) The deceased never acknowledged to the respondent that he was the applicant's father and did not know that he was named on her birth certificate.²
- (b) The non-notarised documents, said to be signed by the deceased on 13 October 2021, cannot be relied upon. The documents were not read or explained to the deceased.³
- (c) The respondent did not pressure the deceased to transfer his land interests to her.⁴ He was her Koro and he raised her as whāngai. In 2021,⁵ he appointed her as the Enduring Power of Attorney (EPOA) in relation to his personal care and welfare and, in 2022,⁶ she was appointed the executrix of his Will and sole beneficiary of his estate.

[8] This matter was first heard before me on 23 September 2022.⁷ Counsel for the applicant, Ms Leonie Farquhar, had been recently appointed and the matter was adjourned for six months to allow Ms Farquhar to take instructions and review the documents. The respondent was also given further time to take legal advice.

[9] The matter was then heard before me on 23 March 2023.⁸ I heard submissions from counsel for the applicant and counsel for the respondent, Ms Marcia Insley.

[10] On the day of the hearing Ms Insley filed a copy of a letters from Lucin Fraser, the lawyer who acted for the deceased in the preparation of his 2019 and 2020 Wills and his 2021 EPOA. She also filed a letter from Dr Graeme Urie, dated 11 May 2021, that stated that while the deceased “does have dementia and his cognition is now limited, he understands the concept of an Enduring Power of Attorney and the need for it, and he is in agreement to this.”

² Affidavit and Brief of Evidence of Jacinta Mary Puhiwahine McLeod (30 August 2022) at [10]

³ Affidavit and BOE, above n 2, at [12] and [14].

⁴ Affidavit and BOE, above n 2, at [17].

⁵ Affidavit and BOE, above n 2, at [3].

⁶ Affidavit and BOE, above n 2, at [4].

⁷ 2022 Chief Judge's MB 722-732 (2022 CJ 722-732).

⁸ 2023 Chief Judge's MB 304-315 (2023 CJ 304-315).

[11] Ms Insley referred to the applicant's birth certificate stating that the name of the deceased was not on the original birth certificate and had been added at a later date by way an application to the Births, Deaths and Marriages Registry.

[12] Counsel appearing for the applicant, Ms Xiaodan Li stated that the applicant asked the deceased for consent for his name to be put on her birth certificate, which he agreed to. She raised concerns as to the influence the respondent had over the deceased during the period he signed his 2020 Will and 2021 Enduring Power of Attorney and queried whether he had capacity to sign these documents, given that he was diagnosed with dementia in the beginning of 2021.

[13] Ms Farquhar also appeared before the Court and raised concerns that counsel had not had the opportunity to review the documents, filed by Ms Insley, and consider the impact of the documents on the applicant. She noted that the letter from Dr Urie shows "you can still have dementia but still have capacity to sign legal documents".⁹ She stated that if the deceased "had capacity to sign the enduring power of attorney following the dementia diagnosis, then it calls into question whether he also had capacity to sign the affidavit."

[14] I adjourned the matter with directions that Ms Farquhar was to file further submissions in response to the documents filed by Ms Insley and provide a brief of evidence on the procedure adopted by the Births, Deaths and Marriages Registry in regard to the addition of names to a birth certificate. Ms Insley had five days to file submissions in reply.

[15] Submissions were filed by counsel and the matter was set down for hearing on 27 June 2023. On the 19 June 2023 Ms Farquhar sought an adjournment and requested an in-person hearing.

[16] On 21 June 2023,¹⁰ I issued directions that the respondent file the medical records of the deceased with the Court and an affidavit from the Registrar of Births, Deaths and Marriages, should they agree. The applicant was directed to undertake a DNA test to be organised by parties through the Registrar. The hearing scheduled for 27 June 2023 was adjourned and an in-person hearing was to be arranged through the Registrar.

⁹ 2023 Chief Judge's MB 304-315, at 314.

¹⁰ 2023 Chief Judge's MB 376-380 (2023 CJ 376-380).

[17] On 29 August 2023, DNA Diagnostics confirmed that samples from the applicant and her mother, Wihiria Herbert, had been processed and that they were awaiting a sample from the only surviving sibling of the deceased, Kate McLeod, to complete the study. On this day Ms Insley notified the Court that Kate McLeod declined to undertake DNA testing.

[18] On 13 September 2023, counsel was notified that Elizabeth Rerekura, a niece of the deceased, had volunteered to be DNA tested.

Te Nohonga a Te Kooti

Court Hearing

[19] The matter was again heard before me, in Hamilton, on 26 September 2023.¹¹ At this hearing the applicant and the respondent as well as Gladys Herbert, Elizabeth Rerekura, and Kate McLeod were cross-examined by counsel. I reserved my decision.

[20] At the time of the September hearing the results of the DNA test were not available.

[21] On 9 October 2023, DNA Diagnostics filed the Relationship Testing Report. The Report stated:

The DNA sample received from Wihiria Herbert, Kim Paea and Elizabeth Rerekura were compared, and a statistical analysis was performed for a first cousin relationship. The calculated value of 122 indicates that the DNA evidence is 122 times more likely if Kim Paea and Elizabeth Rerekura are related as first cousins than unrelated.

SUMMARY/INTERPRETATION: The DNA evidence strongly support that Elizabeth Rerekura and Kim Paea are first cousins.

[22] Considering the DNA Report I issued directions on 17 November 2023,¹² that Ms Insley was to file and serve submissions within four weeks from the date of my direction, and Ms Farquhar was to file and serve submissions four weeks thereafter.

[23] On 20 December 2023, submissions and supporting documents were filed by Ms Insley. On 12 January 2024, an amended submission was filed by Ms Insley due to an error found in the December submission.

¹¹ 2023 Chief Judge's MB 810-902 (2023 CJ 810-902).

¹² 2023 Chief Judge's MB 743-746 (2023 CJ 743-746)

[24] Ms Farquhar requested and was granted a two-week extension to file submissions in reply. Those were filed on 30 January 2024 and on 20 February 2024.

[25] The file was referred to me on 19 April 2024. There has been a delay in issuing this judgment for which I apologise.

Ngā Kōrero a ngā kaitono

Summary of evidence and submissions of the applicant

[26] Counsel submits that the orders were made incorrectly due to an error or omission in the presentation of facts to the Court. The Court was advised by the deceased that he did not have any children. Yet, the applicant is his one and only child. Ms Paea further claims she received no notice of the Court hearings when the orders were made. The applicant seeks to have the orders cancelled as she and her children have been severed from their tūrangawaewae.

[27] The applicant's evidence was that she and her father were estranged until she was 32 years old. She had been raised by her mother's parents. Her grandmother told her when she was 11 years old that her father had passed away. She found out from her mother in 2005 who her father was and that he may be alive. She then went on a quest to track the deceased down. She also gave evidence on how their connection and the relationship between the deceased and her children developed. In 2020, she moved to Taupō to be close to him. Unfortunately, his health deteriorated, and she alleged that due to misinformation, he accused her of trying to sell his land. Kate, the deceased's sister cared for him during this time and her access to him was limited. This she attributed to the respondent. She noted that the respondent claimed to be his whāngai, but that was never acknowledged by her father.

[28] In 2017, the applicant asked her father to have his named entered on her birth certificate. He agreed and applied accordingly to the Registrar. The birth certificate is prima facie evidence of his paternity. However, Ms Insley for the respondent queried why it had taken the applicant so long to move to get her birth certificate amended. It was also established during cross examination that the applicant filled out the application for her father for the change to her birth certificate. The applicant advised that the application was not filed until 2018.

[29] Ms Paea also alleged that when her father denied he had any children in Court in 2012 and 2019, it was because he was sick. At a meeting with him in October 2021, she alleged that he agreed he was pressured to testify this way by the respondent. Her father passed away not long after that.

[30] In terms of supporting evidence Gladys Herbert, the applicant's mother, gave evidence that she met the deceased in 1971, after which they developed a relationship until she became pregnant with the applicant. She eventually had no contact with the deceased prior to the applicant's birth, although he did visit the baby five days after she was born. The applicant was raised by her parents for two months. At two and half months it was discovered that the applicant was born with a hole in her heart which required she be hospitalised until she was two years old. During that time Gladys regularly visited the deceased to advise him of the state of the applicant's health. After the applicant was discharged from the hospital, all contact with the deceased ended. It was not until 2005 she advised the applicant who her father was, and that Gladys thought he was still alive. The applicant then investigated and finally located him.

[31] Elizabeth Rerekura (nee McLeod), a niece of the deceased, gave evidence that she knew of the applicant's existence, that she was present at the reunion between the applicant and her father in 2005, that she was able to verify the nature of how their relationship developed and that there were issues between the deceased and the respondent. She also contended that the respondent was not a whāngai, but acknowledged during cross-examination that in court the deceased agreed that she was a whāngai.

Ngā Kōrero a ngā kaiurupare

Evidence and submissions of the respondent

[32] Ms Insley for the respondent submitted that the deceased told the respondent and others on numerous occasions before the orders were made of his intention to gift his Māori land shares to the respondent, his "whāngai mokopuna" for "aroa." Furthermore, the respondent was sceptical of the claim that the applicant was his daughter. She contended that he did not mislead the Court as there was no legal evidence that she was his daughter in 2012 or 2017. As a member of the preferred class, the respondent was entitled to receive these land interests. Should the orders be cancelled, her client would receive the land interests anyway pursuant to the deceased's Will.

[33] Ms McLeod's evidence was that she was a whāngai of the deceased. Under cross-examination she acknowledged that other than in the minutes of the Māori Land Court, there was no reference to her as a whāngai. In medical evidence she was referred to as his granddaughter and the applicant was referred to as the deceased's daughter. She also acknowledged the applicant claimed to be his daughter yet did nothing to stop the deceased or to correct him from misleading the Court in 2012 and 2017.

[34] The respondent held an EPOA for the deceased dated from 11 May 2021. On that date he was medically assessed as having dementia with limited cognition, but he still understood the concept of an enduring power of attorney and the need for it. He also agreed to it in front of Dr Graeme Urie.

[35] The affidavit that the deceased was encouraged to sign by the applicant was signed on 13 October 2021, after the date when he was medically deemed to be incapable of managing his affairs. Kate McLeod, his caregiver, gave evidence indicating her opinion that he did not understand what he was signing as he had dementia. He was also never acknowledged the applicant as his daughter and that her mother had a number of children from different unions.

[36] The deceased died on 10 November 2021. A grant of probate for his will was awarded on 24 January 2022. Jacinta was appointed executrix of that will. She is the sole beneficiary.

[37] Ms McLeod denied placing any pressure on the deceased. She claimed the deceased had limited contact with the applicant, even after 2005. Evidence from Lawrence Raymond and Debbie Cowlshaw (neighbours) was tendered to demonstrate their relationship was good. Similar evidence was filed from Leanne Devon. Similar evidence was filed from Janna Ash.

[38] Betty Rowena McLeod and Leanne Devon, cousins to Jacinta's biological mother Robyn Barnes (nee McLeod), also gave evidence affirming the whāngai status of the respondent. Robyn Barnes gave evidence relating to how her mother and the deceased raised the respondent.

Ngā Ture
The Law

[39] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in s 44(1) of the Act:

44 Chief Judge may correct mistakes and omissions

- (1) On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160 of this Act, 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, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[40] In *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)*, the principles to be applied in determining such applications made pursuant to s 45 were set out as follows:¹³

- (a) When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence provided by the applicants (and any evidence in opposition);
- (b) Section 45 applications are not to be treated as a rehearing of the original applications;
- (c) The principle of *omnia praesumuntur rite esse acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore, in the absence of a patent defect in the order, there is a presumption that the order made was correct;
- (d) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;

¹³ *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209) at [15].

- (e) The burden of proof is on the applicant to rebut the two presumptions above; and
- (f) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in s 77 of the Act, which states that the Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[41] Section 44 explicitly refers to situations where the Court has made an incorrect decision due to a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct its record. For this reason, s 45 applications must be accompanied by proof of the flaw identified, either through the production of evidence not available or not known of at the time the order was made or through submissions on the law.

[42] As stated in *Tau v Nga Whānau o Morven and Glenavy – Waihao 903 Section IX Block*, the Chief Judge must exercise their jurisdiction by applying the civil standard of proof on the balance of probabilities, having regard to that standard's inherent flexibility that takes into account the nature and gravity of the matter at issue.¹⁴ This means that the applicant must establish on the balance of probabilities that there was a mistake or omission.

[43] The Court of Appeal has confirmed that the power under s 44(1) falls into two parts:¹⁵

The first is an evaluative decision as to whether the order made was “erroneous in fact and 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 second is a power, which is likely in most cases to involve discretion, to “cancel or amend the order ... or make such other order as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.” We note that in making that decision, and exercising that power, the preamble to the Act and ss 2 and 17 are of particular significance.

¹⁴ *Tau v Nga Whānau O Morven & Glenavy – Waihao 903 Section IX Block* [2010] Māori Court MB 167 (2010 APPEAL 167). Appellate

¹⁵ *Inia v Julian* [2020] NZCA 423 at [10].

Kōrerorero

Discussion

[44] The issues for determination are:

- (a) Was an error or omission made in the presentation of the facts to the Court which led to an error in the order complained of?
- (b) If so, is it necessary in the interests of justice to remedy the error by amending or cancelling the order?

Was an error made?

[45] The application is brought on the basis that the order of the Court was made in error. The Court was told the deceased had no children. The evidence for the applicant coupled with the DNA test results indicate that she has proven on the balance of probabilities that the deceased was her father. There is no evidence produced by the respondent of any independent value that would demonstrate that the applicant is a child of a brother of the deceased, rather than the deceased himself. I note that the applicant's mother testified she had only marginal contact with one brother of the deceased during a visit to the deceased's parents. The suggestion that the applicant could be a niece of the deceased cannot be sustained.

[46] The further submission of counsel for the respondent was that there was no proof the applicant was a child of the deceased in 2012 and 2017 as there was no birth certificate or public acceptance by the deceased of the applicant's claim to be his daughter. The evidence for the applicant in comparison was compelling. Contact had been made in 2007 between the applicant and her father. In 2011, the applicant was photographed at a whānau event. At the least, the Court should have been advised of the fact that there was a person claiming to be a daughter of the deceased. It was not. Neither the deceased nor the respondent told the Court of the applicant's existence. That was an omission.

[47] Due to the failure to advise the Court, the applicant did not receive notice of the relevant hearings or the orders that were made. That is a breach of the principles of natural justice. Therefore, the orders were made in error.

Is it necessary in the interests of justice to remedy the error by amending the order?

[48] I accept the evidence of the respondent that she and the deceased were close, that she was raised by the deceased, that she was of the preferred class and that the gift the land to the respondent was not contrary to s 164. However, this evidence cannot displace the need to address the errors made in the making of the orders complained of due to the omission in the presentation of facts to the Court. The applicant was entitled to the opportunity to put her case to that Court. She was denied that opportunity. Taking into account the impact on her and her children, the Preamble and s 2, I find that it is in the interests of justice that the orders complained of be cancelled.

Kupu whakataunga

Decision

[49] Having regard to the findings above, the orders or part thereof, recorded at 57 Waiariki MB 31-33 dated 2 July 2012, 174 Waiariki MB 48-50 dated 2 November 2017 and 205 Waiariki MB 173-174 dated 1 February 2019 in relation to the transfer of land shares from Donald Te Whetu McLeod to Jacinta Mary Puhiwahine McLeod are cancelled.

[50] The parties will need to apply to the Māori Land Court for succession, when the applicant will have a chance to bring Family Protection Act 1955 (and amendments) proceedings.

[51] The Case Manager is directed to distribute a copy of this judgment to all parties.

I whakapuaki i te 1:00pm, i Te Whaganui-a-Tara, tekau ma waru o ngā rā o Hakihea i te tau 2024.

C L Fox
CHIEF JUDGE