

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE TAITOKERAU**

*In the Māori Land Court of New Zealand
Taitokerau District*

AP-20230000021183

A20230007204

WĀHANGA
Under

Sections 113, 117 and 111, Te Ture Whenua Māori
Act 1993

MŌ TE TAKE
In the matter of

Succession to David Hugh Peters

I WAENGA I A
Between

**MARIE JEAN TAUTARI AND WINSTON
RAYMOND PETERS**
Ngā kaitono
Applicants

Nohoanga:
Hearing

26 September 2023, 265 Taitokerau MB 68
19 December 2023, 272 Taitokerau MB 135-158
(Heard at Whangarei)

Whakataunga:
Judgment date

14 August 2024

TE TUHINGA HUKIHUKI Ā KAIWHAKAWĀ TKTAR WILLIAMS
Preliminary Judgment of Judge TKTAR Williams

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Hei tīmatanga*Introduction*

[1] This is an application for succession filed by Marie Tautari and Winston Peters in respect of the estate of David Hugh Peters (David) who was their brother. David passed on the 19th of January 2022. He left a will dated 19 December 2011 and probate was granted by the High Court at Wellington on the 8th of April 2022 under number CIV-2022-485-603367 in favour of Marie Tautari and Winston Peters as the executors.

[2] David was in a de facto relationship at the time of his passing with Denise Hart. Ms Hart has an adopted daughter, Alyse Franks, who was also known as Alyse Marks and Alyse Peters-Hart (Alyse). David had no biological children and had 10 brothers and sisters as follows:

- (a) James Leonard Peters;
- (b) Marie Jean Tautari;
- (c) Leslie Ian Peters;
- (d) Lynette Merle Stewart;
- (e) Winston Raymond Peters;
- (f) Ronald Alexander Peters;
- (g) Heather Joan Peters;
- (h) Beverley Ruth Saward;
- (i) Allan Bruce Peters; and
- (j) Wayne Wesley Peters.

[3] David had interests in the following Māori land blocks:

- (a) Oriwa No 1 A No 1;
- (b) Oriwa No.1 B No.1; and
- (c) Spithills.

[4] In addition to the abovementioned Māori land blocks, David held General land interests in the following properties:

- (a) Section 8, Block IX, Opuawhanga SD;¹ and
- (b) Lot 2 DP210915.²

[5] The applicants ask the Court to deal with the deceased's interests in General land in addition to the Māori land interests, pursuant to s 111 of Te Ture Whenua Māori Act 1993 (the Act).

Te Wira
The Will

[6] David's Will indicated how he wanted his estate to be dealt with by his executors.

[7] The relevant provisions of the Will are as follows:

- Clause 2.** "I appoint my sister Marie Tautari ("Marie) and my brother Winston Raymond Peters ("Winston") ("my trustees") executors and trustees of this my will."
- Clause 4.** "I give to my partner Denise Hart ("Denise") all my estate and interest at my death in the land at Whananaki South Road described as Lot 2 Deposited Plan 210915 containing 20.5500 hectares and comprised in identifier NA138C/275 free of all mortgages and other financial charges to the trustees of the Denise and Company Trust as is constituted by deed of trust dated 13 August 2007. This gift is in recognition of the support Denise has given me over the years and in part recompense for her financial contribution to our home which is built on the Māori freehold land known as Oriwa 1B1 in which she cannot have legal ownership."

¹ Record of title reference: NA790/122.

² Record of title reference: NA138C/275.

Clause 5. “I give all my estate and interest at my death in the Māori freehold land known at the date of this my will as Oriwa 1A1 together with the rents and profits from the block (without apportionment) which I have not received in my lifetime to be divided equally among Marie and my brother Allan Peters “Allan” who are living at my death. However, if any of them are not living at my death but leave a child or children living at my death, then that child will take or those children will take equally the share his, her or their parent would otherwise have taken under this clause.”

Clause 6. “I give all my estate and interest at my death in the Māori freehold land known as Spithills together with the rents and profits from that block (without apportionment) which I have never received in my lifetime to my trustees on trust to divide the same into four equal shares to be help upon the following trusts:

- a) As to one such share for the children of my late cousin Jack Edwards who are living at my death and if than one then in equal shares;
- b) As to one such share for the children of my late cousin Janie Penny who are living at my death and if more than one then equal shares;
- c) As to one share for Katie Tito if she if [sic] living at my death;
- d) As to one share for Rena Kiwikiwi if she is living at my death;

I record these are the descendants of my late auntie Rangi Tito. If the trusts of any share under this clause fail, my trustees will add that share equally to the other shares the trust of which do not fail. This provision applies to both the original shares and to shares increased by application of this provision.”

Clause 7.1. “All my estate and interest at my death in the Māori freehold land known as Oriwa 1B1 (“my Oriwa Shares”); and

Clause 7.2. “My home which is on Oriwa 1B1 together with all fitted floor coverings, blinds, curtains and light fittings in or about my home at my death (“my Home”);

To my trustees on the trusts set out in this clause.

- a) If Denise is living at the time of my death my trustees will let Denise have free use of my Oriwa Shares and my Home for lifetime on these terms and conditions:
 - i) Denise will pay the rates, insurance premiums, mortgage interest and principal repayments and other outgoings usually paid from income on my Oriwa Shares and my Home;
 - ii) Denise will keep my Home in the same condition it is in at my death and my trustees will be under no obligation to maintain it;
 - iii) No inspection of my Home will be made while Denise is living there and my trustees will not be liable for any deterioration in my Home;

- iv) Denise will not be responsible for any damage cause or loss to my Home caused by fire earthquake, storm or other inevitable accident.
- b) If Denise is not living at my Death or should she survive me, then on her death or the date that she earlier waives rights that I have given her under clause 7, then my trustee will let Denise's daughter Alyse Marks if she is living at the date of termination of Denise's rights under this clause 7, have free use of my Oriwa Shares and my Home for her lifetime on these terms and conditions:
 - i) Alyse will pay the rates, insurance premiums, mortgage interest and principal repayments and other outgoings usually paid from income on my Oriwa Shares and my Home;
 - ii) Alyse will keep my Home in the same condition it is in at my death or as the case may be at the date of the termination of Denise's right under clause 7 and my trustees will be under no obligation to maintain it;
 - iii) No inspection of my Home will be made while Alyse is living there and my trustees will not be liable for any deterioration in my Home;
 - iv) Alyse will not be responsible for any damage cause or loss to my Home caused by fire earthquake, storm or other inevitable accident.

From the first point of time ("the expiry date") when I have died and:

- i) Denise has died or earlier waived her rights under clause 7; and
- ii) Alyse has died or earlier waived her rights under clause 7;

My trustees will transfer my Oriwa Shares and my Home equally to Marie, my sister Lynette Merle Stewart ("Lynette"), Winston, Allan and my brother Wayne Wesley Peters ("Wayne") who are living at the expiry date. However, if any of them are not living at the expiry date but leave a child or children living at the expiry date, then that child or those children take equally the shares which his, her or their parent would otherwise have taken under this clause."

Clause 7.3. "For the avoidance of doubt I record that reference in this clause 7 to "my estate and interest" shall include all rights vested in me at my death by order of the Māori Land Court made under S.238 Te Ture Whenua Māori Act 1993 ("the Act") in respect of Oriwa 1B1."

Clause 8. "I direct that if the appellation of any block of Māori freehold land specifically referred to in this my will changes before my death then my corresponding estate and interest in that new block shall pass to the beneficiary named as if it were the block specifically referred to."

- Clause 9.** “I give all my estate and interest at my death in all Māori freehold land not otherwise previously disposed of by this my will together with the rents and profits from those blocks (without apportionment) which I have not received in my lifetime to be divided equally among Marie, Lynette, Winston, Allan and Wayne who are living at my death. However, if any of them are not living at my death but leave a child or children living at the expiry date, then that child or those children take equally the shares which his, her or their parent would otherwise have taken under this clause. This gift includes beneficial interest in land which forms part of any Māori Incorporation. In this case “Māori freehold land” and “Māori Incorporation” will have the meanings given to them by the Act or any Act altering or replacing the Act.”
- Clause 10.** “I give my land described as section 8 Block IX Opuawhanga Survey District containing 16.4302 hectares and comprised in identifier NA790/122 to Marie, Lynette, Winston, Allan and Wayne who are living at my death. However, if any of them are not living at my death but leave a child or children living at the expiry date, then that child or those children take equally the shares which his, her or their parent would otherwise have taken under this clause.”
- Clause 11.1.** “My Home (“my Hailes Road Home”) situated on the land described as Section 1 Block IX Opuawhanga Survey District containing 10.1171 hectares being comprised in identifier NA2D/653 (“the Hailes Road Property”); and”
- Clause 11.2.** “Any fitted floor coverings, blinds, curtains and light fittings in or about my Hailes Road Home at my death; and”
- Clause 11.3.** “The curtilage surrounding my Hailes Road Home comprising an area of approximately two acres fenced off together with such reasonable access that may be necessary through my Hailes Road Property to my Hailes Road Home, such to be determined by my trustees (“the Curtilage”)”

To my trustees on trust to grant to Marie, if she is living at my death, a license to occupy my Hailes Road Home and the Curtilage for her lifetime on the terms and conditions set out in this clause and on such other reasonable terms and conditions as my trustees may determine:

- a) Marie will pay the rates, insurance premiums and other outgoing on My Hailes Road Home and the Curtilage;
- b) Marie will keep my Hailes Road Home and the Curtilage in the same condition it is in at my death and my trustees will be under no obligation to maintain it, Marie will pay the cost for the repairs and maintenance for any access way through the Hailes Road Property to my Hailes Road Home and the Curtilage;
- c) No inspection of my Hailes Road Home will be made while Marie is living in my Hailes Road Home and my trustees will not be liable for any deterioration in my Hailes Road Home;

- d) My sister Marie will not be responsible for any damage or loss to my Hailes Road Home caused by fire, earthquake, storm or other inevitable accident.”

Clause 12. “I give the Hailes Road Property subject to the license to occupy set out in clause 11 to Marie, Lynette, Winston, Allan and Wayne who are living at my death. However, if any of them are not living at my death but leave a child or children living at the expiry date, then that child or those children take equally the shares which his, her or their parent would otherwise have taken under this clause.”

Ngā Take

The issues

[8] There is no substantive opposition to giving effect to the bulk of the wishes expressed in David’s Will. However, the applicants and David’s other siblings oppose giving effect to clause 7.2 of his Will. Ms Hart seeks to enforce clause 7.2 of the Will and asks the Court to recognise that the buildings on Oriwa No.1 B No.1 (Oriwa 1B1) comprise a home that she is entitled to occupy as per David’s wishes. Alyse also seeks orders from the Court recognising her as a whāngai of the deceased.

[9] The applicants are opposed to allowing Ms Hart the right to occupy the building on Oriwa 1B1 and recognising Alyse as a whāngai of David.

[10] The issues to be determined are as follows:

- (a) who is entitled to succeed to David’s Māori land interests;
- (b) who is entitled to receive David’s interests in General land;
- (c) who owns the land and buildings on Oriwa 1B1 and who is entitled to occupy it; and
- (d) should Alyse be recognised as a whāngai of the deceased.

[11] Counsel for the applicants have also indicated that due to outstanding GST issues, the executors seek a preliminary determination of entitlements to the deceased’s interests in Māori land. Counsel ask that the Court not make orders vesting those interests in the

beneficiaries determined by the Court, until those GST issues have been resolved. Once that has occurred, orders giving effect to those entitlements will be sought from the Court.

[12] There is no similar submission in relation to the deceased's interests in General land and as such there does not appear to be any impediment to the Court making orders in relation to the General land.

The application process

[13] In conjunction with the application for succession, Marie Tautari filed an affidavit in support. Ms Tautari sets out the position of the executors in relation to distributions under David's Will. She has also set out the executors' position in relation to the occupation rights sought by Ms Hart and the whāngai application for Alyse.

[14] Ms Hart and Alyse also filed evidence in support of their positions and in response to the position expressed by Ms Tautari.

[15] A hearing was held on 19 December 2023 in order for the Court to hear from the parties, David's siblings, Ms Hart and Alyse, and counsel for the executors. At the hearing, it became clear that evidence was required from the accountant for David and orders were made requiring that evidence to be filed by way of affidavit.

[16] The affidavit of the accountant for David, Jason Prisk, has now been filed. Having now received that evidence and having heard from the parties, the Court is in a position to issue this decision.

Kōrerorero

Discussion

Who is entitled to succeed to David's Māori land interests?

[17] There is no contest to clause 5 of the Will and therefore orders will be made in respect of David's shares in Oriwa No 1 A No 1 together with the rents and profits from the block (without apportionment) to Marie Jean Tautari and Allan Bruce Peters equally.

[18] In relation to clause 6 of the Will relating to the Spithills land block, the Will seeks to devise his interests in this land block together with the rents and profits from the block (without apportionment) into four equal parts to:

- (a) the children of Jack Edwards equally (who are Noel Edwards, Paul Edwards, Debbie Meyer and Reulen Edwards);
- (b) the children of Jane Penny equally (who are William Penney, Rodney Penney, Kelvin Penney, Waiora Hare, Spencer Penney and Carlton Penney);
- (c) Katie Tito if she is living at David's death; and
- (d) Rena Kiwikiwi if she is living at David's death.

[19] Again, there is no contest to this proposed distribution and therefore I propose to make those orders accordingly.

[20] Clause 7 of the Will relating to Oriwa 1B1 is more complex, and I deal with that issue later in the decision.

[21] In relation to clause 9 of the Will again there is no contest to this provision. Therefore, I intend to make orders vesting any other Māori land interests that David may have had and not disposed of in the Will in Marie Jean Tautari, Lynette Merle Stewart, Winston Raymond Peters, Allan Bruce Peters and Wayne Wesley Peters equally, or if any were not living at his death, their child or children living at David's death to take equally the shares their parent would otherwise have taken.

Who is entitled to receive David's interests in General land?

[22] Clause 4 of the Will confirms that land referred to as Lot 2 DP 210915 is General land.³ He bequeathed these interests to the trustees of the Denise and Company Trust. Ms Tautari confirms that the executors intend to transfer this property by way of an order of the

³ Record of title reference: NA138C/275.

Court pursuant to s 111 of the Act. I confirm that when final orders are to be made that this bequest will be given effect to.

[23] In relation to clause 10 of the Will, David's wishes were to bequeath his interest in section 8 Block IX Opuawhanga Survey District containing 16.4302 hectares to Marie Jean Tautari, Lynette Merle Stewart, Winston Raymond Peters, Allan Bruce Peters and Wayne Wesley Peters equally, or if any were not living at his death, their child or children living at David's death to take equally the shares their parent would otherwise have taken.⁴ However, this land has been sold and as such this provision of the Will cannot be given effect to.

Who owns the land and buildings on Oriwa 1B1 and who is entitled to occupy the property?

[24] Clause 7 of David's Will devises his shares in Oriwa 1B1, which is Māori Freehold land, to Marie Jean Tautari, Lynette Merle Stewart, Winston Raymond Peters, Allan Bruce Peters and his brother Wayne Wesley Peters who are all his siblings. There is no opposition to this occurring and therefore I indicate that when final orders are to be made, this bequest will be given effect to. However, that is not the end of the matter.

[25] David also held an occupation order in respect of Oriwa 1B1. Section 108(2A) of the Act stipulates that:

a person in whom an occupation order has been vested may leave the occupation order by will to any 1 or more persons who come within subsection (2).

[26] David has not sought to leave the benefit of the occupation order in his Will. There has been no application to succeed to the occupation order. Therefore, my view is that the occupation order should be cancelled or terminated. If counsel wish to make submissions on this point then they may do so along with the submissions to be filed on other matters I identify.

[27] David's Will describes Denise Hart as his partner. Despite contrary views being expressed by David's siblings, I see no reason to doubt this description of Ms Hart.

⁴ Record of title reference: NA790/122.

[28] In clause 7 of David's Will, he seeks to grant Denise Hart a life interest in a home located on the Oriwa 1B1 block. On Denise's death he provides similar occupation rights to Denise's daughter, Alyse, if she is living at the time of cessation of Denise's rights.

[29] At the expiration of those life interests the Will directs that David's interests in the home pass to his siblings: Marie Jean Tautari, Lynette Merle Stewart, Winston Raymond Peters, Allan Bruce Peters and Wayne Wesley Peters if they are living at that expiration date with a gift over to any living children of the aforementioned who have passed before that expiration date.

[30] Ms Hart provided evidence outlining the relationship that she had with David Peters. She also attended the hearing in December 2023 by Zoom and spoke to her position. She has also provided documentation of the financial support she provided for the building at Oriwa 1B1.

[31] Additionally, Ms Hart outlined the fractious relationship that she and David had with some of David's siblings and the manner in which she and Alyse were treated by some family members, particularly when David was close to passing.

[32] Denise Hart says that she wishes to take up the life interest in the building on Oriwa 1B1.

[33] Issues arising in this matter are:

- (a) What is the status of the building erected by David on Oriwa 1B1;
- (b) If Ms Hart contributed financially to the construction of the building on Oriwa 1B1 by David, does she have an equitable interest in the building;
- (c) Is Ms Hart entitled to the income from Oriwa 1B1 or to occupy the building pursuant to s 108A of the Act.

Status of the Building

[34] The building on Oriwa 1B1 has been described by the deceased as a home in the Will. However, the evidence of Marie Tautari is that the building is a shed and not a dwelling house or home.

[35] Ms Tautari refers to the fact that the building plan that was submitted to the Whangārei District Council for a building consent referred to the building as a shed with temporary accommodation. The building consent itself was issued on that basis. The plan submitted also shows the site of a proposed future house.⁵

[36] Ms Tautari says that the shed was never intended to be a permanent dwelling and refers to minutes of a Court hearing attended by David Peters in 2009 where Mr Peters sought an occupation order from the Court and in that application the buildings are referred to as a shed with basic facilities and that the building was a barn with right to live in it.⁶ The plan that is attached to the occupation order shows a single building in the approximate location of the “shed” in the plan submitted to council.

[37] Ms Tautari says that the shed had basic facilities and was constructed primarily to assist with David’s farming operations and storage whilst providing a place for David to “sleep over” on occasion.⁷

[38] She also says it was David’s intention to erect a dwelling house on the General land that David had. This dwellinghouse is referred to in a contracting out agreement between David Peters and Ms Hart dated 19 December 2011.⁸ The land referred to in the contracting out agreement is the land which is now to be vested in Denise and Company Trust as per his Will.

[39] Ms Tautari says that the building on Oriwa 1B1 was never intended to be a “home” or for it to be used as such by David and Denise. Her evidence is that it was not intended

⁵ Affidavit of Marie Tautari, 5 April 2023, at para 15.3.

⁶ Affidavit, above n 5, at para 15.2; 144 Whangarei MB 7-28 (144 WH 7-28) at 11-12.

⁷ Affidavit, above n 5, at para 16.

⁸ Affidavit, above n 5, at para 15.4.

that either he or Denise Hart live in the building at any time during their relationship, even though on occasion she may have stayed there on occasion with him.

[40] Ms Tautari accepts that requests were made by Ms Hart to obtain information about the property at Oriwa 1B1 in 2009 and understood that Ms Hart had wanted to build a home there by the ocean, but this never occurred.

[41] It is the executor's position that the building is not a house or home, and this building has not, nor has it ever been used or described as a principal home. It was used only as part of a farming operation. She also says that there's no income or discretionary grants derived from his interests in Oriwa 1B1.

Denise Hart's Position

[42] Ms Hart's evidence, both written and verbal, attested to the personal relationship she had with David that persisted over 21 years. That, combined with David's description of Ms Hart in his Will as his partner, leaves me in little doubt that she was his de facto partner.

[43] She also refers to the construction of "the barn" on Oriwa 1B1, which was to house contents formerly stored in a bach, prior to seeking consents for it. Her evidence was that David lived in the barn and that she and Alyse moved into an apartment in town.

[44] She also says that she purchased a property at 984 Whananaki South in 2012 at David's insistence. She says, it was purchased originally for one of David's sisters, but the property was kept by Ms Hart, and because of that purchase they were unable to build on the ocean frontage – she could not do both. I have taken reference to the ocean frontage to mean Oriwa 1B1.

[45] Ms Hart also supplied emails that refer to the building which is on Oriwa 1B1 as a barn.⁹ Ms Hart asserts that David left the barn to her to use because she paid for it. She says she paid not only for the building costs of the exterior, but also interior finishes, kitchen and dishwasher, bathroom fittings, light fittings, security cameras, floor-standing, interior painting, varnishing and other matters.

⁹ See email dated 3 November 2023 from Denise Hart to Vaughan Sayers.

Te Mutunga*Conclusion*

[46] There is little doubt from the evidence of both Ms Tautari and Ms Hart that the shed was used primarily for David's farming activities. It also appears that David and Denise intended to build a home on Oriwa 1B1 but that did not eventuate. It also seems clear that the shed was not set up to be used as a home or as a principal family home.

[47] Ms Hart acknowledges that the building is a barn and not a house. That, alongside the indications in the evidence filed that the building consent applied for in respect of this property was for a shed and not a house, leans to a determination that that the building was not a home or a house of David Peters.

[48] I accept that on occasion he did stay in the building but that of itself does not the building a house. The evidence also seems to establish that it was neither his or Ms Harts principal home.

If Ms Hart contributed financially to the construction of the building on Oriwa 1B1 by David, does she have an equitable interest in the building?

[49] Ms Hart has provided evidence, which is uncontested, that she financially assisted Mr Peters with the construction of the building on Oriwa 1B1. Ms Hart said at the hearing that the money she provided for the building had not been repaid.

[50] Mr Jason William Paul Prisk of Whangārei Accountants acted for David in relation to his financial reporting, tax and related matters for approximately 25 years up until his passing.

[51] Ms Tautari has filed an email from Mr Prisk dated 17 May 2022 in which he states that:

Paragraph 7.2 refers to the "Home" on Oriwa 1B1 in which Denise Hart retains a life interest. We require clarity as to the buildings on this property. We were advised that at the time of construction of a building in 2009, believed to be on this property, that it was a shed used for storage of farm equipment and had bathroom facilities due to its distance from Mr Peters other property....."

From what we can ascertain the building referred to in the Will is what we have noted as a Shed. We have recorded the asset in the Fixed asset schedule as "New Shed with

Toilet & Washroom as per the building consent with a cost price of \$159,017 excluding GST. GST was claimed on this at the time of construction.....”

We note paragraph 4 refers to Denise Hart having made financial contributions to the property.

[52] Mr Prisk also provided an affidavit relating to the construction of the building on Oriwa 1B1 to assist the Court to determine the status of the building.

[53] His evidence was that the building was treated as a shed and not as a dwelling. He also confirms that Ms Hart had advanced funds to David for the construction of the building between December 2012 and July 2013.

[54] His says that the cost of construction of the shed was \$159,017.00 approximately plus GST with those costs initially funded by advances made by Ms Hart to Mr David Peters.¹⁰

[55] However, he also refers to a loan repayment of \$189,926.13 to Denise Hart.¹¹ This was calculated after reviewing the ledger accounts and establishing that most of the funds for the construction of the building on Oriwa 1B1 that had been advanced from Denise directly to David were repaid between December 2012 and July 2013.

[56] In total Mr Prisk says that David repaid Denise Hart the sum of \$197,697.01 in the accounting years ending March 2013 and 2014 for the construction of the shed and for other sundry advances.¹²

[57] He says that all financial contributions made by Ms Hart to the building on Oriwa 1B1 have been repaid to her.

[58] Additionally, I note that David specifically bequeathed his interest in Lot 2 DP Deposited Plan 210915 to Ms Hart and states that it is in part recompense for her financial contribution to the home built on Oriwa 1B1 as she cannot have legal ownership.

¹⁰ Affidavit of Jason Prisk, 22 March 2024 at para 7.2.

¹¹ Email attachment to affidavit of Jason Prisk, dated 20 July 2022.

¹² Affidavit, above n 11, at para 7.3.

[59] I have assumed that he says this bequest is “in part”, since he has also repaid the loan she provided for constructing the building as well as gifting the general land he has devised to her.

[60] Based on the repayment of all financial contributions and the provision of his General land interests in Lot 2 DP Deposited Plan 210915, it would seem that there is no financial or equitable interest attributable to Denise Hart in relation to the building on Oriwa 1B1.

Is Ms Hart entitled to the income from Oriwa 1B1 or to occupy the building pursuant to section 108A?

[61] Section 108A provides for the disposition of a beneficial interest in Māori Freehold land by will subject to a gift to the owner’s spouse, civil union partner or de facto partner of 1 or both rights specified in subsection 2. Those rights are:

- (a) the right to occupy the principal family home if it is on the land:
- (b) the right to receive any income or discretionary grants from the interest.

[62] As I have signalled earlier, I have no doubt that Ms Hart was David’s de facto partner.

[63] However, a fundamental question arises as to whether the building was the principal family home. Both Ms Tautari’s and Ms Hart’s evidence attest to the fact that it was not a principal family home for David and Denise Hart. They say it was variously a barn or shed and used only occasionally for over-night stays.

[64] Further, Ms Hart’s evidence was that she had the property at 984 Whananaki South Road, Whananaki, and that David would come to stay with her at an apartment she shared with Alyse. Neither of those residences are the building on the Oriwa 1B1 block.

[65] Given that evidence, I am not persuaded that the building on Oriwa 1B1 was the principal family home for David and Ms Hart.

[66] However, David’s Will also refers to granting Ms Hart “free use of my Oriwa shares” This provision of the Will is poorly drafted.

[67] Ms Hart does not whakapapa to the land. She cannot receive ownership of the shares themselves. However, if there is income that comes from Oriwa 1B1 or from the farming activities that have or are being run on Oriwa 1B1, then she may be entitled to receive the benefit of that income. I perceive that the terminology “free use of Oriwa shares” means that David intended to provide Ms Hart with the ability to receive income or discretionary grants from his shares in the land.

[68] Ms Tautari has said there is no income on Oriwa 1B1.¹³ I find this difficult to accept, if, as the evidence indicates, David ran a farming operation on the land. Mr Prisk’s evidence was not directed to this issue. I consider this issue needs to be addressed by the executors and Mr Prisk prior to final orders being made.

[69] Therefore, I determine that the provision in the Will which proposes to provide an interest in the building that is situated upon Oriwa 1B1 to provide Denise Hart with a right of occupancy shall be void and of no effect.

[70] The building is to be transferred with the land and vested in Marie Jean Tautari, Lynette Merle Stewart, Winston Raymond Peters, Alan Peters and Wayne Wesley Peters equally.

[71] The occupation order granted in favour of David should be terminated.

[72] However, the issue as to whether Ms Hart is to receive any income or discretionary grants from Oriwa 1B1 remains live.

[73] I direct that evidence and submissions are to be filed on this issue prior to final orders being made.

Te tūtohunga hei whāngai

Application for recognition as Whāngai

[74] Also opposed is the suggestion that Alyse be recognised as a whāngai of David. It is readily acknowledged by all parties that there is no relationship of descent between Alyse and David. The question becomes, was Alyse raised as a whāngai as defined in our act.

¹³ Affidavit of Marie Tautari, above n 5, at para 26.

[75] Whāngai is defined in our Act as “a person adopted in accordance with tikanga Māori”.¹⁴ To *whāngai* a person means “to feed, nourish, bring up, foster, adopt, raise, nurture, rear”.¹⁵

[76] The obligation is on the person who seeks to be recognised as whāngai to establish that position. In *Milner v Milner* the Court noted there were essentially four main questions to be answered to establish whether a person was a tamaiti whāngai.¹⁶

- (a) Did the person grow up within the whānau?
- (b) Was this well-known among the whānau?
- (c) Was this an accepted thing among the whānau?
- (d) Did the person become integrated into the whānau?

Alyse’s position

[77] Alyse filed an affidavit attesting to her relationship with David Peters. She also spoke to this issue at the hearing in December 2023.

[78] Alyse spoke glowingly of the relationship that she enjoyed with David and the role that he played in her life. This began when she was approximately eight years old (she is now in her twenties) through involvement with her schooling, sports and farming.

[79] She also spoke of the efforts that David made to assist Denise with her upbringing, including picking her up from work and town, dining with her and Ms Hart, and spending many hours on the phone talking with each other. She enjoyed many farming activities with him as well as eeling, seafood gathering and athletics.

¹⁴ Te Ture Whenua Māori Act 1993, s 4

¹⁵ John Moorefield “Whāngai” Te Aka Māori dictionary
<<https://www.maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&key words=whangai>>.

¹⁶ *Milner v Milner – Succession to Warahi Te Keu Faenza Milner* (2008) 83 Ruatoria MB 108 (83 RUA 108) at [9].

[80] She also spoke of the mental and physical support and protection that he provided to her and Ms Hart.

[81] She believed he gave her the support that a father would have given her throughout that period.

[82] She asserts that her surname Peters-Hart was a name given to her by David Peters when she was a child as an alternative to him formally adopting her and as a result of that, she recognised him as her father figure.

[83] She says he played a strong fatherly role in her life until his passing. She refers to the fact that on occasion David lived with her and her adoptive mother Denise when they stayed at the holiday bach in Whananaki South, and the major role that he played assisting in her schooling, physical education, athletics, life lessons and mental health.

[84] She asserts that she spent most of her upbringing with David when attending primary school and that she looked up to him as he took her everywhere around Whananaki. She says that David provided her not only with a fatherly influence but a sense of cultural belonging.

[85] She acknowledges that at no time had she called him 'dad' or 'father' and that despite her asking if he would adopt her, he said he could not due to his Māori blood. The alternative, she says, was therefore a name change to Alyse Peters-Hart which she asserts was a blessing of her by David.

In Opposition

[86] Ms Tautari says that Alyse has no blood relationship with David and that she never resided with David, nor did he financially support her.

[87] She says that David had never suggested that Alyse was a whāngai to him nor had he apparently described her as such to other members of the whānau. She also says that Alyse did not participate in whānau or hapū gatherings and she was not integrated into the whānau or hapū.

[88] She says there is no reference to Alyse being a whāngai in the will and a matter she says is significant is that David refers to Alyse as Denise's daughter as opposed to referring to her, or asking that she be recognised, as a whāngai.

[89] It is clear from both Alyse's and Ms Tautari's evidence that David treated Alyse as one might in a stepfather role. This is acknowledged by Ms Tautari in her evidence where she says that "there is no doubt that David did enjoy a good and affectionate association with Alyse which developed with David's relationship with Denise." Therefore, I consider that the first and second questions in *Milner* are answered in the positive.

[90] However, Ms Tautari also refers to the fact that David never advised her or the family that he had adopted Alyse or contemplated doing so. Further, if that was contemplated, then as per normal whānau practise he would have sought approval from their parents as there would have been Māori land interests involved. This occurred for example when a sister, Lynette, sought to adopt twin babies in the 1960s and their parents' approval was sought.

[91] The whānau did not accept Alyse as a whāngai of David. Ms Tautari's evidence is that as Alyse did not become integrated into the wider whānau, the whānau consider that Alyse is not and should not be recognised as David's whāngai.

[92] Having read the evidence and heard from the parties at the hearing of the 19th of December, I have no doubt that David treated Alyse as one might treat the daughter of a de facto partner. The evidence seems to indicate that David treated Alyse with kindness and affection in an environment of aroha, whanaungatanga and manaakitanga.

[93] However, does that go so far as to consider that she is to be recognised as a whāngai, with the right to a long-lasting connection to Māori land that she does not whakapapa to much less share a cordial relationship with the whānau?

[94] The fact that the wider whānau did not have a cordial relationship with Alyse and her adopted mother is not determinative. Nor is the assertion that David did not legally adopt Alyse. Whāngai adoption does not require formal adoption. Whilst Ms Tautari says that Alyse was not accepted into the whānau, her evidence accepts that David treated Alyse with the love and affection that one might treat someone who is close to them. Ms Tautari suggests

this is simply due to the relationship David enjoyed with Ms Hart. I do not accept that. I consider the relationship went well beyond simple acceptance that she was his partner's daughter and that is illustrated by the suggested change to her surname.

[95] I consider that the whānau knew, and it was accepted (although not supported), that Alyse was a part of the whānau unit that David enjoyed with Ms Hart, despite their misgivings about the relationship. This in my view answers the third question in *Milner*.

[96] I also cannot ignore the fact that David has sought to provide Alyse with the same interests in Oriwa 1B1 that he has to his de facto partner if she were to predecease him. I consider that he sought to provide for Alyse as if she were a whāngai despite not referring to her as such.

[97] Given the stated animosity that existed between Ms Hart and David's family, it is unsurprising that they did not integrate Alyse as part of the whānau. Given the fractious relationship, it is unsurprising that David may not have discussed his thoughts around adopting Alyse or treating her as his whāngai. Therefore, whilst the answer to the fourth question in *Milner* is negative, it is none the less, understandable.

[98] Alyse has also stated that when the proposal to legally adopt her was raised, David indicated that this could not occur and part of his consideration for that was that he did not wish the Māori land interests to be affected by a proposed adoption. That does not stop a tamaiti being recognised as whāngai.

[99] Given the evidence I have received, and the positions expressed, I was left in little doubt that Alyse was fed, nourished, brought up, fostered, raised, nurtured, and reared by David consistent with tikanga Māori. It is the relationship between David and Alyse that is the key focus and not what the extended whānau perceived to be the relationship. I am therefore of the view that Alyse should be recognised as a whāngai of David.

[100] Recognition of Alyse as a whāngai does not need to affect the ownership of David's Māori land interests, as pursuant to s 116 of the Act, a Court may provide for those rights where there is no descent relationship.

[101] As with Ms Hart, David has sought to provide Alyse with a right to occupy the building on Oriwa 1B1 and “free use” of his Oriwa shares.

[102] I have already determined that the building was not a principal family home, so s 116(1)(a) of the Act cannot be applied. However, s 116(1)(b) may still apply.

[103] Given that position, the intended bequests in clause 7.2(b) are still a live issue.

[104] This issue along with the issue identified in paragraph 72 will therefore need to be determined when final orders are being sought.

Whakataunga *Decision*

[105] These are the preliminary indications of this Court, which is what the applicants seek at this point in time.

[106] Pursuant to s 113 of Te Ture Whenua Māori Act 1993, I propose to issue final orders that the entitlements to the deceased’s interests in Māori land are as per the determinations in this preliminary decision, unencumbered by the proposed lifetime occupancy issues.

[107] Pursuant to s 111 of Te Ture Whenua Māori Act 1993, I propose to issue final orders that the entitlements to the deceased’s interests in General land indicated in Mr Peter’s Will, will also be given effect to as per this determination, except for clause 10 of the Will as that land has now transferred out of his ownership and cannot be vested.

[108] Evidence from the executors and accountants for the estate is to be filed on whether income or discretionary grants are being received from Oriwa No.1 B No.1. Submissions are also to be filed on whether the use of the term “free use” of his Oriwa shares, means that David intended to provide the benefits under s 108A(2)(b) and s 116(1)(b) of the Act to Ms Hart and Alyse.

[109] Submissions may also be filed, if required on the proposed termination of the occupation order.

[110] I propose that this evidence and those submissions should be filed within 21 working days of this preliminary decision.

[111] This Court will not make final orders until those matters and the GST issues surrounding the properties have been resolved.

I whakapuaki i te 4:00 pm i Whangārei, 14th o ngā rā o Akuhata i te tau 2024.
Pronounced at 4:00 pm in Whangārei on Wednesday this 14th day of August 2024.

TKTAR Williams
JUDGE