IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD IN AUCKLAND, NEW ZEALAND

CA3/2003
(Land 156/96)

IN THE MATTER	**of Article 60(3) of the Constitution**
BETWEEN:	**MAURI SHORT**
	Appellant
A N D:	**MRS AMI WHITTAKER, NGAMARAMA COWAN, MATA NIA (KAINUKU ARIKI) & TEARIKI PAITAI**
	Respondent

Hearing:	**29 September 2003**
Coram:	**Casey JA (Presiding)** **Smellie JA** **Williams JA**
Appearances:	**Mrs T Browne for Appellant** **M Mitchell for Respondents**
Judgment:	**2 October 2003**

JUDGMENT OF THE COURT

Solicitors:
Mrs T Browne, Browne Gibson Harvey PC, Barristers, Solicitors & Notary Public, P O Box 144, Rarotonga, Cook Island
M C Mitchell & Co, Solicitors, Rarotonga, Cook Islands

Introduction

[1] This appeal concerns the question whether an adopted child who has succeeded to the interests of adopting parents can also enjoy succession rights from natural parents. The matter originally came before the High Court (Land Division) on an application of the Appellant pursuant to s450 of the Cook Islands Act 1915 seeking the revocation of a succession order relating to her natural mother's lands from which she claims she had been inadvertently excluded. Thereafter, however, fresh applications were filed in which the Appellant sought declarations that she could succeed along with her natural brothers and sisters. It is the judgment refusing that relief which is the subject of this appeal.

Leave

[2] The appeal was brought out of time and leave was opposed. The Court was persuaded, however, that the issues raised are of significant public importance and that the case is a proper one for the exercise of the discretion provided in Article 50(3) of the Constitution. As a consequence leave was granted at the commencement of the hearing subject to security for costs of $2,500.00.

The factual background

[3] Except in one particular (mentioned later) the facts are not in dispute.

[4] The Appellant is the natural child of Charlie and Nuka Cowan but was adopted at the age of 17 in March 1937 by a great-aunt and her husband with whom she had lived since infancy. Although apparently not part of the formal order of the Court, nonetheless, at time of the adoption, the Court having heard from both the adopting and natural parents recorded the following:

> On succession as adopted child would only get what is proper according to true Maori custom from adopting parents and also a share in real parent's land. [emphasis added]

[5] The Appellant's adoptive parents have now died and she has succeeded to interests in a number of their lands.

[6] On the application before the High Court (Lands Division) final hearing date, the Appellant's brothers and sisters and other blood relatives opposed her right to succeed. The opposition appears to have been on the basis that native custom was either that having been adopted she had no right to succeed to the interests of her natural parents; or that she could only so succeed with her natural siblings agreement and the extent that they agreed. Further, that she had agreed at an earlier stage not to claim and was therefore precluded from resiling from that position. There was also a non-specific objection on the ground that it would be unfair if the Appellant succeeded to the interests of two sets of parents.

[7] The objectors, represented in both the Court below and on this appeal by Mr Mitchell, appeared to number approximately 30. Only a selected few, however, gave evidence in the proceedings which for some reason stretched over several years.

[8] The disputed issue of fact referred to in paragraph [3] above concerns the making of a succession order in April 1967 shortly after Nuka Cowan's death when the Appellant along with eight of her siblings succeeded to a one tenth share each to a particular interest of her natural mother. At that hearing, however, it was recorded that the Appellant was sworn and said this:

> I abide by what my father suggests that I come into Surangaare with my brothers and sisters but stay out of other shares of Nuka (that is her natural mother). I was adopted by Kere.

[9] The record also records that after that evidence was given the Appellant's natural father said:

> I asked for order in favour of all issue exception Maui but on condition Maui also comes into Surangaare.

[10] The Appellant in her evidence given in the Court below in this case, however, denied having made that statement. Furthermore, if she in fact had a lawful interest in her natural mother at that time it was of course inalienable.

The judgment under appeal

[11] The judgment was given on the last day of the hearing.

[12] Having identified the Appellant's position as the natural sister of the principal objectors and that as a consequence of her adoption she had succeeded to her adoptive parent's lands, the Judge said:

> The issue before the Court is quite simple – should the Applicant, having succeeded to her adoptive parent's lands now be entitled to succeed equally with her natural siblings to the lands of her natural mother. The answer to this, however, is far from simple.

[13] Reference was made to ss465 and 465A of the Cook Islands Act 1915 [the Act] but the case was said to fall within the ambit of s446 – "in essence the application of native custom and failing applicable native custom in the same manner as if the deceased was a European".

[14] So far as native custom was concerned the judge found that there was insufficient before him "to establish a native custom on the point in issue" and went on to express the view that it was unlikely that one would emerge in the future.

[15] The requirement of s446 that in the absence of custom, the issue must be resolved "as if the deceased was a European" was then addressed but was not pursued because the judge considered "no European would be an owner in native land".

[16] Having decided that neither custom nor s446 could provide the answer the judge then noted the Appellant's statement back in 1967 (referred to above) and the objector's contention that it would not be fair for her to resile from that having already succeeded to her adoptive parent's land. By a combination of s446 of the Act and s8 of the Judicature Act and applying "as broad an interpretation as possible" the judge found for the objectors.

Was an equitable solution legitimate?

[17] We can understand and even sympathise with the judge's approach but we are unable to uphold it. The Court of Appeal (Sir Thaddeus McCarthy, McMullin J and Sir Clinton Roper) in Re: Vaine Nooroa o Taratangi Pauarii (CA3/85), Judgment 8 October 1985 said at page 7 of the judgment:

> We do not find that argument convincing. What we are required to do is to follow the appropriate native custom, not to impose what we ourselves might think was a more fair result than the custom produces.

The "custom" evidence adduced

[18] Various witnesses expressed opinions, some of which supported the grounds relied upon by the objectors. But from the witnesses no clear or authoritative picture emerged. With respect, however, we are satisfied that there was evidence which established custom before the judge. First, the Appellant produced Legislative Assembly Paper No. 28 which was forwarded to the Premier of the Day in 1970 with the following covering communication:

HOUSE OF ARIKI RECOMMENDATION
TO THE LEGISLATIVE ASSEMBLY

Sir,

The Clerk of the House of Ariki has forwarded to me a Paper entitled "Maori Customs approved by the House of Ariki 1970" together with the unanimous recommendation of that House concerning this Paper. The text of the recommendation is as follows:

> The House of Ariki submits the Paper " Maori Customs approved by the Fifth House of Ariki 1970" to the Legislative Assembly and recommends the Legislative Assembly to request Government to prepare legislation in accordance with the contents of the Paper.

In accordance with section 8 of the House of Ariki Act 1966 the above recommendation and the Paper referred to are transmitted herewith to the Legislative Assembly.

John M. Scott
Clerk of the Legislative Assembly

[19] Part Five of the paper is headed "Adopted Children" and reads as follows:

> (1) An adopted child has no Legal Rights to the land and title of the family if he has no blood relationship to the ancestral land-owner, but he may be given occupation rights for his life-time only and will be directly responsible to the family. When he dies his family will be under the direction of either the Ariki or the Mataiapo.
>
> (2) a. Any person who may be admitted to any land as owner, must have blood right to the ancestral owner of the land.
>
> b. That if he is an adopted child, he must have blood connection with the ancestral owner of the land.
>
> c. That if he is an adopted child, who has no rights by blood to the ancestral owner of that land, his tenure of ownership is for his lifetime only.
>
> d. There is only one qualification to ownership of land under Maori Custom that is, right of blood to the source of land, which is the ancestral land owner.
>
> e. The right of succession to any land is by blood to the ancestral landowner and not only to the person he succeeds. There is no registration of birth in the old Maori Custom with regard to adopted children instead, if a child is adopted, and is of blood relation to his adopted parent, then his right of ownership is equal to that of the natural children of his adoptive parents. But an adopted child with no blood relation has no right to the title or lands of his adopted parent.
>
> Under Maori Custom, an adopted child with blood relation to his adopted parents, cannot alter the blood right of a child from his family or their lands. [emphasis added]

[20] There was a further paper from the House of Ariki provided in 1977 which was produced and again, adopted children are dealt with in Part 5 of that paper and the entry reads as follows:

> There are two kinds of adopted children. Firstly the adopted children who have blood relationship with the adoptive parent – that is the true and rightful adoption under the Ancient Custom. Such an adopted child has rights of his own into the clan and the land of his adoptive parent because he and his adoptive parent have descended from the same Common Ancestor. Where they are related by blood so also their right to the land and the clan.
>
> Secondly, the adoption of a child that has no blood-right to the adoptive parent; children in this position are known as "tamariki angai kare e pirianga toto". Because he has no blood-right to the

adoptive parent therefore he has no natural right into the clan and its lands; but he may occupy and use the land of that clan with the consent of the clan. There is only one reason why such an adopted child may be ejected off the land, and that is for being over-bearing over the land lord.

There is nothing under the Native Custom that severs the right of any child to his natural parent and his land. [emphasis added]

[21] Of such papers produced pursuant to s8 of the House of Ariki Act 1966 and earlier, the Court of Appeal (Sir Thaddeus McCarthy, Sir Clinton Roper CJ and Sir Muir Chilwell) in Rake Aituoterangi Tamati Kainuku v Mata Nia (CA1/91) Judgment 29 November 1991, Sir Thaddeus McCarthy said at page 4 of his judgment:

> I take first the declaration of the Parliament of the Cook Islands Federation in 1894, which carefully declared the customs governing landholding and use. But its language conveys more than that: it highlights a basic feature of Maori custom generally. It speaks of the "family" consisting of "all the children who have a common ancestor, together with the adopted children, and all descendants who have not entered other tribes". Such a declaration as this has not the binding force of a statute but must convey strong evidentiary values. Then in 1970 the House of Arikis, the council of the Arikis of the Island, recorded that the choice of an Ariki was to be made by the Kopu Ariki of the particular area. .... Then in 1977 there is the statement of Maori custom made by the first Koutu-Nui of the Cook Islands and supported in most parts by the House of Arikis.

[22] In the combined judgment of Roper and Chilwell JJA their Honours also took account of what the first conference of the Koutu-Nui in 1977 had to say. The clear guidance from the Court of Appeal of the importance of materials put forward by the House of Arikis and the Koutu-Nui given in the above case, unfortunately, was not referred to the judge in the Court below.

[23] Mr Mitchell also produced the report of the Koutu-Nui. It is not included in the Appellant's record on appeal but was produced from the Bar during the hearing before us without objection. The relevant portions of that report read as follows:

PART 1 – PREAMBLE

PREAMBLE:

WHEREAS THE KOUTU NUI of the Cook Islands is a statutory body formally established by section 2 of the House of Ariki Amendment Act 1972 to consider the make recommendations to the House of Ariki or to the Government of the cook Islands on matters relating to the customs traditions (and usages of the indigenous people) of the Cook Islands:

AND WHEREAS THE KOUTU NUI desires to promote the distinctive identity of the indigenous people of the Cook Islands by encouraging and promoting the observation respect and practice of the customs, traditions and usages of the indigenous people of the Cook Islands:

AND WHEREAS THE KOUTU NUI desires to make further supplementary commentary to those already contained in the previous Reports by the House of Ariki and the Koutu Nui on the customs, traditions and usage's of the indigenous people of the Cook Islands pertaining to LAND RIGHTS AND TRADITIONAL TITLES:

NOW THEREFORE THE KOUTU NUI submits the following report:

PART II – INTRODUCTION

The basis of this Report, as has been the case for previous Reports by both the House of Ariki and the Koutu Nui is the noble Declaration of the Federal Parliament of the Cook Islands in 1894, viz:

...

PART IV – CHILD ADOPTION

The Koutu Nui reviewed in 1970 House of Ariki Report (Refer Appendix "A") and the Select Committee's Report 1971 (Refer Appendix "D") and recognises that, while adoption according to the indigenous custom is based upon blood right, the adoption of a child without blood right is based upon a law born of foreign customs and imposed upon and enforced in the Cook Islands. However, the Koutu Nui recognises the two types of adoption but is bound to accept only the adoption according to the indigenous custom as the only adoption that carries with it the right to succession to any traditional title and to rights of occupation and use of land.

While the Koutu Nui gives paramount importance to adoption according to the indigenous custom, it is forced by law to accept also

the adoption according to the law of the country. In respect of the latter case, the Koutu Nui proposes that the law be changed to allow the descendants of the common ancestor to decide what right the child adopted other than in accordance with the indigenous custom should have.

The Koutu Nui makes the following further comments:-

(A) ADOPTION ACCORDING TO INDIGENOUS CUSTOM

Any child adopted according to indigenous custom cannot be denied his/her right to succession, through both the maternal and the paternal lines to traditional land.

(B) ADOPTION NOT ACCORDING TO INDIGENOUS CUSTOMS

Any child not adopted in accordance with the indigenous custom may claim the right of succession to traditional land but subject only to the approval of the descendants of the common ancestor and upon such terms and conditions as the descendants of the common ancestor may impose.

[24] We note counsel's advice from the Bar that the proposed change to the law put forward by the Koutu Nui has not been implemented.

[25] To echo Sir Thaddeus McCarthy's words in the Rake Aituoterangi case (supra), although these papers and reports do not have the binding force of statute yet they "must convey strong evidentiary values".

[26] From this evidence the following native custom can be deduced relative to an adopted child's right to succeed to the lands of his or her natural parents:

[a] There is only one qualification to ownership of land under Maori custom, that is, right of blood to the source of land, which is the ancestral landowner (1970 Report Part 5 paragraph 2(d)).

[b] There is nothing under the native custom that severs the right of any child to his natural parents and his land (1977 Report paragraph 5).

[c] Although the Koutu Nui has recommended a law change to allow the descendants of the common ancestor to decide what right the child

adopted other than in accordance with the indigenous custom should have, no change in the law has occurred.

[27] On the basis of the above three conclusions all of which could have and should have been drawn by the judge in the Court below, the Appellant qualifies to succeed to a share in her parent's lands and there is nothing in custom to take that right away.

[28] Further material produced on appeal confirms the above view. First, there is the appendix to the journal of the House of Representatives of New Zealand 1894 which is the paper of the then British Resident, Frederick J Moss, to the New Zealand Governor of the day. This fascinating document discusses very fully the "past and present institutions of the Maori people of these islands" and includes the following regarding adoption:

> The adopted members are numerous in every family, and indistinguishable by any title from the rest. They have the same rights and are under the same obligations. The child adopted is sometimes given in charge to a foster-mother as soon as born; at others the child is left with the parent till weaned. In the latter case the adoptive parent has to provide the mother with the best of food, and to find all necessaries for the child till taken away. The adoption is marked by the usual feast, all the family and friends being present on the occasion. This system of adoption is so old and constant that mothers part with their babies apparently without a pang, but its tendency must be to weaken very materially all family affection.
>
> The child adopted must belong to kindred families in order to enter at once into the family. If from other tribes or people he does not become a member till formally admitted, and may at any future time be cast out Children in this position are known as *tama ua* (children of the thigh).
>
> If a daughter marry, she enters her husband's family if of the same island. If the husband be of a different island, he may be taken into the wife's family during her life. IF she die before him she may by oral will have declared that he is not to be disturbed in his relationship. Her will is religiously respected. The head of the family is known to and recognised by all, and the family is designated by his name, with the prefix of *ngati* applied in this case as in those of larger aggregations.

[29] More compelling, however, is the report of the "Commission of Inquiry Into Land" presented to the Queen's Representative of the Cook Islands on 25 March 1996. In Part VIII the Report deals with adoptions:

> **Part VIII. Adoptions**
> There were many complaints related to adoptions, since adopted children could inherit more land rights than natural children, i.e., through all four parents. [emphasis added]
>
> Additionally, adopted children were seen as a threat to the land shares of all other members of the extended family, since Occupation Rights were voted on by numbers of people at a meeting, rather than by legal shares.
>
> Under the commission's proposed system, land allocation is purely by legal shares, and the adopted children can only get a share of their own parents' land. The complained dominance of adopted children at family meetings will also be severely diminished, as voting is also only by legal shares.
>
> The Commission also feels strongly that adopted children should only inherit through one [emphasis added] set of parents, not both sets. The following proposed rules include that recommendation:
>
> 1. Inheritance Through Only One Set Of Parents: An adopted child may inherit land rights only through one set of parents, either:–
>
> A. the natural parent or parents; or
> B. the adoptive parent or parents;
>
> No adopted child shall be able to inherit land through the combination of one natural parent and one adoptive parent.

[30] The significance of the Commission of Inquiry Into Land is that it sets out accurately the position as at 1996 and then recommends rules that would, had they been enacted, had prevented the Appellant from succeeding to her natural parent's land in this case. But again, the recommendations were never implemented. That report appears to us to put beyond question the current right of an adopted child such as the Appellant to succeed to the lands not only of her adoptive parents but of her natural parents also.

The significance of Maori custom

[31] The judge in the Court below recognised the significance of Maori custom but, as earlier recorded, concluded erroneously, we so find, that no native custom had been established. The relevance, of course, arises from the provisions of s446 of the Cook Islands Act 1915 which reads as follows:

> **446. Succession to deceased Natives** – The persons entitled on the death of a Native to succeed to his real estate, and to his personal estate so far as not disposed of by his will, [and the persons entitled on the death of a descendant of a Native to succeed to his interest in Native freehold land,] and the shares in which they are so entitled, shall be determined in accordance with Native custom, so far as such custom extends; and shall be determined so far as there is no Native custom applicable to the case, in the same manner as if the deceased was a European.

[32] So native custom determines not only the right to succeed but also the share to which the person succeeding is entitled "so far as such custom extends".

[33] The evidence adduced both in the Court below and before us does not show that native custom extends to make any differentiation between the rights of natural children to succeed even where, as here, one of them (the Appellant) has been adopted. Indeed, the second comment (B) of the Koutu Nui following the suggested amendment of the law referred to earlier, may perhaps be seen as seeking to have some qualification to the rights of a person such as the Appellant enacted. Again however, no such legislative change has occurred.

Conclusion

[34] In all the circumstances then we reject the Respondents contention that the Appellant could only succeed to her natural parent's lands "to the extent that her natural siblings agreed" and uphold the Appellant's contention that she is entitled to succeed along with her natural siblings. That being so the remedy sought by the Appellant is the appropriate one. We therefore exercise our powers pursuant to s56(1) of the Judicature Act 1980-1981 and reverse the judgment appealed from and make a succession order including the Appellant as one of the successors to the deceased's land.

[35] The same section provides that the Court "may award such costs as it thinks fit to or against any party to the appeal".

[36] In this case, taking into account the fact that the appeal was filed late and the indulgence of the Court was required to bring this appeal and that the Appellant succeeds here as she is entitled to under the law as it presently stands to both the lands of her adopted parents and her natural parents, there will be no order for costs either way.

Addendum

[37] As recorded in this judgment there have been recommendations for legislative reform of the law as it stands at present by the Koutu Nui and the 1996 Commission of Inquiry into Land allowing adopted children to inherit from two sets of parents. The case also demonstrates that the issue continues to cause uncertainty and dissention within families.

Casey JA Smellie JA Williams JA

Signed at am/pm on 2003