IN THE HIGH COURT OF THE COOK ISLANDS **Application No 47/99**
HELD AT RAROTONGA
LAND DIVISION

IN THE MATTER OF of Section 450 of the Cook Islands Act 1915

AND

IN THE MATTER OF the land known as **Akaoa Section 36 Arorangi.**

AND

IN THE MATTER OF an application by **William Heather** to revoke the succession order made on 21 June 1976 in respect to the interest of John Heather.

Mrs T.P Browne for applicant

Ms L Francis for Objector

Background

John Heather held various substantial interests of land within Rarotonga, the majority of which are still recorded against his name despite his dying on the 5th of November 1974.

On the 31st January 1961, John Heather made an application to adopt Waiareti Tearohanui Wairohu, the 7 year old daughter of Angus Pitiera Wairohu and Ema Wairohu. The adoption was opposed by John Heather's siblings who expressed concerns over possible subsequent successions to his lands. John Heather is recorded at Minute Book 25/18 as saying:

> "I discussed the adoption with my brothers and sisters but there is no agreement. I now suggest that I leave my orange plot to John Junior, son of Sutevera (but living in New Zealand) whom I adopted but didn't register, and Waiareti equally. The rest of my lands would go to my brothers and sisters. Ta Heather said that the family would not object to an arrangement of that nature. Ikitamu and others of Heather family agree."

The adoption order was then made in favour of John Heather and the order signed and sealed by the Court has been endorsed "*succession to lands restricted.*"

On 21 June 1976 (MB 35/119) the interests of John Heather in Akaoa Section 36 Arorangi (acknowledged as not being the Orange Grove) was vested in Violet Heather solely in accordance with her application.

This is the order challenged.

DECISION

A perusal of the Court records shows that following the making of the succession order in respect to Akaoa Section 36 Arorangi the Court held a rehearing on the 15th April 1980 which was heard concurrently with various other applications filed by Violet Heather and numbered 324/76-344/76 all relating to applications for succession to the interests of John Heather. The

Court, at MB 44/22 dismissed all applications (including 336/76 in respect to Akaoa 36 Arorangi) but with the exception of 344/76 in respect to Te Au 90B Arorangi which it appeared was the Orange Grove.

In reaching its decision, the Court referred to the arrangement made for succession to the interests of John Heather at the time of the adoption of Waiareti or Violet and recorded at 25/18. Accordingly, succession was granted in respect to the deceased's interests in Te Au 90B Arorangi, accepted then by the Court as the Orange pot, but succession refused to all other interests including Akaoa Section 36 in accordance with the agreement reached at the time of the adoption.

It should be said at this stage the time of delay between the date of the original hearing of succession in respect to Akaoa Section 36 on the 21st June 1976 and the rehearing on the 15th of April 1980 may seem inordinately long, but would no doubt have been occasioned through the Courts inability to bring the applications on for hearing. It is noted, that the application numbers all relate to 1976 and would therefore have been filed in the same year as the original succession order complained of.

Following the setting aside of the order in respect to Akaoa Section 36 Arorangi on the 14th April 1980, it appears that the Court failed to action the decision of the Court on rehearing and note the cancellation of the succession order to revest the interests in that land into the name of John Heather.

Insofar as the Court has already put the succession order in respect to Akaoa Section 36 Arorangi at an end, although Court staff have failed to record that in the register, and insofar as the Land Division in the High Court is a Court of record, where a patent error appears in the Register it is the duty of the Court to correct the register and set the offending order aside.

Accordingly, in terms of section 450 of the Cook Islands Act 1915 there is an order revoking the succession order made on the 21st June 1976 in respect to the interests of John Heather in Akaoa Section 36 Arorangi to the intent that the interest will revert into the name of John Heather.

It is perhaps appropriate at this stage since further succession orders are still to be made in respect to John Heather's interests, to consider the effect of the agreement reached at the time of Violet's adoption, and the words "succession to land restricted".

Section 465 of the Cook Islands Act 1915 provides:

> "An order of adoption shall have in respect of successions to the estate of any native the same operation and effect as that which is attributed by native custom to adoption by native custom."

This Court has had referred to it the decision by C J Morgan dated the 29th May 1968 with respect to succession to Tuokura Maeva in which the learned judge deals at length with the right of adopted children to succeed to their adoptive parents. At folio 156 of the Minute Book the learned Judge is recorded as stating:

> "The rights of an adopted child in respect to succession to the lands of its foster parents have always been somewhat confusing.
>
> It is clear that an adopted child accepting under circumstances which do not apply in this case, has no right unless an order of adoption is made by the Court (section 456 Cook Islands Act 1915).
>
> If such an order has been made, in this case two orders have been made, that order has only the same operation and effect as is attributed to it by native custom (section 465 Cook Islands Act 1915). As the adoption order itself does not confer upon the adopted child an unqualified right to succeed, the Court is required to determine the issue in accordance with native custom. Difficulty arises from the fact that different families at first sight appear to adhere to different custom but this is due to the fact that there are degrees of recognition of an adoption. The taking of a child under native custom or the making of a Court order adoption are only the first steps in what might or might not lead to a final recognition by the foster parent and his near family of a complete adoption.

> With the right of the blood relatives of the person applying to object and where there is objection, then clearly for the purposes of succession, the adoption order is in terms of section 465 of the Act limited in this application."

In this present instance however the siblings of the adoptive father withdrew their objection to the adoption and could be seen to have taken the child into the family in accordance with custom but subject to certain restrictions relating to the right of the adopted child to succeed.

In other words, the adoption order could be seen to be a conditional order, and the right of the adopted child to succeed is limited by the terms of the agreement. It seems clear however that where the adopted child is of the kin group of the adopting parent any customary right the child may have to succeed as being a member of such kin group would still be preserved.

The agreement entered into by the adopting parent and his siblings restricted succession by the adopted child to the Orange Grove and the only rights that Violet would have to succeed to the remaining interests of John Heather are in whatever rights she may have in customary law as a member of the kin group as though no adoption order had ever been made.

These are merely observations by the Court at this stage. This is no argument presented on these matters which would no doubt be addressed at the time of hearing any application for succession.

This decision was promulgated at Tauranga, New Zealand on the 26th day of November 1999.

Smith J