IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

APPLICATION NO'S 390A 11-15/15

IN THE MATTER of Section 390A of the Cook Islands Act 1915 (NZ)

AND

IN THE MATTER of the lands known as **AREUTU & TE AUVAERE 189G, MARAEPURE 189C, PUNATAIA 189B, VAIOTAPU 187I, TE KAKA, TE KAUTU & EURI 129N, VAIAKURA 127S1, MURIVAI 127R1, TUATEA 189F, TE VAIROA 127D, VAIKAI 187H1, PARERAVAKAI 127, AVARUA** and

TUINIKAU 17E, TAKITUMU and

AREPUA 6, VAIEKE 16K2, TIREKI 13T, MURIVAI 13A3, TUKIA 17B, MATAVERA and

TUANAKI 89c, TAPIRIATUA 94B, RUAROA & VAIPAPA 89D, MAIOKARERE 89K2, ENUAVAI 90I1, ARORANGI and

TOREA 12J2, TA MAKIRAU 13D, MATARIVA 13J, AREMANGO 7B2B2B, PUATAI 6Y, NGATANGIIA

AND

IN THE MATTER of applications for Revocation of Succession Orders to Rongorangi Tetupuariki @ Rongorangi Dick Browne by **MARY SAMUELA**

Applicant

AND **DOUGLAS TE PUARIKI BAYLEY for JAMES JACKSON BROWN**

Respondent

Date of Applications:	5 November 2015
Date of Referral to Land Division:	1 June 2016
Date of Hearing in Land Division:	1 May 2019
Appearances:	Ms M Francis (originally) and Mrs T Browne (latterly) for Applicant Mr M Short, Mr T Moore (originally) and Mr Bayley (latterly) in person, for and as Respondent
Date of Land Division Report:	7 May 2019
Date of Judgment (No.1):	27 May 2019
Date of Judgment (No.2):	10 October 2019

JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ

[0681.dss]

Introduction

[1] The current position concerning this application under s 390A of the Cook Islands Act 1915 (NZ) was set out in Judgment (No.1) delivered on 27 May 2019 as follows[1]:

> [1] On 5 November 2015 the applicant, Mary Samuela, filed the five applications set out in the intituling pursuant to ss 390A, 450 and 448 of the Cook Islands Act 1915 seeking rehearing of succession orders made on 20 October 1997 and 3 March 2014 in Applications 89-93/14 and 398/96 to the interests of Rongorangi Dick Brown @ Rongorangi Tetupariki on the grounds that Rongorangi Dick Brown had two children, James Jackson Brown and Mary Samuela, not just the former.
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> [2] Details of the applications were that James Jackson Brown, who succeeded to Rongorangi Dick Brown who died in 1983, was not the sole child of Rongorangi Dick Brown but that Mary Samuela was also a child as a result of a liaison between Rongorangi Dick Brown and Tearii Samuela, something the applicant said she only learned about shortly before filing the applications.
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> [3] The applications were supported by affidavits by the applicant, Tina Meti Taramai Roriki and Tutu Mangavai Esetera Ngaputa sworn on 31 October and 4 November 2015 though the persuasiveness of that evidence was somewhat clouded by the two last deponents withdrawing their affidavits by letter dated 19 November 2015.
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> [4] The application was also supported by comprehensive submissions initially from Ms Francis dated 31 December 2015 and opposed by a notice of objection filed by Mr Moore on 16 November 2015.
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> [5] After considering the then position concerning the files, Weston CJ, on 1 June 2016, referred the matters to the Land Division for a report saying the essential question for the Land Division to decide was whether James Jackson Brown had a half-sister, namely the applicant.
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> [6] Procedural difficulties then occurred but the defended application finally came before Isaac J for hearing on 23 April 2018. At that hearing, as the Judge's report dated 7 May 2019 details, the main issue relating to proof was whether the parties most directly involved would consent to undertaking DNA testing to prove or disprove their relationship. After a consent memorandum signed by counsel was

1 Paras [1]-[9].

filed on 27 April 2018 an order for such testing was made with the test result carried out in New Zealand in accordance with the provisions of the Family Proceedings Act 1980 (NZ). The analysis, carried out by a private firm, DNA Diagnostics, on samples derived from the applicant and James Jackson Brown, showed them to be "460 times more likely to be half siblings than unrelated". The scientist summarized the results as showing that they "strongly support that Mary Samuela-Anderson [sic] and James Jackson [sic] are half siblings". A likelihood index rating provided that strong support.

[7] The applications were then recalled on 1 May 2019 with Mrs Browne, by then acting for the applicant, relying on the result of the DNA relationship test, making submissions as to the absence of any paternal information on Mr Brown's death certificate and referring to the affidavits.

[8] Mr Bayley had filed an affidavit sworn on 30 April 2019 raising questions as to whether the DNA testing had been properly carried out. Isaac J's report, summarised Mr Bayley's objections and noted his submissions that "DNA testing should not be undertaken in the Cook Islands as it was contrary to custom. … he also stated that DNA testing was new to the Cook Islands and there are no Cook Islands laws to allow DNA testing".

[9] That led the Judge to observe:

> [17] As stated earlier the issue in this case was whether or not Rongorangi Tetupuariki was Mary's father.
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> [18] The parties agreed that the best way to prove or disprove this allegation was DNA testing.
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> [19] The testing was carried out by consent and the results show that Mary and James are 460 times more likely to be siblings.
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> [20] When this is coupled with the affidavit evidence in support, it is highly probably that Rongorangi Tetupuariki was Marys' father.
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> [21] The submissions and evidence filed by the respondent and Mr Bayley no do [sic: "do not"?] lessen this probability.
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> [22] Having regard to the above I would recommend you exercise your jurisdiction in terms of s 390A to grant the application and revoke the succession orders dated 20 October 1997 and 3 March 2014 to the interest of Rongorangi Dick Brown @ Rongorangi Tetupuariki and substitute new succession orders in respect to the deceased interests in both his children, James Jackson Brown and Mary Samuela.

[2] The discussion section of Judgment (No.1) then said[2]:

[10] As noted, the essential question in relation to each of these applications was whether the applicant could prove to the required standard that she and James

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2 Paras [10]-[17].

Jackson Brown were half siblings, both having Rongorangi Tepuariki @ Rongorangi Dick Brown as father.

[11] The supporting affidavit evidence says that Rongorangi Dick Brown died on 19 November 1983 and had two children, the applicant who was born of a relationship between Rongorangi Dick Brown and Tearii Metua Samuela and James Jackson Brown who was the second child of Rongorangi Dick Brown's later marriage to Constance Ray. Nothing was said of the elder child but it seems that by 2013 the son James Jackson Brown was the only surviving offspring. Tutu Ngaputa said that James has a physical handicap and has lived for most of his life at the Wilson Home in Auckland New Zealand and that by late 2012 was being treated for cancer.

[12] Mr Bayley's affidavit said that one of the samples submitted for DNA testing was "faecal material from a Stoma bag taken from James Loris Kautai Jackson Brown [sic] in 2009" taken when he was in hospital. He said that "no definitive conclusion may be reached without a match of DNA from James paternal/maternal lineage as a half sibling story was never raised by Rongorangi".

[13] The DNA relationship report speaks of one of the samples as being Stoma tissue taken from "James Jackson".

[14] That review shows that there are inconsistencies in the ways the persons from whom the samples were taken – and others – are named in the papers on file.

[15] It is crucial to ensure that those persons are the persons from whom the samples were tested and the relationship probability determined.

[16] In view of that, this matter will be adjourned, for:

a) an affidavit to be filed confirming that Mary Samuela and Mary Samuela-Anderson are, as seems likely, the same person; and

b) an affidavit is filed showing that James Jackson Brown (or Browne) is the same person as the James Loris Kautai Jackson Brown described in Mr Bayley's affidavit and the same person listed as James Jackson in the DNA relationship report.

[17] If, as seems likely, those affidavits provide the necessary linkages, on the evidence there seems no reason to reject the conclusions reached in the DNA relationship report and, by extension, the conclusions reached and recommendations by Isaac J.

Developments since 27 May 2019

[3] As a preliminary, it is noted that paragraphs 16(a) and (b) of the 27 May 2019 judgment have yet to be complied with[3].

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[3] Despite the applicant being ordered by Weston CJ on 1 June 2016 to file a copy of her birth certificate by way of affidavit.

[4] On 9 September 2019 the respondent, Mr Bayley, lodged a letter with the Court attaching some United Kingdom Home Office guidance about "inviting applicants to volunteer relevant evidence to establish biological family relationships which may include DNA evidence" and email correspondence between his representative and the testing laboratory between 24-30 April 2019. The letter said "you will note that a Stoma bag (stomach bag) had never been received by the Laboratory and therefore the "faeces" within which are purported to have been tested, had to have been tampered with, in order to submit the sample to the Laboratory without the Stoma bag being present", in effect repeating the objections he made in his affidavit of 30 April 2019, though that also queried the respondent' capacity to make an informed decision to consent.

[5] In addition, a transcript of the hearing before Isaac J on 1 May 2019 was obtained[4] as was Mrs Browne's memorandum of 7 November 2018[5] which originally attached the relationship testing report and a probability explanation. Mrs Browne re-drew that memorandum at the 1 May 2019 hearing in favour of a further memorandum dated 30 April 2019 which again attached the relationship testing report, the probability explanation and added some transmissal emails. At the hearing she said there had been a typographical error in the first report.

[6] At the hearing, Mr Bayley summarised his objections to the application in the following passages:

> "**Mr Bayley:** Let's start with the revocation in respect of the revocation order. The reason behind the DNA testing is due to Mary Samuela's claiming to be the half-sister of James Lorus Jackson Kautai Brown my second cousin. Rongorangi was my first cousin. As Mary Samuela's birth certificate does not include a father's name what right does she have to be on this land? I do not know how she got herself onto this land in 2014 without a father on the birth certificate. I do not understand how the Land Registry allowed this to happen. This is crucial that the Court knows this. I wish to draw the Court's attention to an argument presented by Travis Moore in July 2016 in which he is critical of the applicant's affidavit because Mary Samuela attached the death certificate of Rongorangi which showed he had one issue on his death, a son. The death certificate does not show any other issue and certainly no female that might be Mary Samuela. And this is the reason I had my witness Reo Kautai who was going to be here but I'm not sure if Reo Kautai has made it today. Reo Kautai was going to be my witness but I can't see him here. But, let's say, if you just bear with me while just pick up my notes here. Because, and this is the reason that Reo was going to be here as my witness to confirm to the Court that Rongorangi never made a mention of having any daughter to Reo whatsoever. Who is lying? Who is telling the truth here?

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4 Received by Chief Justice on 19 September 2019 (NZ time).

5 Received by Chief Justice on 3 October 2019 (NZ time).

Travis says it was based on hearsay that Rongorangi had a daughter. Now we have Tina Browne saying in a memo of agreement she has tested the DNA that she says more likely than not it is a match for siblings.

…

Mr Bayley: Fair enough. Concerning the new testing centre report and the claimant's evidence this is not accompanied by any witness statements or James signature, so there is nothing to confirm the origin of the material. This is a civil land court, not a criminal trial, hence it is important to have an evidence trail to indicate to the court every step of the process was professionally managed. Where is the material, where has the material been kept since 2009? By whom? That's another question, who tampered with it? To just send the lab the stoma tissue, that's a question. So from 2009 it's been kept in a box under the bed at somebody's house because there's no evidence to indicate otherwise. Just so the Court knows, stoma tissue is faeces from a stomach bag. In James case a ileostomy bag is a plastic bag full of shit. The laboratory confirmed that they did not receive an intact stoma bag. This means that somebody tampered with the stoma bag, ileostomy bag, evidence meaning this is a totally fabricated façade and could be poo from any cousin related to James. To make this legal we need signatures on the test report of all the people involved and their qualifications. There are too many events in this chain that have not been signed off which would prove the legality of this test report. There's no signature from James. There's no signature from James doctor, his carers, his power of attorney in New Zealand, of his solicitor in New Zealand. Who carried the bag? That's a question. What means did they use to carry the bag as the material has to be kept cold. To stop the material bacteria reproducing and destroying any tissue it must be frozen. This has been kept for ten years. How many times has the freezer been changed or in 10 years broken down or a power cut occurred? Was it stored under the bed or was it stored beside a frozen leg of lamb? We want an adjournment if this is going to go any further. The DNA needs to be tested through a warrant of the court to ensure no fraud is carried out and no miscarriage of justice occurs. And I have this that's been handed to me. This is a landmark application. This is intended to allow DNA testing to given entitlement to succession to native freehold lands. It is my understanding that present Cook Islands Law does not support DNA testing to give entitlement to succession to native freehold lands. Therefore I do question whether such a case as this is in line with the sovereign laws of our country. Furthermore there are no proper procedures in place by Court to give strict guidelines in the procurement of DNA sampling. According to our laws failure to have these legal procedures in place means that cheap DNA sampling kits available online can be presented as evidence to support an entitlement to succession to land. What is being sought to be determined by the applicant is new ground for the Cook Islands Land Court and should not be entered into lightly, especially as there are no Cook Islands laws at present that allow DNA testing as a method of obtaining succession rights to native freehold land. I also question the authenticity of the DNA sample said to be obtained by the applicant and the methods of how it was obtained. On the basis that we do not have laws in place to support DNA testing to grant succession to lands I seek a dismissal of the applications by the applicant. If I am wrong and there are laws in place that allow DNA testing that gives entitlement to succession to lands I seek an adjournment so that proper procedures are put into the Court in accordance with Cook Islands laws on how DNA sampling and testing is to be procured sufficient to admissible as evidence in court. Thank you your Honour, that's all I've got to say."

[7] It also warrants noting that Mr Bayley accepted during the hearing that the respondent consented to DNA testing[6].

Discussion and decision

[8] As regards the admissibility of DNA evidence in the Cook Islands and elsewhere, Judgment (No.1) commented[7]:

> [18] This is, as far as is known, the first occasion when DNA relationship testing has been utilised as a form of proof in land applications in the Cook Islands and, as noted, Mr Bayley challenges the admissibility of such evidence on the grounds earlier mentioned.
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> [19] That method of proof, however, is widely used in other jurisdictions and, unless it can be demonstrated to breach Native custom – as to which there is no evidence in this case – there is no reason why, subject to the usual safeguards as to the reliability of any particular form of evidence, it cannot be used in the Cook Islands. It is widely used overseas as an aspect of proof in both civil and criminal matters. Its conclusions are, of course, subject to the usual requirements of proof, including such things as the manner of obtaining, storing and testing the necessary samples, but provided those evidential requirements are satisfied the results of DNA relationship testing are admissible in the Cook Islands. Indeed, although in a large proportion of land applications the necessary samples may no longer be available, where they are available, they would seem to provide more reliable proof – or disproof – of family relationships than traditional genealogies. At least, where available, DNA relationship testing may be useful to fortify, or not, the genealogical evidence which so often forms part of the proof in Cook Islands Court cases, particularly land applications.
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> [20] The proper safeguards in relation to the reliability of such evidence are well-established in other jurisdictions but should, if the samples are still available, include the opportunity for parties objecting to the admissibility of DNA relationship testing reports to obtain their own test and report on the issue. However, where, as here, the order for DNA testing was made by consent, no such issue arises.

[9] Those comments produced the additional material filed by Mr Bayley.

[10] The admissibility of DNA evidence can be contentious. Entire books have been written about it. The obtaining of samples for DNA analysis, the method of storage and analysis, the probability index and the admissibility of the evidence in court cases is often strongly opposed.

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6 Transcript, p7.

7 At 18, 19 and 20.

But, where the various stages of the process are correctly carried out, it can be, depending on the probability ratio, a powerful tool in the chain of proof or disproof.

[11] The potential impact of DNA testing in an individual case is such that requirements for its admissibility need to be carefully complied with. The obtaining of samples for DNA analysis are often, even where they are buccal swabs, invasive[8] the storage of such samples must eliminate as far as possible the chances of cross-contamination, the analysis must be undertaken by skilled operatives and, the probability figures – often being so arresting – need to be explained so they can be carefully considered by decision-makers.

[12] In some countries such as the United Kingdom, as the Home Office guidance shows, attempts have been made to reduce the correct procedure to a Code but in most the obtaining storage and adduction of such evidence is assessed in accordance with the ordinary rules relating to expert evidence. The short point is that there is no internationally accepted code for the obtaining of samples for DNA analysis, their storage, their analysis and their production in evidence. Best practice is usually in general terms.

[13] In this case there can be little concern about the obtaining of the samples on which the relationship testing report was based since, as Mr Bayley acknowledged, the respondent consented to giving a sample for DNA analysis[9].

[14] Mr Bayley also raises the absence in this case of parental samples, but while those might have been desirable, there is no suggestion, either generally or in the analysis report, that their absence in any way undermines the analyst's conclusions. It is noted that the samples were said to have been treated and analysed in accordance with the Family Proceedings Act 1981 (NZ).

[15] In relation to the applicant, the relationship testing report said the sample was obtained from "Mary Samuela-Anderson" with the sample type being "Tissue_rectal" and being dated 13 October 2000. It was received by the testing laboratory on 18 June 2018.

[16] In relation to that sample, while there must have been consent to its taking, there is no evidence as to the taking of the sample nor of the way in which it was stored during the nearly

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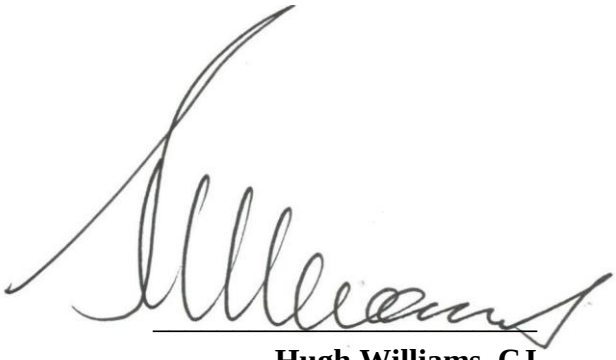
8 And, in criminal cases, can trench on the privilege against self-incrimination.

9 It is noted that in Savage J's report of 16 August 2016 in applications 14/15 and 15/15.he said the respondent was "confined to a wheelchair in Wanganui" and that "the form of his affidavit makes it clear he has a serios disability."

18 years between its being taken and being tested. Without such evidence, the possibility of decay of the sample over time, inadequate storage and cross-contamination may arise. Before this matter can be concluded, affidavit evidence needs to be filed dealing with those issues.

[17] Similarly, as far as "James Jackson" is concerned the sample type is noted as "Tissue_Stoma" but the scientist who carried out the testing said[10] "we have certainly not received a colostomy bag or its contents from any source". That comment needs to be reconciled with the type of sample to which the relationship testing report refers and the evidence needs to cover the interval between the sample being taken on 2 February 2009 and it being tested on 11 October 2018. Again, issues such as the adequacy of storage, the possibility of deterioration over time and the measures taken to prevent cross-contamination need to be covered by affidavit.

[18] The application was adjourned by Judgment (No.1) for the provision of proof of the matters in paragraph 16. It is now further adjourned for the provision of the affidavits mentioned, but as such proof may be difficult to obtain, no timetable is set for the affidavits to be filed.



Hugh Williams, CJ

[10] Email to Mr Bayley's representative, 29 April 2018 at 8.24 pm.