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

APPLICATION NO. 8/2015

IN THE MATTER	of Section 390A of the Cook Islands Act 1915 (NZ)
AND	
IN THE MATTER	of the lands known as **TE TAORA 128D, TUTAKIMOA 14E, AVARUA 190A1, AVARUA 190A2, TAPATEA 107B1, TAPATEA 107B2, TAPATEA 223, PARAKO 134, AVARUA**
AND	
IN THE MATTER	of an Application to cancel or amend a Succession Order dated 11 September 1996
BETWEEN	**TUAPIKEPIKE PORETI SAMUEL** Applicant
AND	**SUCCESSORS OF EMMA MOETAUA**[1] Respondents

Date of Application:	9 July 2015
Date of Referral to Land Division:	8 June 2016
Date of Hearing:	10 October 2019
Date of Land Division Report:	2 April 2020
Appearances:	Mr B Mason for Applicant Mrs T Browne for Respondents
Date of Provisional Judgment:	8 September 2020

PROVISIONAL JUDGMENT OF HUGH WILLIAMS, CJ

[0779.dss]

[1] Being the successors to Emma Moetaua in the succession order of 11 September 1996, and their successors, as listed in the memorandum from Mrs Browne, counsel for the respondents, dated 2 September 2020.

Application

[1] On 9 July 2015 Tuapikepike Poreti Samuel, the abovenamed applicant, applied under s 390A of the Cook Islands Act 1915 (NZ)[2] for an order cancelling or amending a succession order made on 11 September 1966 in Land Application 217/95 on the lands listed in the intituling to the interest of Emma Moetaua, those succeeding being Taupini John Teariki, Oteniera John Teariki, Tereemi John Teariki, Rimatutoko Terai John Teariki, John John Teariki, and Vaiora John Teariki[3].

[2] The grounds of the application included that the succession to Emma Moetaua was not in accordance with Native custom as required by ss 446 and 465 of the Cook Islands Act 1915; the land should have reverted by Native custom to the source of the land following Emma Moetaua's death without issue; and those who succeeded were not connected by blood to the source of the lands as required by Native custom, custom which should have led the land reverting to the source of the land or next of kin, not the next of kin of a non-blood adopted child.

[3] As noted by Weston CJ, on 31 May 2016 Mr Moore, then acting for the applicant, sought leave to amend the application to one under s 450, an issue reserved by Weston CJ[4]. Following receipt of memoranda from counsel, that application was dismissed by minute dated 24 August 2020[5].

[4] On 21 July 2015, Mrs Browne, counsel for the "landowners", filed a notice of opposition relying on earlier decisions concerning this much-litigated succession.

[5] Also on 9 July 2015 the applicant filed a second application under s 390A[6] seeking to cancel an order confirming a conveyance made on 27 March 1972 in proceedings involving the Cook Islands Government Property Corporation and Westpac Banking Corporation. In an accompanying memorandum Mr Moore submitted that progress on 9/2015 should await the outcome in 8/2015. No notice of opposition has ever been filed in

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2 With the application also relying on ss 446 and 465.
3 See fn 1.
4 Minute of 8 June 2016, at [11].
5 At [2].
6 9/2015.

9/2015, but it is proceeding separately and its disposition need not delay disposition of 8/2015.

[6] 8/2015 was heard by Savage J on 10 October 2019[7] and, following receipt of final submissions, Savage J reported to the Chief Justice on 2 April 2020, a report which led to this provisional judgment. It is to be incorporated herein.

Savage J's report

[7] After reviewing the contrasting stances of the parties, Savage J noted that the "succession of Emma Moetaua to her adopted mother Tuokura Maeva has been the subject of well-known decisions before the Courts"[8] starting in 1968 and continuing down to 2007 through a number of regularly-cited cases before both the High Court and the Court of Appeal[9].

[8] After reviewing the earlier litigation, noting the primacy of Native custom under ss 446 and 465 and Article 66A of the Constitution of the Cook Islands[10], Savage J went on to note the sources of custom (in the absence of an opinion from a duly constituted Aronga Mana) as found in the House of Ariki Papers of 1970 and 1977, the Koutu Nui Paper of 1977 and the Commission of Inquiry Into Lands Report of 1996. Savage J then noted[11]:

> [35] Both parties accepted the findings of the Courts in 1968, that the adoption of Emma Moetaua had matured, and she was entitled to succeed to her adopted mother without restriction. However, the present case is concerned with quite different circumstances, where the adopted child subsequently dies without issue, effectively bringing an end to the family line. The question is whether the adopted child's natural next of kin should be entitled to succeed to lands, regardless of the fact they were received from the adopted family, or whether such lands should return to their source for the appropriate successors to then be determined.

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7 With Mr Mason and Mrs Carr apparently both appearing for the applicant.
8 At [4].
9 The case references appear in Savage J's report to which were appended four earlier decisions.
10 As considered in *Browne v Munukoa*, CICA CA 1/16, 14 February 2017, a decision confirmed in the Privy Council.
11 At [35].

[9] The Judge then discussed Native custom as it applies to natural children and concluded[12]:

> "It appears well-recognised custom therefore, that where natural children die without issue, the lands return to the source from which they came. If that person is deceased, the lands go to the next of kin of that source, excluding those who have left the family or tribe."

concluding[13] that: "where a person dies without issue, their lands revert to their source, regardless of whether they are adopted".

[10] The Judge then recounted the essentials of the factual background to this application noting that, despite the extensive litigation concerning the succession under challenge in this matter "what is most remarkable … is that none of those decisions have addressed the central issue regarding the custom where an adopted child dies without issue"[14].

[11] In considering the custom of reversion of lands to the source, the Judge's report comments[15]:

> [57] The respondents' argument, that the custom of reversion of lands to the source does not apply as Emma Moetaua had natural next of kin, may well be misconceived. If we consider how the custom operates, we can see that its application is not altered where the person is adopted. For example, where a person dies without issue but leaves brothers and sisters, in applying the custom of reversion to source, their interests in the land can be succeeded to by their brothers and sisters. At a detailed level, that person's interests return to their source (likely their parent) and the successors are then determined by reference to that source. Naturally, if that parent has other children, the interests are then available to those other children. Therefore, while in practice the interests are succeeded to by the deceased's siblings, that is only because of their connection to the source of the land. For an adopted person who dies without issue, the lands would also return to the source. If that source is their adopted parent, the successors would then be determined by reference to that source. Accordingly, if the adopted person (not of the blood) has natural siblings or next of kin, they will not have a connection to the source of the land and would not be entitled to succeed. To put it another way, where an adoption has matured, the adopted child is accepted as part of the kin group.

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12 At [43].
13 At [48].
14 At [55].
15 At [57].

[12] The Judge's conclusion from that careful consideration was that "the Native custom to be applied where a person dies without issue is reversion to the source of the land"[16] but that, in the present case, it appears the "Order in issue here was not supported by any evidence before that court as to Native custom"[17].

[13] He therefore recommended that the 11 September 1966 order be cancelled "in relation to those lands Emma received from her adopted family"[18] and recommended that the "matter be set down for a rehearing so that the parties and their successors be required to squarely address Native custom with the appropriate evidence"[19].

Discussion and decision

[14] Savage J's careful analysis of the background of, and the authorities related to, this much-debated succession is perceptive and persuasive, and the present Chief Justice is minded to accept the recommendation that the order of 11 September 1996 in 217/1995 be cancelled. Strictly, as that order will leave that portion of application 217/1995 which related to the lands described in the intituling to this application undecided, it is unnecessary to order a rehearing of that aspect of 217/1995 but, out of an abundance of caution, there will be an order that, as Savage J recommended, that portion of 217/1995 be reheard, solely for evidence as to the relevant Native custom to be given[20].

[15] However, as the order under challenge was made more than five years before the filing of this application, before that part of 217/1995 can be ordered to be reheard, it will be necessary, pursuant to s 390A(8), for the consent of the Queen's Representative to be obtained to the orders proposed.

[16] It is for that reason that this judgment is described as provisional.

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16 At [60].
17 At [61].
18 At [62].
19 At [63].
20 Although, given 24 years have passed since the order, it is accepted that it may be necessary for updating evidence to be given. Further, it is for the parties to application 217/1995 to decide what action, if any, should be taken with the balance of the application.

[17] Issues of costs will be the subject of further directions once the stance of the Queen's Representative is known.

Hugh Williams, CJ