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NZLR X
(3)
Maori Land Laws
Case

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

A.15/82

1179

BETWEEN PEGGY TAKAROA RURU of Gisborne, married woman

Plaintiff

A N D MOLLY TAKA AKURANGI of Gisborne, Cleaner

First Defendant

AND THE GISBORNE DISTRICT LAND REGISTRAR

Second Defendant

Hearing: 15 August 1984

Counsel: T D Caley for Plaintiff
A J Adeane for Defendant trustee
T G Stapleton for Second Defendant

Judgment: 24th September 1984

JUDGMENT OF HENRY J.

In this action the Plaintiff is seeking to establish her entitlement to an interest in two freehold properties and in certain shares in Maori land. The Plaintiff is the administratrix and sole beneficiary of the estate of Hector AKURANGI, deceased ("Hector"). At an early age she had been informally adopted, but in accordance with Maori custom, by Hector and Peti Maremare HARONGA ("Peti"). The land and the shares in question formed part of Peti's estate, she having died on 6 May 1971, leaving a Will dated 25 June 1969 in the following terms :

"THIS IS THE LAST WILL AND TESTAMENT of me PETI MAREMARE HARONGA of Patutahi near Gisborne in the Dominion of New Zealand, Married Woman

I HEREBY REVOKE all Wills Codicils and other Testamentary dispositions heretofore made by me and declare this to be my last and only Will

I APPOINT DENIS REDDING KOHN of Gisborne, Solicitor, to be the Executor of this my Will.

I APPOINT my Husband according to Maori Custom to wit HECTOR otherwise HII AKURANGI and WALTER JUDD of Patutahi, Farmer or the survivor of them to be the Trustees for my Granddaughter MOLLY TAKA AKURANGI.

I GIVE DEVISE AND BEQUEATH unto the said HECTOR otherwise HII AKURANGI and my Granddaughter MOLLY TAKA AKURANGI or the survivor of them for their sole use and benefit absolutely all my interests in the house and contents of my matrimonial home situated on Repongaere 4E1 Block together with all my interests in Repongaere 4E2 Block and the Mangatu Incorporation.

I GIVE DEVISE AND BEQUEATH all my other interests including unpaid dividends or rents in all Maori lands not hereinbefore mentioned unto my son HOROMONO RIHIMONA of Patutahi, Freezing Worker, for his sole use and benefit absolutely.

I DECLARE that if my said Granddaughter MOLLY shall predecease me then her issue shall take and if more than one in equal shares the interests under this my Will which she would have taken had she not predeceased me PROVIDED FURTHER that she shall die without issue then such interest shall go to my said son for his sole use and benefit absolutely.

I GIVE DEVISE AND BEQUEATH all the rest residue and remainder of my estate not hereinbefore specifically disposed of unto the said HECTOR otherwise HII AKURANGI and my Granddaughter MOLLY or the survivor of them for their sole use and benefit absolutely.

I DECLARE that my Executor being a Solicitor shall be entitled to charge all usual professional charges for work done by him as though he had not been my Executor but had been employed by my Executor to do such work.

"IN WITNESS whereof I have to this my Will set my hand this 25th day of June One thousand nine hundred and sixty nine (1969).

"P M HARONGA"

SIGNED by the Testatrix the said PETI MAREMARE HARONGA as and for her last Will and Testament in the presence of us both present at the same time who at her request in her sight and presence and in the sight and presence of each other have hereunto subscribed our names our attesting witnesses :

"D LOVELOCK"
Typiste
Gisborne

"T McDONALD"
Typiste
Gisborne.

"

A named beneficiary under the will is Peti's granddaughter, Molly Taka Akurangi, the Defendant in this action. Molly is a natural daughter of the Plaintiff, and was also informally adopted by Hector and Peti shortly after her birth. She was raised by them until Peti's death in 1971, since when she has been living with the Plaintiff. Unfortunately, Molly has always suffered from a substantial hearing defect, which created learning difficulties for her. She was for some time employed in a Sheltered Workshop in Gisborne, but has recently commenced work there in an old people's home.

On 17 June 1980 the properties referred to were registered in the name of Denis Redding Kohn by way of transmission, and on the same day transferred to the names

of Hector (although he was then deceased) and Molly, purportedly pursuant to the terms of Peti's will. The primary issue is whether the devise to Hector and Molly contained in the first disposition provision of the will is to them as joint tenants or as tenants in common in equal shares. If it created a joint tenancy, then Molly takes the whole of the property specified by virtue of her survivorship. If, on the other hand, it created a tenancy in common, then the Plaintiff would be entitled to a one-half share by virtue of her beneficial interest in Hector's estate.

On its face and standing alone the disposition would create a joint tenancy, being as it is without words of severance. However, the will must be construed as a whole, and it is therefore necessary to consider whether there are other provisions which would throw doubt on that as having been the testatrix's intention, and which would then lead to the preferring of a tenancy in common. In this regard I do not think that any assistance can be gained from the use of the phrase "or the survivor of them" in the disposition. It does create some difficulties of its own by reason of the later provisions gifting over in the event of Molly's death, but I think looked at in its entirety, the intention is merely to make survivorship of the testatrix a condition to vesting, be it either by Hector on the one hand or by Molly or her substitutionary beneficiaries on the

other. I do not think the reference to survivorship gives any indication as to the nature of the tenancy created by the disposition, it being in the context of this will quite unrelated thereto.

The next point is the substitutionary clause. It provides, first, for Molly's issue to take her interests in equal shares, and second, in the event of Molly leaving no issue then for Peti's son to take those interests. The testatrix was therefore taking some care to deal with these particular interests, designating where they would devolve in the event of Molly predeceasing her. Although a simple gift over to another named person would not necesarily defeat a joint tenancy (because it may not evidence any inconsistency with such a term) I think the position is otherwise when the gift over is to a number of persons "in equal shares". Such a disposition normally means that those persons take as tenants in common, and that I think is the intention of this particular provision. The position therefore is that in this substitutionary clause, providing for two eventualities as it does, one of the situations which was envisaged by the testatrix was that two or more of Molly's issue may become entitled - and that if they did, they would take the interests as tenants in common in equal shares.

A similar situation arose for consideration in In re Harrison [1922] GLR 379. In that case there had been a bequest to children as "joint tenants in equal shares" and a gift over provision to issue. Chapman J. at p.380 said :

> "The real question is what the testator himself had in mind when he made or assented to this disposition. I think that it is quite clear that he intended that the issue of a child dying in his lifetime should come into a share as tenants in common. This, according to possible events, might mean that such issue took the whole property or two-thirds or one-third. As matters turned out, the event never happened, but we must resort to the will to ascertain the testator's intention on any assumption not as to what has happened, but as to what might have happened. What seems to be decisive is that if a third of the bequest had passed to such issue they as a group could not have held it as joint tenants with the other children, as they might in turn have died successively, transmitting their sub-shares by will or intestacy. The theory of joint tenancy is that all have equal chances. Here clearly the chances would not be equal. These considerations, I think, affect the interpretation of the clause from the start. Its purpose did not in this respect alter with the event. It was intended to suit all events. In a case of doubt such considerations may be taken into account in determining the testator's intention, always remembering that the inclination of the Court in interpreting equivocal documents is in favour of finding a tenancy in common.
>
> For these reasons I come to the conclusion that this instrument creates a tenancy in common."

With respect, I agree with that reasoning. Two or more persons cannot succeed as tenants in common to a joint

interest with another person, with their interest still remaining joint. It follows from that, that in the event of this particular contingency eventuating, the disposition to Hector and the issue of Molly must be as tenants in common. That in turn raises the question whether any different result in the nature of the tenure was intended if the disposition in fact happened to be to Molly, to her sole issue, or to Peti's son. In my view, it would be quite illogical to give a different result to the nature of the tenure, depending on which eventuality occurred. The intent of the will, I think, was to give separate or common rather than joint interests. As was said by Chapman J., the purpose of the clause was to suit all events, and did not alter with any particular event.

In the course of argument, Mr Caley for the Plaintiff very properly referred me to an authority which appeared to run counter to his submissions. It is Heasman v Pearse [1872] 7 Ch. 275, a somewhat complicated case, which could provide support for the proposition that a disposition such as that in question was a disposition of a joint tenancy but which would convert to a tenancy in common if, but only if, the eventuality of two or more of the issue of Molly becoming entitled occurred. In that case, there was a bequest to children living at a prescribed period and to the issue of deceased children, with a proviso that if any one or more of the issue be then dead having left lawful

issue, the issue of such issue should receive a share, which share his or her parent would have taken if living. It was held that the effect was to create a joint tenancy, subject to this, that if any person died leaving issue it must be conidered for the purpose of determining the share which such issue were to take, as if he had survived the period of distribution but had severed the joint tenancy at his death. In other words, it was said that there was a joint tenancy in general, but if a particular contingency eventuated, then that operated to sever the joint tenancy. Each will must stand on its own, and its true consruction determined by a consideration of the whole document. The Heasman will was in terms far different from those in the present will, and is distinguishable on that ground alone. The intention, as found there by the Court of Appeal, was that there should be a joint tenancy, which would only convert to a tenancy in common in the event of a particular contingency occurring. Here, in my opinion, the intention was otherwise. The desire to separate out Molly's share, to provide for it to go to her issue in equal shares or, failing issue, to another named person are, I think, clear pointers which at the very least creates a doubt, thereby requiring the favouring of a tenancy in common. I am therefore of opinon that on its true construction the devise to Hector and Molly was a devise to them as tenants in common and not as joint tenants.

It is therefore unnecessary to have regard to any surrounding circumstance, nor to consider the question of admissibility of direct evidence as to the intention of the testatrix. The evidence tendered in the latter respect did not relate to the classification of an ambiguity as to persons taking or propety passing, and I think would have been inadmissible in any event. As matters stand, I have not had regard to that evidence, and the point does not arise for determination.

For the Defendant, there was no submission made that she had obtained an indefeasible title under the provisions of the Land Transfer Act 1952 such as to deprive the Court of any jurisdiction to give relief in the event of a finding supporting the Plaintiff's primary submissions. I think Mr Stapleton, who appeared for the District Land Registrar, was correct in contending that registration had been properly effected, and there could be no question of requiring rectification of the register. But that is not to say that the Plaintiff is without remedy. The Defendant remains as registered proprietor, and no third party interests are affected. She is in the position of a constructive trustee for the Plaintiff as to the Plaintiff's equitable interest, and equity will act to give proper effect to that interest. (Karepa & Another v Saunders & Others and The District Land Registrar [1930] NZLR 242; In re Foley (Deceased) [1955] NZLR 702).

There will accordingly be a declaration that the Defendant holds in trust for the Plaintiff :

(a) A one-half share in that parcel of land containing 9.3065 hectares more or less being Repongaere 4E1 Block situate in Block 1 Waimata Survey District and being the whole of the land in Certificate of Title Volume 4B Folio 1425 (Gisborne Registry).

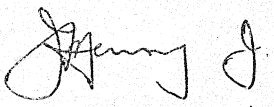
(b) A one-half share in that parcel of land containing 9.3044 hectares more or less situate in Block 1 Waimata Survey District being Repongaere 4E2 and being the whole of the land comprised and described in Certificate of Title Volume 2B Folio 546 (Gisborne Registry).

(c) A one-half share in 5107 shares in Mangatu Maori Incorporation.

The Court also has jurisdiction, as it has in relation to actions for partition of land, to direct the taking of steps to give effect to the above declarations. There will therefore also be an order directing the Plaintiff to take such steps as may be necessary, including the execution of all appropriate documents, to transfer the said one-half interest into the name of the Plaintiff.

Leave to apply further is reserved.

Costs are reserved and counsel can submit a memorandum if necessary.



Solicitors:

Chrisp Caley & Co., Gisborne, for Plaintiff
Burnard Bull & Co., Gisborne, for First Defendant
Crown Solicitor, Gisborne, for Second Defendant